SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cooney* [2019] QCA 166
PARTIES:	**R** **v** **COONEY, Justin James** (applicant)
FILE NO/S:	CA No 15 of 2019 DC No 2699 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 21 December 2018 (Allen QC DCJ)
DELIVERED ON:	27 August 2019
DELIVERED AT:	Brisbane
HEARING DATE:	31 July 2019
JUDGES:	Gotterson JA and Henry and Bradley JJ
ORDER:	**1. Application for leave to appeal sentence granted.** **2. Appeal allowed.** **3. The sentences imposed below are varied only to the extent of reducing the concurrent head sentences imposed:** **(i) on count 1 to 12 months imprisonment;** **(ii) on count 2 to six months imprisonment; and** **(iii) on count 3 to six months imprisonment.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to attempted unlawful entry of a vehicle with intent to commit an indictable offence, with violence, and two counts of serious assault of police while acting in execution of duty – where the applicant received a head sentence of two years imprisonment for one count of serious assault, and 18 months for each of the other counts – where the applicant was delusional as a result of voluntary intoxication and believed the police were in fact Hells Angels – where the offending against police consisted of swinging blows that did not make contact – whether the sentence was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the applicant had sustained lacerations and was bleeding when police attempted to restrain him – where the applicant's blood was inadvertently deposited on the cut hand of a police officer – where there was no circumstance of aggravation – where a victim impact statement from the complainant referred to the psychological stress of fear of HIV contamination – where the learned sentencing judge had regard to the emotional harm caused to the complainant – whether the learned sentencing judge erred in considering an uncharged circumstance of aggravation in determining sentence – whether the emotional harm was relevant as harm suffered by a victim because a crime was committed against that person

Criminal Code (Qld), s 340, s 564
Penalties and Sentences Act 1992 (Qld), s 9(2)(c), s 179K, s 189I
Victims of Crime Assistance Act 2009 (Qld), s 5

Nguyen v The Queen (2016) 256 CLR 656; [2016] HCA 17, applied
R v Brown [2013] QCA 185, discussed
R v D [1996] 1 Qd R 363; [1995] QCA 329, applied
R v King (2008) 179 A Crim R 600; [2008] QCA 1, discussed
R v Mathieson [2005] QCA 313, discussed
R v Murray (2014) 245 A Crim R 37; [2014] QCA 250, discussed
R v Nagy [2004] 1 Qd R 63; [2003] QCA 175, applied
R v Taylor [2004] QCA 447, discussed
Royall v The Queen (1990) 172 CLR 378; [1991] HCA 27, applied
Veen v The Queen [No 2] (1988) 164 CLR 465; [1988] HCA 14, applied

COUNSEL: J R Jones, with N Edridge, for the applicant (pro bono)
S Cupina for the respondent

SOLICITORS: Fisher Dore Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Henry J and with the reasons given by his Honour.

[2] **HENRY J:** The applicant pleaded guilty to the following offences, receiving the following concurrent sentences:

- Count 1, attempted unlawful entry of a vehicle with intent to commit an indictable offence, with violence – 18 months imprisonment;

- Count 2, serious assault of police while acting in execution of duty – two years imprisonment;
- Count 3, serious assault of police while acting in execution of duty – 18 months imprisonment.

He was immediately released upon parole. His preceding 75 days on remand was declared to be time already served under the sentences imposed.

[3] The applicant seeks leave to appeal his sentences on the following grounds:

1. The sentence imposed on counts 1, 2 and 3 in all the circumstances is manifestly excessive.
2. The learned sentencing judge erred by having regard to a circumstance of aggravation of which the applicant had not been convicted.

Facts

[4] The applicant was in a depressed state following the sudden death of a friend. He commenced using methamphetamine to self-medicate, becoming dependent on the drug, thus perpetuating his depressive experience. The offending occurred on a day when he took an excessive amount of methamphetamine and, as a result, suffered a psychotic experience.

[5] Having taken what he later reported was around one gram of "ice", the applicant became extremely paranoid that "bikies" were out to get him. He met up with his father, who was unsuccessful in trying to calm him down. He attended a bottle-shop and obtained alcohol which he also consumed. He smashed a bottle of wine he had purchased and cut his arm with the glass.

