SUPREME COURT OF QUEENSLAND

CITATION:	*R v Potter* [2019] QCA 162
PARTIES:	**R** **v** **POTTER, William Thomas** **(applicant)**
FILE NO/S:	CA No 199 of 2019 DC No 59 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Warwick – Date of Sentence: 30 July 2019 (Reid DCJ)
DELIVERED ON:	23 August 2019
DELIVERED AT:	Brisbane
HEARING DATE:	19 August 2019
JUDGES:	Holmes CJ and Gotterson JA and Flanagan J
ORDERS:	**1. The application for leave to appeal against the sentences imposed on counts 1 and 3 is allowed.** **2. The sentences of imprisonment imposed in respect of counts 1 and 3 are varied as follows:** **a) on count 1 the applicant is sentenced to three months imprisonment;** **b) on count 3 the applicant is sentenced to four months imprisonment.** **3. The application for leave to appeal against the sentence imposed on count 2 is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant was convicted of one count of dangerous driving, one count of assault occasioning bodily harm while armed, and one count of common assault – where the convictions for dangerous driving and occasioning bodily harm while armed were charged as domestic violence offences – where the applicant was sentenced to 18 months imprisonment on the dangerous driving count with six month's licence disqualification, three years imprisonment on the occasioning bodily harm while armed charge, and 12 months imprisonment on the common assault charge – where the applicant was fixed a parole release date four months after

the date of conviction and sentence – where the applicant seeks leave to appeal against his sentences on the basis that they were manifestly excessive, both as to head sentence and the imposition of a period of actual custody – where the applicant argues that the sentencing judge had insufficient regard to the applicant's youth, his prospects of rehabilitation, and the complainant's desire that the applicant not go to jail – whether the sentences imposed at first instance were manifestly excessive – whether the imposition of a period of actual custody renders the sentence more excessive than is appropriate in all of the circumstances

R v Kelley [2018] QCA 18, considered
R v Nielsen [2006] QCA 2, considered
R v Price [1992] QCA 229, considered
R v Rowlands [2019] QCA 112, considered
R v Theuerkauf & Theuerkauf; Ex parte Attorney-General (Qld) [2003] QCA 94, considered

COUNSEL: S Kissick for the applicant
D Nardone for the respondent

SOLICITORS: Lilley Spanner & Stacey for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** The applicant for leave for appeal was convicted of one count of dangerous driving and one count of assault occasioning bodily harm while armed, both charged as domestic violence offences, and a further count of common assault. He was sentenced to concurrent sentences of: 18 months imprisonment on count 1, the dangerous driving count, with six months' licence disqualification; three years imprisonment on count 2, the assault occasioning bodily harm count; and 12 months imprisonment on the common assault count. A parole release date of 29 November 2019 was fixed, four months after the date of conviction and sentence (30 July 2019). He seeks leave to appeal those sentences on the grounds that they were manifestly excessive; that the sentencing judge had insufficient regard to his age (24 years at the relevant time) and his prospects of rehabilitation; and that his Honour had no regard to the personal circumstances of, and the views and wishes of, the complainant.

The offences

[2] The complainant in relation to the domestic violence offences was the applicant's de facto partner. The couple, who had two children and the care of the complainant's child by another relationship, lived in a rural town. On the evening of 24 February 2018, they went to a party, at which the applicant became extremely intoxicated. At about 1.00 am the complainant decided to leave; the applicant expressed his indifference and left her to walk the 1.5 kilometres to their home. She set out, walking along a dirt road. The applicant attempted to telephone her; when she finally answered a call, he said the single word "slut" before she ended the call. He announced to other partygoers that he had found out that she was "cheating on him" and if it were so, he would shoot her and then shoot himself. Others at the party told him that she was

probably just walking home. The applicant announced that he was leaving and that if he saw the complainant on the road he was going to "run clean over the top of her". He drove away rapidly; the description given was that he was driving "flat out". His manner of driving gave rise to the count of dangerous operation of a motor vehicle.

