SUPREME COURT OF QUEENSLAND

CITATION:	*R v ABE* [2019] QCA 83
PARTIES:	**R** **v** **ABE** (applicant)
FILE NO/S:	CA No 323 of 2018 DC No 1662 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 2 November 2018 (Jones DCJ)
DELIVERED ON:	14 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	29 April 2019
JUDGES:	Sofronoff P and Mullins and Davis JJ
ORDERS:	**1. Application for leave to adduce further evidence refused.** **2. Application for leave to appeal against sentence granted.** **3. Appeal against sentence allowed.** **4. Sentence varied by substituting 1 August 2019 as the parole eligibility date in lieu of 1 February 2020.**
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 malicious act with intent (domestic violence offence) and one count of grievous bodily harm (domestic violence offence) – where the applicant was sentenced to six years for each count with a parole eligibility date fixed after 15 months had been served in custody – where the applicant's teenage daughter is severely disabled and the applicant is the primary carer – whether the sentencing judge erred in failing to find that the circumstances of the daughter's needs were so exceptional that a non-custodial sentence was justified – whether the sentence was manifestly excessive in that the parole eligibility date should have been fixed after less time served in custody than 15 months

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – FRESH EVIDENCE AND EVENTS OCCURRING AFTER SENTENCE – where the applicant's adult daughter provided further affidavits which detailed the care arrangements for the applicant's severely disabled teenage daughter since the applicant went into custody – whether the further affidavits should be received as new evidence on the application for leave to appeal against sentence – whether it was necessary or expedient in the interests of justice for the court to receive the evidence

Criminal Code (Qld), s 671B

R v Chong; ex parte Attorney-General (Qld) (2008) 181 A Crim R 200; [2008] QCA 22, considered

COUNSEL: J W Fenton for the applicant
P J McCarthy for the respondent

SOLICITORS: Life Law Solutions for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Mullins J and the orders her Honour proposes.

[2] **MULLINS J:** On 2 November 2018 the applicant pleaded guilty to one count of stalking (count 1), one count of malicious act with intent (domestic violence offence) (count 2) and one count of grievous bodily harm (domestic violence offence) (count 3). She was sentenced to four months' imprisonment for the stalking. She was sentenced to six years' imprisonment with a parole eligibility date fixed at 1 February 2020 (after serving 15 months in custody) for each of the other counts. The complainant for counts 2 and 3 was her husband from whom she was separated at the date of the offending. The applicant applies for leave to appeal against her sentence on the grounds the sentence was manifestly excessive and that the learned sentencing judge erred in failing to find that the circumstances of her daughter (AA) who suffers from spina bifida and requires 24 hour care from her mother were exceptional and therefore justified a non-custodial sentence.

[3] As the sentence for the stalking has been served in full, the purpose of the application is to review the sentence imposed on each of counts 2 and 3. The applicant also applies for leave to adduce further evidence that was not available at the sentence, namely an affidavit from her adult daughter filed on 4 April 2019 and another filed by leave on the hearing of the application, dealing with how the care arrangements for AA were actually working in the applicant's absence.

The applicant's antecedents

[4] The applicant was 49 years old when she committed counts 2 and 3 on 24 January 2018. The applicant and the complainant married in 1999. There are three children of the marriage, AA, a son and another daughter. At the date of sentence those children were respectively 14 years, 13 years and 11 years. The applicant also has two adult daughters from her first marriage, one of whom lives in New Zealand and

the other (to whom I will refer as "the adult daughter") is the deponent of the affidavits sought to be relied on as the new evidence in support of this application who is 24 years old. The applicant experienced domestic violence from her husband from 2005. The applicant's husband began a casual sexual relationship in 2015 with a woman who was described as a family friend of both the applicant and her husband. The applicant had confirmed by December 2017 her suspicions that her husband was having an affair with the family friend who was the complainant for count 1. The applicant and her husband had separated and there were cross protection orders in place by January 2018 before the offending.