[6] He subsequently walked onto and along a busy road, amidst moving traffic. He motioned from the middle of the road lanes for the male driver of an oncoming vehicle to stop his car. The driver of that vehicle, the complainant in count 1, stopped his vehicle and the applicant walked to the driver's side door. The applicant said, "Get out, get out or do you want to be shot in the head." His counsel later explained the applicant then held the delusional belief he was going to be shot in the head by the Hells Angels. Be that as it may, the applicant's plea of guilty involved a concession he held the intention to commit an indictable offence in then attempting to enter the car. That offence must have been the stealing or unlawful use of the motor vehicle.

[7] The applicant opened the driver's door and grabbed the driver, trying to pull him from the car. The driver noticed blood on the applicant. The driver's seatbelt remained secured and he accelerated away. The applicant was heard by passers-by to say, "Someone's going to report that. That was stupid."

[8] Two police officers conducting a vehicle intercept nearby became aware of the applicant's conduct and sought him out. They found him walking in the middle of the road in the face of oncoming traffic. He was grabbing at passing car doors and windows, causing drivers to swerve.

[9] The police approached the applicant. They took hold of the applicant's arms, preparatory to directing him to the sidewalk. He resisted, swinging punches

towards them but did not make contact. He was screaming, "Hells Angels! Hells Angels! They're trying to kill me. They aren't real police!" The applicant's delusional belief that the police were Hells Angels was not reasonably held; it was a result of his abuse of methamphetamine.

[10] Despite the applicant's resistance, the police manoeuvred the applicant from the traffic lanes to the ground. They placed handcuffs on him as he continued to try and move his arms and strike at them, again without making contact.[1] The police noticed a number of large deep lacerations to the applicant's left arm which they subsequently bandaged and applied pressure to, in order to stem the bleeding.

[11] The applicant was yelling his own name repeatedly and saying, "Josh is trying to kill me. Hells Angels. I've got HIV. HIV. They're trying to kill me." The applicant asserted through his counsel he had no recollection of yelling out that he had HIV and wondered whether he had yelled "HA" as an abbreviated reference to Hells Angels. Nonetheless the applicant recognised through his counsel that he may have said "HIV". In the absence of actual contradiction of the information before the court the applicant was properly sentenced on the basis he said he had HIV.

[12] The complainant in count 2 noticed he had sustained cuts to the back of his left hand which were covered in the applicant's blood. Defence counsel below asserted that concerning outcome was not caused by the applicant's application of force, informing the court:

> "The police officers don't say they were struck, and in fact, what they say is that they arrived and tried to calm him down, and then when they [frogmarched] him to the side of the road, he was struggling and thrashing his arms around, and swinging at them, but no contact was made, and then, it seems as though the police officer's hurt himself when trying to take Mr Cooney to the ground – has grazed his hands, but the grazes weren't the subject of an application of force by Mr Cooney, and it may only be a very small moment, but it's then the police officer's discovered that he's profusely bleeding from several very deep cuts on his arm, and blood has got on the police officer's hand."[2]

That information was not disputed below.

[13] The applicant was taken to hospital, sedated, charged and remanded in custody.

[14] A victim impact statement from the complainant police officer in respect of count 2 summarised the psychological stress caused to him by fearing he might have contracted HIV. He spoke of its interference with his normal intimacy with his partner and the angst and stress of awaiting test results.

[15] The applicant's counsel informed the Court that while the applicant did not believe he had HIV, he intended to arrange for relevant testing and notification of the prosecution on his release from custody. It was explained he had not been tested for communicable diseases whilst on remand.

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1 Any ambiguity as to whether any of the applicant's attempts to strike police succeeded was removed by defence counsel's uncontested submissions that there was no actual contact – AR 16 LL35-39.

2 AR 16 LL35-44.

[16] A psychological report tendered on the applicant's behalf explained there was a direct link between the offending and the applicant's drug intoxication with methamphetamine on the day of the offending. The author opined the applicant's rehabilitation should address the ongoing management of his depression and his abuse of drugs and alcohol.

[17] The applicant was 40 years old at the time of the offending and sentence. His only previous conviction was for the dangerous operation of a vehicle whilst adversely affected, obstructing police and wilful damage, all committed on 15 December 2012.