[3] Seeing the applicant's head lights approaching, the complainant moved from the middle to the side of the road. He skidded to a stop nearby. The complainant walked to the driver's side of the utility. The applicant opened the window and began to abuse her. She punched him to the forehead through the vehicle's window, using minimal force, then began to walk away in the middle of the road. She heard him rev the engine, after which he drove forward and struck her in the lower back with the bull bar of the vehicle, knocking her to the ground. He proceeded to drive over her until her body was completely under the utility. He then reversed and stopped at a point where the bull bar was just above her head. (This was the assault occasioning bodily harm while armed, the vehicle being the instrument used.) The complainant, who was experiencing pain in her lower back, pulled herself from under the vehicle and lay down in front of it. The applicant asked her if she was all right and expressed his concern that he might go to jail.

[4] Another partygoer, Mr Ward, returning home with his children from the party, stopped and saw that the complainant was lying on her stomach in front of the utility, the engine of which was still running, with the applicant standing over her. Her face was in a puddle of water and she was covered in mud. The complainant told Mr Ward that the applicant had run over her, and the applicant admitted having done so. When Mr Ward's daughter asked if she was ok, the applicant told the complainant to get up, and that she was ok. He tried to lift her by the arm. Mr Ward's daughter assisted the complainant into the seat of the utility. The applicant became agitated, and grabbing Mr Ward by the collar with both hands, lifted him and pushed him against the bull bar of the utility, causing him some back pain. The latter's daughter intervened and for a moment the applicant loosened his grip, before repeating the grabbing by the collar. This was the common assault count.

[5] The applicant and the complainant returned to their home. She was still in some pain and said that she needed to go to hospital, but the applicant would be in "serious trouble". He did nothing to assist her to get treatment. The next morning, the complainant went to work but because of pain was taken to hospital where she was found to be suffering from a bulging spinal disc, bruising and soreness and grazing to her left leg. Others reported the incident. The complainant initially made a statement to police, but later attempted to withdraw the complaint.

[6] The applicant had a very minor criminal history of possession of unauthorised explosives (firecrackers) in 2012 and wilful damage in 2015; in neither instance had a conviction been recorded. His traffic history was of some significance, because it showed that in August 2018, after the offences, he had driven with a blood alcohol concentration of .084 per cent.

The applicant's submissions on sentence

[7] The applicant had trained as a boilermaker and was at the time of the offending employed as operations superintendent at a silver mine. His counsel described him as the family's primary breadwinner. He had excellent references from his

employer and two other persons. Since the incident he had completed an online anger management course. His counsel said that the applicant's relationship with the complainant continued and she was in court to support him. She had no desire to see him go to jail. Counsel attributed the applicant's behaviour to misinformation about his partner's supposed infidelity and extreme intoxication. The prosecutor had contended that a sentence of three years imprisonment was appropriate; defence counsel conceded that a head sentence of imprisonment was warranted, but submitted that immediate parole release ought to be granted.

The sentencing judge's remarks

[8] The sentencing judge proceeded on the basis that it was an early plea of guilty and expressly took into account the applicant's relative youth, his good employment history and his continued support from the complainant. His Honour observed that through good fortune neither the complainant's nor Mr Ward's injuries were serious, he regarded the applicant's conduct as appalling and as exhibiting callous disregard for the complainant's welfare. While accepting that the applicant's prospects of rehabilitation were good, given his relative youth, good work history, immaterial criminal history and good personal references, he noted that the subsequent offence of drink driving meant that any conclusion of remorse and contrition had to be tempered. Both personal and general deterrence and denunciation were important. Young men who became drunk and drove dangerously, resorting to violence against their partners because of some perceived slight, created dangers, not only for themselves and their partners, but for community members.

The proposed appeal

[9] I will commence consideration of the application with the proposed appeal ground that the sentences imposed were manifestly excessive, both as to head sentence and the imposition of a period of actual custody. In my view, the sentences imposed for the offences of dangerous driving and common assault were too severe. The former consisted solely of the applicant's driving on leaving the party at an excessive but unspecified speed. Since that allegation relied on the observation of others at the party, there was no evidence that the driving at speed persisted for any length of time and there were no other particulars of dangerousness. The common assault did not consist of any actual blow, but rather lifting and pushing of Mr Ward against the utility, although it was of some significance that the latter had done nothing to provoke the applicant's aggression, but had merely stopped to assist. Those offences standing alone would not have warranted actual custody, but in the context of the inevitable sentence of imprisonment on the remaining count, concurrent lesser sentences were appropriate. However, both sentences, in my view, were manifestly in excess of what the facts warranted and should be reduced. But that will not avail the applicant much if the sentence for assault occasioning bodily harm while armed stands.

