SUPREME COURT OF QUEENSLAND

CITATION:	*R v Keogh* [2019] QCA 173
PARTIES:	**R** **v** **KEOGH, Mark Thomas** (applicant)
FILE NO/S:	CA No 137 of 2019 DC No 1027 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 15 May 2019 (Loury QC DCJ)
DELIVERED ON:	Date of Orders: 23 August 2019 Date of Publication of Reasons: 6 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	23 August 2019
JUDGES:	Holmes CJ and Gotterson and McMurdo JJA
ORDERS:	**Date of Orders: 23 August 2019** **1. Grant leave to appeal.** **2. Allow the appeal.** **3. Vary the sentence to a period of 18 months imprisonment.** **4. Fix a parole release date at 23 August 2019.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant pleaded guilty to one count of extortion – where the applicant was sentenced to two years imprisonment, suspended after eight months for an operational period of two years – where the applicant and another person made threats to the complainant to the effect that if the complainant did not pay back bond money owed to another person, the complainant would suffer personal violence – where the applicant stood to gain nothing personally from the threat – where the applicant did not actually extract money from the complainant nor did he threaten to cause harm to other innocent people – where the learned sentencing judge had acted upon a principle that for an offence of extortion, a sentence of imprisonment requiring actual custody must be imposed and that term must be significant if one of a number of defined circumstances of

aggravation applied – whether the learned sentencing judge acted on an incorrect principle in sentencing the applicant

R v Amery [1999] QCA 236, considered
R v Cifuentes [2006] QCA 566, discussed
R v Shambrook [1997] QCA 356, considered

COUNSEL: A M Hoare for the applicant
M T Whitbread for the respondent

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

[1] **HOLMES CJ:** I agree with the reasons of Gotterson JA.

[2] **GOTTERSON JA:** On 15 May 2019, the applicant, Mark Thomas Keogh, pleaded guilty in the District Court at Brisbane to a charge of offending against s 415(1) of the *Criminal Code* (Qld) in that between 19 and 22 November 2017 at Indooroopilly, he demanded a sum of money, without reasonable cause, with intent to gain a benefit for Vasanth Elumalai, and with a threat to cause a detriment to Matthew Keith Edwards. He was convicted and a sentence hearing ensued.

[3] On the same day, the applicant was sentenced to two years imprisonment. The sentence was suspended after eight months for an operational period of two years.

[4] The applicant filed an application for leave to appeal to this Court against the sentence on 17 May 2019.[1] The application was heard on 23 August 2019. At the conclusion of the hearing, the Court made the following orders:

1. Grant leave to appeal.
2. Allow the appeal.
3. Vary the sentence to a period of 18 months imprisonment.
4. Fix a parole release date at 23 August 2019.

[5] The following are my reasons for the orders then made.

Circumstances of the offending and its impact

[6] An agreed Statement of Facts was tendered at the sentence hearing.[2] It disclosed the following.

[7] In late 2016, the complainant, Mr Edwards, then in his mid-30's, began living with Mr Elumalai at a unit in Indooroopilly. In November 2017, Mr Elumalai left the address following a tenancy dispute with the complainant. At some time prior to his departure, he had introduced the applicant to the complainant. The former was the foreman at a construction site where Mr Elumalai was working. He was introduced to the complainant by the name "Irish". He has a strong Irish accent.

[8] When Mr Elumalai departed, he indicated that he was going to stay at the applicant's house at Kuraby. The complainant assisted in transporting him to an address in Kuraby at which the applicant was present.

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1 AB 1-3.
2 Exhibit 3: AB 36-37.

[9] The complainant's father was the owner of the unit at Indooroopilly. Given the ongoing tenancy dispute, a bond payment of about $750 that Mr Elumalai had made, was not repaid to him after his departure.