[18] His pleas of guilty were indicated at an early stage – indeed he was sentenced within 75 days of the offences occurring. He wrote letters of apology to the police officers he had assaulted.

The proceeding below

[19] The prosecutor below submitted for a head sentence in the order of two to two and a half years imprisonment with the extremely early pleas of guilty being recognised by release after serving a quarter thereof.

[20] The applicant's counsel below submitted for probation or mixed prison probation with the term of imprisonment being solely constituted by the declarable 75 days he had spent on remand.

[21] In sentencing the applicant the learned sentencing judge had regard to the applicant's early pleas of guilty, his mature age, his reasonable employment history, his past good character other than his previous convictions, his letter of apology to the officers, his obvious remorse, community interest in his rehabilitation and the psychologist's report.

[22] The learned sentencing judge accepted it was obvious that at the time of the offending the applicant was suffering from a psychotic episode deriving from his own consumption of methamphetamine. His Honour noted the applicant's psychotic delusions explained his behaviour but that self-intoxication was not a mitigating factor.

[23] His Honour noted the adverse impact of the offending upon the complainant in count 2. The terms in which he did so are discussed later in these reasons.

[24] His Honour concluded that a term of probation would not reflect the seriousness of the offending or carry the necessary deterrent message. However, he concluded it was appropriate to immediately release the applicant upon parole in light of the significant mitigating factors and his early pleas of guilty.

[25] After the imposition of sentence, defence counsel enquired whether his Honour had formed the view that count 2 was the most serious of the three offences. His Honour responded he had and that was the reason why it attracted a head sentence of two years as distinct from the head sentences of 18 months in respect of the other two counts.

Consideration

[26] Before dealing with the complaint of manifest excess it is convenient to dispense with the complaint that the sentencing judge had regard to an uncharged circumstance of aggravation.

Ground 2 - Was regard had to an uncharged circumstance of aggravation?

[27] The learned sentencing judge apparently made the sentence on count 2 more severe than the other sentences by reason of the emotional impact upon the victim in count 2.

[28] It follows that in determining sentence the learned sentencing judge had regard to the fact the applicant's blood had been deposited on the complainant's cut hand. The applicant's counsel contends that fact constituted an uncharged circumstance of aggravation[3] and should therefore have been disregarded by the sentencing judge. It is in turn submitted the impact on the complainant in consequence of that fact should also have been disregarded.

[29] The principle relied upon by the applicant was articulated in *R v D*[4] where this court, following *R v De Simoni*,[5] observed:

> "An act, omission, matter or circumstance which it would be permissible otherwise to take into account may not be taken into account if the circumstances would then establish:
>
> (a) a separate offence which consisted of, or included, conduct which did not form part of the offence of which the person to be sentenced has been convicted;
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> (b) a more serious offence than the offence of which the person is to be sentenced has been convicted; or
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> (c) a 'circumstance of aggravation' (Code, s.1) of which the person to be sentenced has not been convicted; i.e., a circumstance which increases the maximum penalty to which that person is exposed."

[30] Section 340 *Criminal Code* (Qld) provides for a maximum penalty of seven years imprisonment for assaulting a police officer acting in the execution of the officer's duty. However, it elevates the maximum to 14 years if the offender assaults a police officer in certain aggravating circumstances, including if:

> "(i) the offender bites or spits on the police officer or throws at, or in any way <u>applies</u> to, the police officer a bodily fluid or faeces;
>
> (ii) the offender <u>causes</u> bodily harm to the police officer; …"
>
> (emphasis added)

[31] Each of those circumstances had at least potential application here because the applicant's blood was a bodily fluid and the cuts to the complainant's hand amounted to bodily harm. However, those circumstances required that the applicant

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3 Section 564 *Criminal Code* provides if a circumstance of aggravation is intended to be relied upon it must be charged in the indictment.

4 [1996] 1 Qd R 363.

5 (1981) 147 CLR 383.

applied the blood or caused the bodily harm. The facts placed before the learned sentencing judge did not describe the applicant doing either of those things.