The circumstances of the offending

[5] On 23 January 2018 the applicant arrived at the matrimonial residence with the two children of the marriage other than AA. The complainant was then residing at that residence to the exclusion of the applicant, as there was a protection order in place prohibiting the complainant and the applicant from living together. The applicant insisted on staying the night. The complainant went to sleep in the main bedroom and the applicant stayed the evening in the living room. At appropriately 2.30 am the next day, the complainant awoke from sleeping to feel a pain in his lower buttock area and felt blood. The applicant was standing over him with a knife saying words to the effect "I am going to kill you tonight" and then started stabbing her husband in various places on his body. The complainant pushed the applicant away and tried to run from her. By this time the two children in the home were present for the struggle that ensued in which the complainant gained partial control of the knife, but in the course of the struggle he suffered two lacerations to the right hand that caused tendon and nerve damage, requiring surgical repair, and which are the subject of count 3.

[6] The complainant pushed the applicant into a room and shut the door, ran out the front door screaming for help, and passed out on the driveway of a neighbour's house. The complainant was taken by ambulance to the hospital. The complainant sustained four stab wounds during the applicant's stabbing of him that comprised count 2, namely on his right shoulder, arm, elbow and buttock. These wounds were washed and sutured. They penetrated the true skin and constituted wounding.

[7] The applicant gave an absurd and dishonest version of events to police, suggesting it was the complainant who started the episode and grabbed the knife from his bedside table and approached her and he suffered the injuries as a consequence of the applicant's defending herself.

[8] There was one aspect of the schedule of facts tendered by the prosecution at the sentence hearing that was contested. The prosecution asserted that the applicant had involved the children in trying to stab their father. The prosecution relied on the s 93A transcripts of the records of interview with each of the children that were undertaken on 24 January 2018, the complainant's victim impact statement and oral evidence given by the complainant before the sentencing judge. On the basis of conflicting evidence, the sentencing judge ruled against the prosecution and those contested facts were excised from the schedule of facts. As a result, the prosecution did not rely on the complainant's victim impact statement for the purpose of the sentencing submissions.

The sentencing remarks

[9] It was a very expeditious plea of guilty that was indicative of remorse. The disturbing features were that the applicant armed herself with a knife; there was no provocation; the complainant was asleep and entirely defenceless when attacked by her; and there was a level of persistence in the attack even in the presence of the children.

[10] Factors in mitigation included the continued volatility between the complainant and the applicant. There were also a number of medical and health concerns for the applicant. She suffered a stroke in 2005 resulting in persisting right-side weakness, including her right arm, and she has elevated blood pressure and type 2 diabetes. Of significance is that AA suffers spina bifida to a very serious extent and requires close supervision and attention.

[11] The report of the psychologist referred to the history of violence and deceit in the marriage between the applicant and the complainant. The psychologist reported on the applicant's feelings of genuine remorse and acceptance of full responsibility for her actions. The applicant had voluntarily sought counselling and was taking medication to deal with anxiety. The sentencing judge quoted from the report:

> "Her offending impressed as occurring within the context of substantial psychological stresses, emotional instability and assorted paucity of coping with strain/adversity and marked paucity of judgment. There would seem support for the view of her judgment being impaired by multiple psychological concerns at the time of her offences, specifically low mood, some extent of trauma from the stress, resentment/jealousy and sense of stress and worry for the welfare of their daughter [AA]."

[12] The positive factors identified by the psychologist included the applicant's sound work history which became overshadowed by her dedication to the care of the children, her voluntary attendance for psychological treatment, her acceptance of responsibility and expressions of remorse, and the fact that the applicant had no relevant prior criminal history. The psychologist reported that the applicant retained psychological treatment needs. On the basis that the applicant continues with her psychological treatment and counselling, the psychologist expressed the opinion the applicant was at low risk of reoffending. After referring to AA's condition, the sentencing judge stated:

> "I have no doubt that any prison sentence or any term of actual custody will cause you enormous emotional distress and, no doubt, cause – potentially cause [AA] to also suffer anxiety and that – I say that in the context of you having been her carer for such a long period of time. I do not intend to go into detail as to just what is involved in caring for that poor child as it is set out in some detail in the material that was provided by your counsel; although, I would note that the condition is so severe as to require you to deal with her bladder and bowel incontinence and also with her high risk of suffering from pressure sores and other consequences."