[10] The applicant argued that the three year head sentence imposed on the assault occasioning bodily harm count was too high. He sought to distinguish cases relied on by the prosecutor at sentence, and accepted by the sentencing judge as of some assistance: *R v Theuerkauf & Theuerkauf; Ex parte Attorney-General (Qld)*[1] and

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1 [2003] QCA 94.

R v Rowlands,[2] arguing that they were more serious examples of offences, respectively, of dangerous driving causing injury and of domestic violence.

[11] In *Theuerkauf*, the offender was convicted of two counts of dangerous operation of a motor vehicle. He had driven his vehicle at an elderly man with whom he had an altercation, knocking him to the ground with his bull bar and then driving once more at him, so as to hit his shoulder with his front tyre. That complainant suffered injuries and symptoms of a similar order to the complainant in the present case. In the second instance, the offender was a passenger in a vehicle driven dangerously by his brother in order to outrun a police pursuit. He assisted by shining a spotlight at a following police car so as to blind its occupants. He was 20 years old, with some minor drug history; he had never been imprisoned. On an Attorney-General's appeal, his sentence was increased to one of two years and six months suspended after 12 months for an operational period of three years. The fact that pursuant to his original sentence he had completed three months of an intensive correction order was taken into account.

[12] The case, was in my view, of some relevance to the sentencing judge's considerations in this case, and does not suggest any marked disproportion in the sentence given here. There were two counts, but against that, in the present case there is the aggravating factor that it was a domestic violence offence, involving a more mature offender. Significantly, the maximum penalty in that case was three years imprisonment, which the court said would have been imposed but for the fact of the offender having completed part of his original sentence; here it is ten years.

[13] *Rowlands* was an application for leave to appeal against a sentence of three years imprisonment suspended after 15 months imposed on an applicant who had gone to trial in respect of a number of counts, involving assaults on his girlfriend, one of which caused a tear to her rotator cuff, and an overnight deprivation of liberty, followed by further violence a month later. In the later incident, his driving caused a minor collision with her vehicle. He pulled her out of her vehicle, hitting and injuring her arm with a wheel brace, and then threw her down an embankment and threatened her. That applicant had no prior criminal history and was described as a well-educated man in employment who had contributed to the community in various ways. Describing the sentence as "distinctly moderate", the court refused the application for leave. The level of injury experienced by that complainant seems to have been worse, and there was more than one occasion of abuse. On the other hand, she was not subjected to the terrifying experience of being run over by a vehicle. Nor, it is clear, did the court regard the three year sentence imposed on that applicant as the limit of an appropriate exercise of discretion.

[14] On this application the respondent adverted to two other decisions of this court involving use of a vehicle for the purpose of causing harm. The first was *R v Price*,[3] involving an Attorney-General's appeal against a sentence of six months imprisonment followed by two years' probation imposed on a 27 year old applicant who had pleaded to one count of assault occasioning bodily harm, one of dangerous driving and two of wilful damage. The intoxicated respondent had attended a medical centre one evening and abused and threatened the doctor on duty. Told to leave the premises, he returned in his car, driving up to the glass doors of the centre.

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2 [2019] QCA 112.
3 [1992] QCA 229.

After abusing the doctor and a cleaner who were standing inside, he reversed his car and drove at about 40 km per hour through the glass doors. The cleaner was struck by one of the doors, causing him concussion and pain in various limbs, although he recovered without any long term consequence.

[15] That respondent had a long criminal history containing offences of assault, dishonesty and dangerous driving. A significant consideration in sentencing was that he suffered from an organic brain syndrome which probably impaired his ability to control his actions but fell short of giving him any mental health defence. The sentence was set aside by this court, which substituted a sentence of two years and nine months without any recommendation for parole. The court observed that while rehabilitation was important the circumstances (particularly the use of a motor vehicle as a weapon) were such that denunciation required a sentence at the upper end of available punishment, the maximum penalty being three years imprisonment. Putting aside for a moment the question of recognition of mitigating factors, it can be seen that the gravity of the respondent's conduct was broadly comparable to that of the applicant's here, but it did not involve the actual running down of an individual; it was not a domestic violence offence; and, of course, the maximum penalty at that time was much lower.