[32] The assaults by the applicant were only said to have been threatened assaults, constituted by him swinging at but not making contact with the police who were restraining him. Further, on the information before the learned sentencing judge, the cuts and depositing of blood on them was not known to have been caused by an application of force by the applicant. It may have been different if the circumstances under which the cuts and depositing of blood occurred were identified with at least some precision. However, they occurred unnoticed. At the highest their cause can only be articulated as an unintended incident of the physical proximity of the players during the simultaneously occurring acts of assault and restraint.

[33] In the course of imposing sentence, having noted the applicant had repeatedly said he had HIV, the learned sentencing judge observed:

> "That compounded the effect of what followed, which was that the complainant to count 2 noticed that he had sustained cuts to the back of his left hand, which were covered in your blood. Unsurprisingly, he has suffered great anguish as a result. And I have read a victim impact statement from the police officer. The fear of transmission of communicable diseases has had a significant effect upon his relationship with his partner and his children and, of course, his peace of mind."

[34] These observations do not suggest the applicant was sentenced on the factual basis he had applied his blood to the complainant or caused the cuts.

[35] It follows that in having regard to the fact the applicant's blood had been deposited on the complainant's cut hand the learned sentencing judge did not violate the rule in *R v D*. He did not take into account facts which, on the information before the court, constituted a circumstance of aggravation. Ground 2 must fail.

Ground 1 - Were the sentences manifestly excessive?

[36] The applicant's counsel contended that if the deposit of blood causing the emotional impact upon the complainant in count 2 was not a circumstance of aggravation then it and its consequence were irrelevant on sentence. However, it is not the law that victim impact must itself be an element of a charged offence or circumstance of aggravation before it can be taken into account on sentence.

[37] Pursuant to s 9(2)(c) *Penalties and Sentences Act* 1992 (Qld) a sentencing court must have regard to:

> "(c) the nature of the offence and how serious the offence was, including-
>
> (i) any physical, mental or emotional harm done to a victim, including harm mentioned in information relating to the victim given to the court under section 179K; …"

[38] Section 179K refers to the means by which a victim is permitted to detail "the harm caused to the victim by the offence". Its reference to a "victim" is, per s 179I, to the definition of "victim" in s 5 *Victims of Crime Assistance Act* 2009 (Qld). Section 5

relevantly provides that a "victim is a person who has suffered harm … because a crime is committed against the person".[6] Such statutory language casts a broader causal net than the aggravating circumstances in s 340.

[39] The limits of the causal reach of the aggravating circumstances in s 340 will doubtless depend on the circumstances of each case. The circumstances of this case do not require this court to attempt any statement of general application about those limits. For reasons already explained, there was no information before the court indicating that the event which occasioned emotional harm to the complainant in count 2, namely the depositing of blood on cuts, was caused by an act that could properly have been the subject of a circumstance of aggravation.

[40] As to whether the emotional harm can be said to have occurred "because" a crime was committed against the complainant, in *Royall v The Queen*,[7] McHugh J observed:

> "In criminal cases, the common law has refused to apply the "but for" test as the sole test of causation. Nevertheless, the "but for" test is a useful tool in criminal law for determining whether a causal link existed between an accused's act or omission and the relevant injury or damage."[8]

[41] Here, the depositing of blood onto the complainant's cuts and the emotional harm thereby caused must have been the result of the physical proximity between the police and the applicant during the simultaneous process of assault and restraint. The depositing of blood and consequential emotional harm would not have occurred "but for" the applicant's offending against both officers necessitating such proximity. The events are sufficiently causally linked for it to be said those outcomes occurred "because" of that offending.

[42] It follows the learned sentencing judge was entitled to have regard to the emotional harm caused by the complaint's fear of infection as having occurred because of the applicant's serious assault against the complainant.

[43] Nonetheless, it was relevant that the depositing of blood was an unintended and indirect consequence of the offending. This should have moderated the weight the victim impact was given relative to other considerations on sentence. The six month difference between the head sentences imposed for the two charges of serious assault, in which identical offending was alleged, strongly suggests there was no such moderation. Indeed, it was within the sound exercise of the sentencing discretion to take the emotional harm into account without necessarily imposing different head sentences. That is because the relative contribution of the two assaults to the proximity resulting in the depositing of the blood was indistinguishable.