[13] Whilst personal deterrence "might not loom particularly large", a message of general deterrence is of significance, as the community cannot tolerate attacks involving a weapon as dangerous as a knife. General deterrence does not

necessarily mean that nothing else has to be taken into account. The sentence does not involve any need to protect the general community.

[14] After referring to the comparable authorities relied on by the prosecution and the applicant, the sentencing judge concluded that a head sentence in the order of six years was within the appropriate range. The sentencing judge then stated:

> "Any term of custody, as I have already indicated, will have a number of consequences. It will leave your three children having to be cared by others which, no doubt, will cause them and you considerable distress. That is particularly so having regard to [AA's] circumstances. Also, it is quite clear that your own health, both physical and mental health, will make any period of custody more difficult than might be the case for a healthier woman of your age. That said, though, the statement of … your second-eldest daughter from the first marriage, indicates that whilst it would cause enormous difficulty and even to the extent of causing a break-up of her relationship, she would be prepared to take care of the children rather than have them go into some community-based or foster home.
>
> While I have considerable sympathy for the submissions made on your behalf, the offending is so serious for the reasons I have already given that I do not consider it appropriate to make an order warranting immediate – an immediate suspended – wholly suspended sentence; however, I do intend to take into account all of those mitigating and extremely sad circumstances to which I have referred."

[15] The early guilty plea would normally have seen the applicant eligible for parole after two years in custody, but taking into account all the mitigating circumstances, the parole eligibility date was set at 15 months from the date of sentencing. Having regard to the particular circumstances involved where there was no risk to the public at large and there was only a low risk of the applicant reoffending against the complainant, the offending did not warrant the making of a serious violent offender declaration.

The application to adduce further evidence

[16] In order to assess whether the affidavits of the adult daughter should be received as new evidence on the hearing of the application for leave to appeal against sentence, it is necessary to outline the evidence that was before the sentencing judge relating to AA's needs and the applicant's role in meeting those needs. It was in the form of letters from Dr Rodwell of the Queensland Paediatric Rehabilitation Service letter dated 1 August 2018, social worker Ms Martinuzzi from Spina Bifida Hydrocephalus Queensland (SBH) and case manager Ms Darrough of Kyabra Community Association dated 2 August 2018.

[17] Dr Rodwell noted that the applicant was the primary carer for AA and explained about AA's spina bifida:

> "Her lesion is in the high lumbar region meaning that [AA] has minimal movement and sensation of her lower limbs. [AA] also has a brain malformation known as an Arnold-Chiari II malformation and requires a ventriculoperitoneal shunt for hydrocephalus. This

> has impacts on her thinking and learning skills and she has been diagnosed with mild intellectual disability."

[18] Dr Rodwell noted further as follows. AA also has bladder and bowel incontinence and poor sensation of her skin which is at risk of multiple pressure areas, as a result of her spinal condition. AA has had surgery to assist with her continence "including a Mitrofanoff and MACE procedure". AA has type 2 diabetes mellitus which requires insulin injections. AA requires assistance for most of her activities of daily living, including toileting, showering and dressing. She requires prompts to organise and remember daily tasks and is at high risk for pressure sores. Dr Rodwell continued:

> "She requires [the applicant] to perform second daily washouts through a channel called a MACE to help control her bowels. She also requires assistance in performing clean intermittent catheterisation for urinary continence on a daily basis. [AA] has required several prolonged hospital admissions due to her pressure areas and her mother has consistently been available to support [AA] in this environment. [AA's] care is significantly complicated that she requires a consistent point of care to perform all of these complex tasks on a daily basis."