[10] At 4.13 pm on 20 November 2017, the complainant received a telephone call on his mobile phone. The caller introduced himself as "Irish" and told the complainant; "You're going to give the bond money back … I know people … we're going to fuck you up, we're going to burn your fucking house down!" The complainant ended the phone call after receiving those threats and reported the matter to police. They verified that the call had been made from the applicant's mobile phone.

[11] On the following day, the complainant received a voice mail message on his mobile phone at 5.32 pm. The voice said: "I'm calling in regard to the $750 house bond you owe. Now I'm informing you, it's in your best thing (sic) to pay it before we get ya because you're going to be paying a limb. If you don't pay it, you're going to have some part of your body chopped off. And then you're still going to owe a lot more. So you've got one week to pay. We'll find ya".

[12] This message had been sent from a mobile phone owned by one Christopher Allison. Phone records revealed that Mr Allison had contacted the applicant at 5.26 pm that day, some six minutes before the message was left. However, it is not suggested that the applicant scripted the message or that he was aware of the degree of harm that was to be threatened in it.

[13] The applicant voluntarily attended the Indooroopilly Police Station on 16 February 2018 and participated in a formal record of interview. He admitted making a phone call to the complainant about the money "owed" to Mr Elumalai but denied issuing a threat.

[14] In a Victim Impact Statement,[3] the complainant reported that the offending had caused him stress for about six months and that it had affected his studies and work. He was concerned for his safety and that of his girlfriend. He was fearful that something might be done to vandalise the unit during his absences from Brisbane for work.

Applicant's personal circumstances and history of offending

[15] The applicant was 38 years old at the time of the offending. He was born in Australia to Irish parents who returned with their family to Ireland. The applicant qualified as a carpenter when he was 25 years old and in 2008 he settled in Australia as a single man. He was working in the construction industry during 2017.

[16] The applicant married in July 2017 and has an infant child. At the time of his sentence, he was the sole source of financial support for his family as his wife was on maternity leave.

[17] The applicant has participated in the Rural Fire Service in both Western Australian and, more recently, Queensland. References tendered at the hearing[4] commended him for his trustworthiness and industry as an employee and for his commitment to his family.

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3 Exhibit 4: AB 38-39.
4 Exhibit 7: AB 49-51.

[18] The applicant has had a long history of problem drinking. This was noted in a report prepared by Mr Peter Perros, forensic psychologist, dated 26 March 2019 which was tendered at the hearing.[5] Mr Perros attributed the applicant's drinking to a maladaptive strategy for coping with anxiety in his school days.[6] He assessed the applicant as having a pragmatic and independent personality and being disposed to deal with personal issues head on.[7] Notwithstanding that, he was of the opinion that the offending on this occasion "was associated with the problem drinking".[8]

[19] Mr Perros also noted that the applicant's excessive drinking had brought him into conflict with the law.[9] In 2009, he was convicted in Western Australia of drink driving with a blood alcohol level of 0.194 per cent. In October 2017, he pleaded guilty to a charge of offensive and orderly behaviour and two associated summary charges arising out of his drunken misbehaviour on an aircraft flight. He was fined and placed on probation for two years. It was whilst he was on probation that the subject offending occurred.

[20] The applicant presented to Drug Arm Australasia in May 2018 to undertake a Community and Family Support Service Program ("CFSSP"). He attended 10 sessions and successfully completed the program in August 2018.[10]

[21] A probation report tendered at the hearing[11] referred to the applicant's having undertaken the program to address his alcohol abuse, even though he had been charged with the current offending while on probation, and also that he had travelled interstate with permission on two occasions without issue. The author of the report stated that the applicant was considered suitable for further community based orders.