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6 The "personal circumstances of any victim of the offence" are also relevant considerations in this case, per s 9(3)(c), but not in a way which here assists resolution of the present issue. To the extent emotional harm to the complainant resulting from the offending can be described as a personal circumstance of the complainant as a "victim" it is difficult to see how it arises as relevant other than as harm suffered "because" of the offending.

7 (1990) 172 CLR 378.

8 Ibid 440.

[44] In turning to a consideration of the head sentences, it ought be appreciated the practical effect of the sentences imposed by the learned sentencing judge was the applicant's release on parole after serving 75 days imprisonment. Release on parole after being required to serve about two and half months imprisonment, little more than one tenth of the head sentence, was a generous outcome.

[45] Discounting a sentence to allow for mitigating circumstances may be achieved by reducing the time to be served before parole release/ eligibility or reducing the head sentence or reducing both. In the present case, the fixing of a parole release date which was strikingly short in proportion to the head sentence suggests the learned sentencing judge allowed for all the mitigating circumstances of the case by reducing the parole period. That was a legitimate approach to take. However, a decision to reflect all discounting by fixing an early parole release date cannot logically justify inflating a head sentence beyond an objectively appropriate range. In the present case the head sentences for the serious assaults exceeded such a range.

[46] Serious assault on police is an offence which can occur in circumstances of widely variable levels of criminality, ranging, for example, from physical acts of minor resistance to arrest through to deliberately dangerous, degrading or prolonged attacks. For these reasons the range of appropriate sentences for serious assault of police is inevitably very broad.

[47] In now considering some other appellate cases it is to be borne in mind the assaults consisted of swinging attempted blows at police. While this represented more than minor resistance, the blows did not actually strike police. Moreover, the applicant believed, albeit unreasonably, that the police were Hells Angels. It is also relevant for comparison purposes that the serious assaults in the present case carried a maximum penalty of seven years, there being no circumstance of aggravation.

[48] In the oldest of the cases referred to, *R v Taylor*,[9] police were called to a domestic disturbance at a house at which the intoxicated applicant was armed with a large knife. He threatened to kill police, making stabbing gestures with the knife. The police backed into the street, attempting to reason with the applicant. The applicant repeatedly approached them threatening them with the knife, threatening to kill himself and inviting them to shoot him. They pointed their service revolvers at him at one point when he rushed at them. After one and a half hours, during which they retreated 400 metres from the house, the police finally coaxed him into returning to the house and surrendering the knife. Police were said to have behaved with commendable patience and skill in avoiding actual harm being occasioned to anyone. The 31 year old applicant had a "deplorable" criminal history including for "numerous assaults including assaults on police and assaults occasioning bodily harm". The Court of Appeal did not interfere with concurrent sentences of two years imprisonment for the serious assaults of police and 12 months imprisonment for going armed in public.

[49] That outcome illustrates that the absence of infliction of actual physical harm is but one feature relevant to an assessment of the inherent seriousness of this category of offending. While that feature is also present here, *Taylor* involved markedly more threatening, serious and prolonged misconduct and involved an offender with a markedly worse criminal history.

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9 [2004] QCA 447.

[50] In *R v Mathieson*,[10] which was not referred to by the parties, the applicant was sentenced at first instance to concurrent sentences of 12 months imprisonment suspended after four months for serious assault and for assault occasioning bodily harm. Those offences were committed upon male and female police officers who arrested Mathieson when she was drunk, arguing and obstructing traffic on a road in Ingham at night. The police walked her to their police vehicle. As they attempted to make her enter the vehicle she grabbed and tugged the female officer's hair, pulling an earring from her ear. She kicked the male officer in the shoulder and head and punched the female officer several times in the face. She also tore some of the female officer's hair from her scalp in being forced to release her grip. There was evidence of the offending having "fairly serious" physical and emotional impact upon the female officer. Mathieson was the young mother and sole carer of two children and had one minor previous conviction. This court concluded the sentence was manifestly excessive and substituted concurrent sentences of six months imprisonment suspended after two months.

[51] While Mathieson's personal circumstances were somewhat more favourable than the present applicant's, her assaults, unlike those of the applicant, made actual contact and caused bodily harm to one of the officers. It is not possible to reconcile the quantum of the present serious assault sentences with the outcome in *Mathieson*.