[19] Dr Rodwell noted that AA was in hospital from January to May 2018 and the applicant attended to AA consistently throughout her hospital stay and attended weekly family meetings for discharge planning.

[20] Ms Martinuzzi recorded that AA who had a diagnosis of both spina bifida and hydrocephalus had been a registered member of SBH since March 2004 and Ms Martinuzzi, in her capacity as social worker with SBH for six years, considered it is crucial to AA's ongoing wellbeing that the applicant is able to continue in her primary care role of AA and not face a period of incarceration.

[21] Ms Martinuzzi described the condition of spina bifida. She also explained about hydrocephalus:

> "Hydrocephalus is the build-up of fluid and increased pressure on the brain resulting from a blockage to the flow of CSF [cerebrospinal fluid] through its natural pathways. If left untreated, further damage to the brain will result. [AA's] hydrocephalus is controlled by a surgically implanted shunt; a one-way valve with two flexible tubes attached, which 'shunts' the excess CSF to the abdominal cavity."

[22] Ms Martinuzzi noted AA uses a wheelchair fulltime for mobility and is unable to stand independently and her continence management is as follows:

> "• [AA] manages her continence with support from family members and teacher aides at school. [AA] has a neuropathic bladder with a mitrofanoff in situ for bladder management, and empties her bladder via Clean Intermittent Catheterisation.
>
> • [AA] has a neuropathic bowel with a M.A.C.E. in situ for bowel management. [AA] requires support to complete the M.A.C.E. procedure every second day, which takes around 1 hour. [The applicant] supports [AA] with this."

[23] Ms Martinuzzi noted further as follows. Individuals with spina bifida and hydrocephalus require regular medical reviews and AA attends such reviews at the spina bifida clinic at the Queensland Children's Hospital. The applicant supports AA with regular reminders to check her blood sugar levels. Individuals with spina bifida are susceptible to skin breakdown resulting in pressure injuries. As AA has reduced sensation in her lower limbs, she will not feel if she has a burn on her lower body and her hospitalisation (January to May 2018) was after a burn on her legs in the shower. AA has previously had pressure injuries requiring hospitalisation, and is at risk of future pressure injuries which may require surgical or wound care management.

[24] According to Ms Darrough, AA has obtained support since March 2015 through Kyabra's Disability Support Program involving flexible respite and case management support. The applicant was always the contact person for Kyabra regarding AA's disability and noted to be her main carer and advocate.

[25] The adult daughter in the first of the further affidavits sets out the details of AA's care arrangements since the applicant went into custody. The children of the marriage remained living in the matrimonial home, their father moved into the home to care for them and arranged for his mother in her late seventies to come to Australia to help care for the children. The adult daughter notes that AA has found it quite difficult "emotionally and physically" without her mother being there. The adult daughter refers to the fact that AA's younger siblings and her paternal grandmother give her the daily assistance that she requires with toileting and eating and that she is scared to tell her father about her toileting accidents. According to text messages sent by the complainant to the adult daughter, AA was admitted to hospital on 1 February 2019 for a pressure wound on her toe and pressure sores on her legs and had surgery. In early March 2019, AA underwent major surgery for her ventriculoperitoneal (VP) shunt and suffered a major infection after the operation which put her back into hospital for emergency surgery. A new VP shunt has to be inserted into her head, when the infection is gone.

[26] The adult daughter in her first affidavit refers to difficulties the other two children are having in their relationship with their father. The adult daughter is critical of the meals provided to AA and the children.

[27] The adult daughter's main concern is for AA whom she describes as "struggling without her mother there to meet her daily needs" and that she is "more comfortable with her mother being around particularly with respect to female health issues".

[28] The adult daughter in the second affidavit records that AA was admitted to hospital on 20 April 2019, as her VP shunt had become dislocated and tangled in her stomach. She underwent surgery on 22 April 2019 and was now recovering well at home. She had 15 stitches in her stomach, but it was not necessary to operate on her head.