[16] The second decision relied on was *R v Nielsen*.[4] It was not directly comparable, because it involved much worse offending. The applicant there unsuccessfully sought leave to appeal a sentence of six years imprisonment imposed on him, after a late plea of guilty, on three counts of doing a malicious act with intent to do grievous bodily harm. After an altercation at a tavern, the heavily intoxicated applicant repeatedly drove his car at people on the footpath outside, hitting three of them in separate incidents. Fortunately, all three sustained only minor injuries. The applicant was 23 years old at the time, had no relevant criminal or traffic history, had good references and had shown good prospects of rehabilitation. Those factors, together with the late plea, appear to have been recognised only by the sentencing judge imposing a sentence he considered at the lower end of what was appropriate, without making a serious violent offence declaration. The main significance of the case for present purposes is that the court emphasised the use of the motor vehicle as a weapon deliberately aimed at people in a public place required salutary punishment in order to achieve personal and general deterrence.

[17] I do not consider that the submission that the head sentence of three years imprisonment was of itself excessive has any substance. But the sentence must, of course, be taken as a whole, including the requirement that the applicant serve four months in custody, in considering whether it was manifestly excessive. The arguments that the imposition of actual custody rendered it excessive largely turn around the other proposed appeal grounds. In relation to the ground that the sentencing judge had insufficient regard to the applicant's youth and prospects of rehabilitation, counsel for the applicant relied on *R v Kelley*[5] for the proposition that it was undesirable to expose a young person committing a single out of character offence to actual custody. In fact, the principle as described in *Kelley*[6] is that the seriousness of the offending conduct must be balanced against youth, lack of criminal history, good character and rehabilitative prospects. That principle was

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4 [2006] QCA 2.
5 [2018] QCA 18.
6 At [43].

being discussed in that case in the context of a 23 year old applicant who had assaulted his partner, in breach of a domestic violence order, by a single punch and been sentenced to three months imprisonment, to serve one month in actual custody. The court substituted a fully suspended sentence of three months. It can readily be seen that the seriousness of the offending bore no comparison to that here. What is apparent is that the sentencing judge in the present case did have regard to the mitigating factors of youth, good character and rehabilitative prospects, recognising them by ordering release on parole after a very short portion of the head sentence was served.

[18] The sentencing judge also recognised the complainant's continued support of the applicant, but observed that it was nonetheless a serious offence. Apart from the submission of the applicant's counsel that the complainant had no desire to see him in prison there were no particular views expressed by her, nor submissions about how precisely her interests would be affected. One might infer that the imprisonment of the applicant would leave the family in some difficulty, but that was not made explicit. In any event, the sentencing judge clearly took into account the complainant's support for the applicant, and it was not incumbent on his Honour to treat her wishes as paramount. Indeed, it will often be the case in domestic violence offences that considerations of deterrence must override the particular wishes of the complainant.

[19] Generally, it was submitted that the applicant's personal attributes, lack of criminal history, employment, lack of risk to the community, the fact that the offence was out of character, and the complainant's desire that he not go to jail should have resulted in a sentence not requiring actual custody. However, this was a balancing exercise for the sentencing judge, which he clearly undertook. The seriousness of the applicant's offence, driving into and over his partner (having previously expressed an intention to do so) was compounded by the callousness of his failure, having injured her and left her in obvious pain, to seek treatment for her, because of his fear of the consequences for himself. I do not think there is any viable argument that the sentencing judge was not entitled, in a proper exercise of discretion, to regard the applicant's conduct as so serious as to require some period of actual custody, notwithstanding the mitigating factors and the complainant's views.

Orders

[20] I would allow the application for leave to appeal the sentences on counts 1 and 3, and vary those sentences by reducing the period of imprisonment imposed, on count 1 to three months imprisonment, and on count 3 to four months imprisonment. The six month's licence disqualification in respect of Count 1 and the existing parole release date remain unchanged. I would refuse the application for leave to appeal against the sentence imposed on count 2.

[21] **GOTTERSON JA:** I agree with the orders proposed by Holmes CJ and with the reasons given by her Honour.

[22] **FLANAGAN J:** I agree with the orders proposed by Holmes CJ and with her Honour's reasons.