[52] In *R v King*,[11] a 29 year old offender without previous convictions was ejected in an intoxicated state from a bar. He scuffled with a security guard, giving rise to a charge of common assault, for which he was sentenced to two months imprisonment. Police arrived and placed him into their van. He gestured for one of the officers at the door of the van to approach him and he spat blood and phlegm onto the officer's face and into his mouth. The officer endured a stressful six months thereafter, awaiting the outcome of communicable disease testing. For that serious assault King received a head sentence of six months imprisonment, suspended after three months. The then Chief Justice, with whom the other members of the court agreed, observed:

> "One begins with the proposition that those who treat a police officer in this way should ordinarily expect to be imprisoned, meaning actual imprisonment. Police officers carry out duties which are usually onerous and often dangerous. It is abhorrent that a police officer responsibly going about his or her business be subject to the indignity and risk of being spat upon. … In cases like this, it is often the fact of imprisonment rather than the particular duration of the term imposed which secures the necessary deterrence."[12] (emphasis added)

[53] This court concluded the six month head sentence for serious assault was manifestly excessive and reduced it to four months suspended after two months.

[54] At the time of the offending in *King* the offence of serious assault did not carry the above discussed circumstances of aggravation and the maximum penalty was seven years imprisonment. Unlike King the present applicant did not deliberately deposit

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10 [2005] QCA 313.
11 (2008) 179 A Crim R 600.
12 Ibid 601, 602.

bodily fluid on police, yet his head sentence on count 2 was six times higher than the head sentence arrived at in *King*.

[55] The aforementioned circumstances of aggravation were also yet to be legislated at the time of the offending in *R v Brown*.[13] In *Brown* the applicant was a 50 year old indigenous woman with a lengthy criminal history, though for minor offences such as public nuisance. She was charged with two counts of serious assault and associated summary charges. Police were removing her from a premises at which she had created a disturbance. Brown was upset over the suicide of her brother and very intoxicated. She punched one of the officers hard in the chest, a serious assault for which she received a head sentence of nine months imprisonment. She then made noises suggesting she was preparing to spit at another officer who was restraining her. She was told not to spit but nonetheless proceeded to spit saliva over the officer's face, mouth, hair and uniform. This occasioned anxiety to the officer in ensuing months as he awaited the outcome of disease testing. Brown received a concurrent head sentence of 15 months imprisonment for that serious assault. Serious injuries were occasioned to her during her struggle with police. Her sentences were suspended after 203 days, which was the time she had spent in pre-sentence custody.

[56] After an extensive review of the authorities Holmes JA (as her Honour then was), with whom Fraser JA and North J agreed, concluded spitting and biting cases tended to attract sentences up to three months imprisonment, that the head sentences imposed on Brown were each insupportable and that the almost seven months imprisonment already served was "more than adequate" punishment. The head sentences were reduced to the period already served. If seven months was a "more than adequate" head sentence in *Brown* a similar observation would easily apply here.

[57] By the time of the offending in *R v Murray,*[14] the offence of serious assault did carry the aforementioned circumstances of aggravation. Murray was a 19 year old indigenous woman with an infant child. She had a minor criminal history for public nuisance offences and one offence of obstructing police. Police were called to a domestic dispute at premises where Murray was in the front yard, intoxicated and abusing people. She was arrested and taken to the watch house. An officer there attempted to manoeuvre her into a seat and she spat saliva into his face, hitting his eyes and mouth. The ensuing wait on the outcome of disease testing caused stress and concern to the officer. Murray was sentenced to 15 months imprisonment with parole release after serving five months. After reviewing the authorities, Fraser JA, with whom the other members of this Court agreed, concluded:

> "[T]he applicant's sentence is so far out of kilter with the sentences in those cases, even when the fullest possible allowance is made for the increase in the maximum penalty, as to indicate that the sentencing judge must have erred."[15]

[58] His Honour concluded the sentence was manifestly excessive and substituted a sentence of nine months imprisonment, fixing Murray's parole release date after

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13 [2013] QCA 185.
14 (2014) 245 A Crim R 37.
15 Ibid 45.

serving two months and 24 days, the period of actual custody served prior to her successful appeal.