The sentencing remarks

[22] The learned sentencing judge referred to the circumstances of the offending and the applicant's criminal history. Her Honour was not satisfied that the applicant was genuinely remorseful for his conduct because he had denied to police that he had threatened the complainant.[12] The guilty plea was taken into account. Reference was made to the applicant's drinking problem and, to his credit, his having undertaken the CFSSP. Her Honour accepted that the applicant had been drinking when he made the call to the complainant. She thought that, notwithstanding that, it was "part of (his) character that led (him) to commit this offence" and that he had been motivated by a "misguided desire" to help a friend.[13]

[23] The learned sentencing judge referred to the references which spoke well of the applicant and to his work in the community. She factored into account hardship the applicant had caused to his family by putting "their very livelihood at risk". Her Honour cautioned that that factor should not overwhelm the exercise of the sentencing discretion.[14]

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5 Exhibit 5: AB 40-46 at paragraph 75.
6 Ibid paragraph 77.
7 Ibid paragraph 79.
8 Ibid paragraph 81.
9 Ibid paragraph 76.
10 Exhibit 7: AB 47-48.
11 Exhibit 2: AB 35.
12 AB 27 ll17-19.
13 Ibid ll42-45.
14 AB 28 ll4-10.

[24] Reference was made to the impact of the offending on the complainant.[15] Her Honour described it as "unsophisticated".[16] She commented that it beggared belief that the applicant would have engaged in such conduct when he stood to gain nothing personally from it and had a wife who was pregnant.[17]

[25] The learned sentencing judge continued:[18]

> "The maximum penalty for the offence of extortion is 14 years imprisonment. That should indicate how very serious Parliament considers the offence of extortion. As I indicated in the submissions that were made to me, in the decision of *R v Cifuentes* [2006] QCA 566 Justice Jerrard said after a review of comparable decisions that, "It is very difficult to avoid a prison sentence for extortion and that the deterrent element is of particular importance". He considered the factors reflected in the many decisions of the appellate Court that impacted upon the sentence to be imposed.
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> You and Allison threatened to use personal violence to the complainant and to his property. The demands persisted for only two days. It was an unsophisticated offence and the sum of money you demanded was only $750. You did not actually extract any money and you did not threaten to cause harm to other innocent people nor did you prey upon any habits or proclivities of the particular complainant. I take into account that a sentence of imprisonment is a sentence of last resort and a sentence which results in you remaining in the community is preferable. However, general deterrence is of particular importance to the exercise of my discretion. The sentence I impose must act as a real deterrent to others who consider demanding property from other people with threats of violence to either them or their property."

[26] Her Honour then proceeded to sentence the applicant.

The grounds of appeal

[27] The applicant relies on the following grounds of appeal:

1. The learned sentencing judge misapplied principle in holding that the Court was bound to impose a sentence of actual imprisonment.

2. In the alternative, the sentence is manifestly excessive.

I turn first to consider Ground 1.

Ground 1

[28] I preface my discussion of this ground by noting that at the sentence hearing, the prosecutor advanced as her "ultimate submission" that "the court may consider a term of imprisonment with immediate parole release". Such a sentence would, the prosecutor suggested, mark the seriousness of the offending, address personal deterrence

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15 Ibid ll12-19.
16 Ibid l12.
17 Ibid ll19-21.
18 Ibid ll23-40.

and provide ongoing supervision of the applicant. It would "adequately balance the criminality of the offending against (the applicant's) mitigating circumstances".[19]

[29] The learned sentencing judge enquired how that submission reflected the observation made by Jerrard JA in *Cifuentes* at [29] that:

> "[I]t is very difficult to avoid a prison sentence for extortion and that the deterrent element is of particular importance".

[30] The prosecutor responded that she was submitting for a term of imprisonment. Her Honour noted that no actual time to be served was sought and enquired whether there were any "comparables that demonstrate that a term of imprisonment with immediate parole and no actual time served (was) within range". The prosecutor said that she did not have any.[20]

[31] The learned sentencing judge went on to note that there were "many comparables" where terms of imprisonment with actual custody had been imposed. Every one of them that was referred to in *Cifuentes* had involved actual custody.[21]

[32] Defence counsel submitted that a term of actual imprisonment ought not be imposed. Reliance was placed upon the principle in s 9(2) of the *Penalties and Sentences Act* 1992 (Qld) that a sentence of imprisonment should only be imposed as a last resort. That principle had application here, it was submitted.[22]