[29] Mr Fenton of counsel on behalf of the applicant submits the court should receive the affidavits of the adult daughter pursuant to s 671B of the *Criminal Code* (Qld) on the basis it is necessary or expedient in the interests of justice to receive this evidence. The submission is made that:

> "It is difficult to see how the Court could properly dispose of the appeal without evidence of how [AA] has in fact been cared for."

[30] The applicant relies on the statement made in the joint judgment of Davies JA and Helman J in *R v Maniadis* [1997] 1 Qd R 593, 597, after noting that the discretion to admit new evidence in an appeal against a sentence pursuant to s 668E(3) of the *Code* will not be commonly exercised by an appellate court:

> "But a court of appeal will admit new evidence on such an appeal, notwithstanding that it is not fresh in the above sense, if its admission shows that some other sentence, whether more or less severe, is warranted in law;"

[31] The applicant submits that AA's health has deteriorated since her imprisonment and that:

> "[AA] has been admitted to hospital twice for matters that are preventable with adequate pastoral care. Her health may deteriorate further and her life may well be in jeopardy in the absence of her primary carer."

[32] The respondent submits that the new evidence shows the complainant has sought appropriate medical assistance for AA as required and that her care is difficult, whether or not the applicant is present and does not support any conclusion that the applicant's absence has resulted in AA's hospitalisation.

[33] In dealing with the application to adduce further evidence, it should be noted that the nature of AA's disability, her extensive care requirements and the potential for complications, hospitalisation and surgery for AA were known at the date of sentencing and anticipated by the evidence placed before the sentencing judge about AA's needs and the applicant's role in her care.

[34] The care arrangements that have been implemented since the date of sentence are primarily the responsibility of the complainant who is carrying out his role as a parent of the children. The extent to which the children do not appear to relate as well to their father as to their mother is not a matter that can have any bearing on whether the applicant's sentence should be reconsidered and, having regard to the ages of the children and the circumstances which resulted in their being in the care of their father rather than their mother, is unremarkable. To the extent the adult daughter's further evidence deals with the issues that have arisen in relation to AA's care since the date of the sentence, the question to be considered therefore is whether that further evidence shows that AA's care has raised issues that were not contemplated at the date of sentence.

[35] It should be noted there is no medical evidence to support the applicant's submission based on the adult daughter's further affidavits that AA's health has deteriorated, her admissions to hospital were preventable and that her health either may deteriorate further or her life be in jeopardy without the applicant's care. These submissions overstate what is, in fact, disclosed in the further affidavits.

[36] In the light of Dr Rodwell's report that was before the sentencing judge, the further admissions that AA has had to hospital since her mother's imprisonment are attributable to the nature of her condition and the further evidence does not support the conclusion that it was the applicant's absence that resulted in AA's hospitalisation. The further evidence does not raise issues about AA's care that were not anticipated by the evidence accepted by the sentencing judge.

[37] It is therefore neither necessary nor expedient in the interests of justice for the court to receive the further affidavits of the adult daughter. The application for leave to adduce the further evidence should be refused.

The applicant's submissions

[38] The primary submission made on behalf of the applicant is that the sentencing judge erred in failing to conclude that the requirement of AA for her mother's care was such an exceptional circumstance that it justified a non-custodial sentence. The secondary submission is that the sentence was manifestly excessive in that the parole eligibility date should have been fixed at an earlier time than after 15 months in custody.

[39] The applicant accepts the applicable principle is that set out in *R v Gadaloff* [1998] QCA 458 and explained in *R v Chong; ex parte Attorney-General (Qld)* (2008) 181 A Crim R 200 at [29]-[33] that hardship to an offender's family caused by imprisonment cannot be used to justify a non-custodial sentence, unless that hardship is exceptional.

[40] That is why it is submitted on behalf of the applicant that her severely disabled child who needs constant care takes the matter beyond truly exceptional and warranted imposing a sentence that did not require actual custody.