[59] Collective consideration of the above cases unequivocally demonstrates the head sentences for the two offences of serious assault simpliciter were manifestly excessive. I would grant the application for leave to appeal.

[60] In arriving at appropriate lesser head sentences I would take the emotional harm to the complainant in count 2 into account but not impose different head sentences as between counts 2 and 3.

[61] I would substitute concurrent head sentences of six months imprisonment for each of counts 2 and 3. Given the offences were part of a short course of delusional conduct I would not vary the concurrent sentencing approach taken below.

[62] It remains to consider the sentence for count 1, attempting to unlawfully enter a vehicle with intent to commit an indictable offence using actual violence. The parties were unable to locate any relevant comparable authorities for this offence.

[63] The offence of entering a vehicle with intent using actual violence, described in s 427 *Criminal Code*, carries a maximum penalty of 14 years imprisonment, by reason of the aggravating circumstance of the use of actual violence. That is the same maximum penalty as the offence of robbery simpliciter, with which it shares some characteristics, although the use of personal violence in a robbery elevates the maximum penalty to life imprisonment. Also, the foundational element of this offence is entry of a vehicle whereas the foundational element of robbery is stealing.

[64] The variability of charges which the present kind of conduct might attract makes it important on sentence to focus upon the charge in question rather than on popular badges such car-jacking or attempted car-jacking. Here count 1 is charged as an attempt. Pursuant to s 536 *Criminal Code* the maximum penalty is therefore seven rather than 14 years imprisonment. How the applicant managed to open the driver's door, grab the driver and try to pull him from the car without his actions constituting an entry, rather than merely an attempted entry, is unclear. However, it has not been argued he was sentenced in breach of the above discussed rule in *R v D*. While the conduct in count one must have progressed very substantially towards fulfilment of the foundational element of entry, assessment of the appropriate sentence must proceed on the basis charged, namely that there was only an attempt to enter. That assessment is in turn constrained by the reduction of the maximum penalty by reason of the offence being charged as an attempt.

[65] It is also relevant to that assessment that the driver was said to have been left bemused by the incident, the violence used involved an attempt to remove rather than to injure the driver and no harm was done to the driver's person or property. Further, sight must not be lost of the delusional nature of the applicant's motivation for committing the offence. It is to be appreciated the applicant's delusions resulted from his deliberate abuse of methamphetamine rather than from a naturally occurring psychiatric illness. They are not per se a mitigating personal circumstance. They are relevant, by explaining the novel absence of comprehensible criminal motivation, to an assessment of the underlying level of wickedness of the offence.

[66] While count 1 had the same maximum penalty as counts 2 and 3 it was more serious. The offence was committed on a public road amidst moving traffic. It was inherently alarming and potentially dangerous to road users. Even allowing for the absence of comprehensible criminal motivation this was objectively serious offending. General deterrence looms as an especially important consideration in sentencing for such conduct.

[67] In sentencing concurrently, it is permissible to allow for the overall criminality by imposing a sentence for the most serious offence which is more severe than it would be if the offence were falling for sentence in isolation.[16] However, such a sentence must remain within a just range of punishment for the offence, lest it offend the over-arching principle that a sentence must not be so severe as to be disproportionate to the gravity of the offence to which it attaches.[17]

[68] A head sentence of 18 months was disproportionate to the gravity of count 1, which offence was an attempt. Even allowing for some uplift adequate to accommodate the overall criminality in the context of concurrent sentencing, it was a manifestly excessive head sentence.

[69] I would vary that head sentence, reducing it to 12 months imprisonment.

[70] In allowing the appeal I would only reduce the head sentences and make no change to the parole release order.

Orders

[71] I would order:

1. Application for leave to appeal sentence granted.
2. Appeal allowed.
3. The sentences imposed below are varied only to the extent of reducing the concurrent head sentences imposed:
   (i) on count 1 to 12 months imprisonment;
   (ii) on count 2 to six months imprisonment; and
   (iii) on count 3 to six months imprisonment.

[72] **BRADLEY J:** I agree with Henry J.

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16 *Nguyen v The Queen* (2016) 256 CLR 656, 677 [64]; *R v Nagy* [2004] 1 Qd R 63, 72.
17 *Veen v The Queen [No 2]* (1988) 164 CLR 465, 477.