[33] The learned sentencing judge referred to the nine factors in addition to deterrence that Jerrard JA had identified at [29] in *Cifuentes* as tending to require the imposition of substantial sentences of imprisonment for extortion. She observed that, as to two of them, personal violence had been threatened by the applicant and the demands had spanned two days; but that, otherwise, his offending did not exhibit any of those factors.[23] As can be seen in the second paragraph of the sentencing remarks that I have extracted,[24] these observations were repeated by her Honour in sentencing the applicant.

[34] Her Honour then mentioned the observation of Jerrard JA concerning the deterrence factor and asked if defence counsel could take her to any "comparable decisions where no actual custody has been served". Counsel replied that he could not find any such decision on appeal and added the qualification that that did not mean that such a sentence could not be imposed. Her Honour said that she accepted that.[25]

[35] **Applicant's submissions:** The applicant submitted that the learned sentencing judge had acted upon a principle that for an offence of extortion, a sentence of imprisonment requiring actual custody must be imposed. Such a principle is erroneous, it was further submitted. It is not supported by the decision in *Cifuentes*. Further, the sentencing decisions referred to in that case all involved offending with a considerably higher degree of criminality than that of the offending in this case.

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19 AB 12 Tr 1-5 ll27-33.
20 Ibid ll41-47.
21 AB 13 Tr 1-6 ll1-3.
22 AB 20 Tr 1-13 l36-40.
23 AB 21 Tr 1-14 l44 – AB 22 Tr 1-15 l6.
24 At [25].
25 AB 22 Tr 1-15 ll22-38.

[36] The applicant drew to the attention of this Court numerous sentencing decisions for lower level extortion offending in which wholly suspended sentences of imprisonment had been imposed by judges of the District Court.[26] Those sentences, all of which were imposed after the decision in *Cifuentes* in 2006, were not the subject of any appeal. The learned sentenced judge was not referred to them at the sentence hearing.

[37] **Respondent's submissions:** The respondent submitted that the learned sentencing judge had not acted upon a principle that mandated actual custody for extortion offending. Her Honour had accepted that it did not follow that because no example of a non-custodial sentence had been cited to her, such a sentence could not be imposed.

[38] **Discussion:** The offender in *Cifuentes* was a serving police officer. He made a demand with a threat to an individual whom he had, at an earlier time, arrested for drug offences. The individual had pleaded guilty to those offences and had been fined. The demand and threat were that the individual had to pay the offender $15,000 or his "boss" would take action against the individual ranging from conducting searches, confiscating property and removing children from his custody. Some $8,000 was paid over by the individual. Initially, the offender denied any involvement. He was convicted on a plea of guilty to an offence of extortion. He was sentenced to three and a half year's imprisonment. No parole eligibility date was fixed. His application for leave to appeal against his sentence as being manifestly excessive was refused.

[39] Jerrard JA (with whom Holmes JA and Helman J agreed) referred to a number of sentencing decisions of this Court and another appellate court where the offender was a police officer who had committed extortion or similar offending. He also referred to sentencing decisions of this Court for other varieties of extortion including extortion that had involved threats to the public or threats to business associates.

[40] In the course of oral argument on the current application, the Court was taken to two of the sentencing decisions referred to by Jerrard JA. Since they are illustrative of the context in which his Honour went on to express conclusions at [29], I shall summarise salient aspects of them.