[41] The court should take into account the period of approximately six months that has already been served in custody by the applicant and not declare it as time served, but resentence the applicant to imprisonment of five years suspended forthwith for an operational period of five years that would result in an effective sentence of imprisonment of five years six months to serve six months in custody which would achieve all the relevant purposes of sentencing and reflect the exceptional case of AA's need for her mother's care.

The respondent's submissions

[42] The sentencing judge identified the features of the offending which made it objectively serious and acknowledged the anticipated hardship to AA. The fact that the sentencing judge expressly took into account the hardship to AA meant that circumstance was treated in the sentencing as exceptional. The sentencing judge accepted the references in the psychological report to the risk of re-offending and remorse and noted the applicant's lack of criminal history. The sentencing judge carefully balanced the competing factors and did not allow the relevant consideration of hardship to third parties to overwhelm the other considerations, such as the need for deterrence, denunciation and punishment. The comparable authorities of *R v Oakes* [2012] QCA 336, *R v Young* [2005] QCA 32 and *R v McClintock* [2010] 1 Qd R 354 support the head sentence of six years' imprisonment. The sentencing judge moderated the sentence in acknowledging the mitigating factors, including hardship to AA, in advancing the parole eligibility date after a period of only 15 months in custody.

Was the sentence manifestly excessive?

[43] The applicant committed the offences against the complainant whilst AA was in hospital, but in circumstances where the applicant remained her primary carer and was aware of the AA's needs.

[44] But for the mitigating circumstance of AA's needs, there was never a question that condign punishment for the applicant's offending against the complainant with the aggravating feature of the offences being domestic violence offences required actual custody to be served in respect of the inevitable term of imprisonment.

[45] Reducing the head sentence to five years, in order to allow for a suspension of the sentence going forward on the basis of the time already spent serving the sentence without declaring it (which was not a sentence open at all to the sentencing judge) would not achieve the purposes of punishment, general deterrence and denunciation that are important purposes in sentencing for offending of this nature.

[46] Apart from proposing a head sentence of five years to enable suspension, it was not in issue that the head sentence of six years' imprisonment for the malicious act with intent (domestic violence offence) was supported by the authorities relied on by the respondent.

[47] The balancing exercise undertaken by the sentencing judge of imposing an appropriate sentence had to fulfil the relevant purposes of sentencing for serious offending involving premeditated use of a weapon to inflict injury in a domestic setting, but also allow for the mitigating circumstances and particularly the applicant's role in relation to the special needs of AA. The actual custodial component had to give some recognition to the length of the head sentence, but be of sufficient length to amount to punishment for the offending, without prolonging the applicant's absence from AA any longer than necessary.

[48] In all the circumstances of this matter, and giving due weight to the exceptional case of AA without overwhelming the other considerations in sentencing, the custodial component of the sentence should have been shortened by a further period of six months. I therefore conclude that the sentence was manifestly excessive only to the extent of fixing the parole eligibility date after 15 months in custody rather than after a period of nine months.

Orders

[49] It follows the orders should be:

1. Application for leave to adduce further evidence refused.
2. Application for leave to appeal against sentence granted.
3. Appeal against sentence allowed.
4. Sentence varied by substituting 1 August 2019 as the parole eligibility date in lieu of 1 February 2020.

[50] **DAVIS J:** I agree with the reasons of Mullins J and I join in the orders which Her Honour proposes.

[51] The setting of an eligibility date nine months into the sentence results in the applicant being eligible for parole 27 months before she would become eligible by force of s 184(2) of the *Corrective Services Act* 2006 in the absence of an order.

[52] Hardship to an offender's family resulting from the offender's imprisonment "cannot be allowed to overwhelm all other considerations in sentencing" (*R v Chong; ex parte Attorney-General (Qld)* (2008) 181 A Crim R 200 [30] and the cases referred to). However, there will be cases where family hardship results in a

substantial reduction either in the sentence, or the period to be served before parole eligibility even where the offending is serious, as it is here.

[53] Those cases will not be common. For the reasons explained by her Honour though, this is such a case.