[41] In *R v Amery*,[27] the 33 year old offender was a prostitute. She threatened an ex-client, demanding $2,000 from him. The threat was that she would tell police that he was a paedophile and burn some of his property. The victim contacted police and the $2,000 was paid over. The offender was apprehended. Notwithstanding that, she persisted in her claim, telling the victim's brother and his solicitor that he was a paedophile. She was sentenced to one year imprisonment. Her application for leave to appeal it was refused. Thomas JA described the offending as "a very nasty case of extortion".[28]

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26 Those sentencing decisions are listed in a Schedule to the Applicant's Outline of Submissions. They are *R v SM Karger* (20 May 2011); *R v DR Lacey* (12 March 2012); *R v EM Sullivan* (8 May 2015); *R v M Marinov* (1 March 2016); *R v NE Avery* (13 May 2016); *R v AL Vaughan* (6 February 2017) and *R v P Jones* (10 February 2017).

27 [1999] QCA 236.

28 At p5.

[42] The other decision was that in *R v Shambrook*[29] where this Court upheld a sentence of three years imprisonment imposed after a trial on six counts of extortion and one of wilful damage. The offender, a private investigator, had been engaged for a fee of $2,000 to approach and threaten a businessman. The objective was to have the businessman withdraw warrants of execution against property of the offender's employer. The offender had threatened to harm the health of the businessman. The wilful damage involved slashing tyres on his car. Davies JA noted that the conduct was plainly calculated to cause distress to the businessman and his family, and that it had done so. As well, it was aimed at defeating a legal process and "showed a contempt for the judgment of the court and the rule of law", for which the offender had shown no remorse.[30]

[43] It was after a consideration of those and other cases to which he had referred, that Jerrard JA went on to express the following conclusions at [29]:

> "Those other sentences upheld or imposed by this Court show the head sentence imposed here was not manifestly excessive. The sentences reviewed show that it is very difficult to avoid a prison sentence for extortion, and that the deterrent element is of particular importance. Other matters tending to require the imposition of substantial sentences of imprisonment, reflected in those decisions, include:
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> - if the offender used violence to the victim, or damaged the victim's property;
> - if the offender threatened personal violence to the victim;
> - the length of time over which the demands persisted;
> - the extent of planning and organisation involved in the offence;
> - the sum of money demanded from the victim;
> - whether, as in this case, the offender abused a position of power or trust;
> - whether the offender actually extracted money from the victim;
> - whether the offender threatened to cause harm to other, quite innocent, people; and
> - whether the offender preyed upon the habits or proclivities of others."

[44] I now turn to the two paragraphs that I have extracted from the sentencing remarks. I infer from them that the learned sentencing judge here understood Jerrard JA to have stated by way of principle that, for an extortion offence, general deterrence will call for a term of actual imprisonment and that where any of the other nine

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29 [1997] QCA 356.
30 At p22.

listed factors are present, the period of actual custody is to be a substantial one. The sentence imposed by her Honour reflected such a principle.

[45] In my view, it was an error for her Honour to have acted upon a principle of that kind. In the first place, Jerrard JA did not address, expressly or impliedly, time to be spent in actual custody. His observations were limited to the imposition of a term of imprisonment as such.

[46] It need also be borne in mind that his Honour's observations were drawn from his consideration of sentencing decisions for a range of extortions which, as the two decisions I have summarised illustrate, involved, in broad terms, more serious offending than that of the applicant here. As well, the range did not include examples of lesser offending of the kinds reflected in the District Court sentencing decisions to which the applicant has referred here.

[47] But, in any event, the principle on which her Honour appears to have acted, cannot be correct. It would attribute overwhelming importance to general deterrence whatever the circumstances of the offending and its impact or of the offender.

[48] For these reasons, I concluded that this ground of appeal has been established.

Disposition

[49] In view of the success of Ground 1, the applicant was granted leave to appeal and his appeal allowed. It is unnecessary to consider Ground 2.

[50] For the purposes of resentencing the applicant, I categorised his offending, its impact and his personal circumstances as broadly comparable with those exhibited in the sentencing decisions of the District Court to which the Court was referred. The applicant was therefore resentenced to 18 months imprisonment with an immediate parole release.

[51] **McMURDO JA:** For the reasons given by Gotterson JA, I agreed to the orders which were made at the conclusion of the hearing of this appeal.