SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dixon* [2019] QCA 224
PARTIES:	**R** **v** **DIXON, Milan Joseph John** (appellant/applicant)
FILE NO/S:	CA No 219 of 2017 DC No 84 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence Miscellaneous Applications – Criminal
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 22 August 2017; Date of Sentence: 23 August 2017 (Shanahan DCJ)
DELIVERED ON:	22 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	19 September 2019
JUDGES:	Fraser and Gotterson and Morrison JJA
ORDERS:	**1. Leave to adduce further evidence refused.** **2. Appeal against conviction dismissed.** **3. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – where the appellant was found guilty after trial of causing a detriment to a witness for the purpose of retaliation because the witness provided a statement against the appellant's son – where it was alleged that the appellant visited the witness and made threats to him – where evidence was adduced at trial of a telephone conversation between the appellant and his son in which the son asked the appellant to visit the witness in order to influence the latter's testimony – where the appellant alleged on appeal that the witness was not trustworthy or reliable and had a criminal record – where the appellant sought to rely upon new evidence contained in affidavits – whether the new evidence, combined with the evidence at trial, shows the appellant to be innocent or raises a reasonable doubt as to his guilt – whether, upon the whole of the evidence, it was open to the jury to have been satisfied beyond reasonable doubt of the appellant's guilt

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF DEFENCE COUNSEL – where the appellant was found guilty after trial of causing a detriment to a witness for the purpose of retaliation because the witness provided a statement against the appellant's son – where the appellant alleged on appeal that his legal representatives failed to follow his instructions because his request to adduce evidence from others was ignored and he was directed that he was not going to give evidence – whether it was incompetent for the appellant's legal representatives to have not followed the appellant's instructions – whether the appellant's prospects of acquittal were harmed as a result

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the appellant was found guilty after trial of causing a detriment to a witness for the purpose of retaliation because the witness provided a statement against the appellant's son – where the appellant was sentenced to 12 months imprisonment, suspended after two months for an operational period of 12 months for his offending – where the appellant is a New Zealand citizen and his visa was cancelled as a result of his sentence – where the appellant remained in immigration detention for six months upon his release from custody while he waited for his application for revocation of the cancellation to be determined – where no reference was made during the sentence hearing to relevant provisions of the *Migration Act* 1958 (Cth) and how their operation may have affected the appellant – whether the appellant was prejudiced by his counsel's neglect to address factors relevant to sentence – whether upon a resentence of the appellant, some lesser sentence would be imposed

Migration Act 1958 (Cth), s 501(3A)

Kentwell v The Queen (2014) 252 CLR 601; [2014] HCA 37, applied
R v GBD [2018] QCA 340, cited
R v Hodges [2019] 1 Qd R 172; [2018] QCA 92, cited
R v Norris; Ex parte Attorney-General (Qld) [2018] 3 Qd R 420; [2018] QCA 27, cited
R v S [2003] 1 Qd R 76; [2001] QCA 531, cited

COUNSEL: The appellant/applicant appeared on his own behalf
S J Bain for the respondent

SOLICITORS: The appellant/applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the orders proposed by his Honour.

[2] **GOTTERSON JA:** The appellant, Milan Joseph John Dixon, was charged with an offence against s 119B(1)(b) of the *Criminal Code* (Qld). The count on which he was indicted alleged that, without reasonable cause, on an unknown date between 22 August and 25 December 2014 at Beachmere he caused a detriment to Damian Joseph Campbell, a witness, for the purpose of retaliation and/or intimidation because Mr Campbell, as a witness in the prosecution of Milan John Dixon (the appellant's son), had lawfully provided a statement and/or was going to give evidence in a judicial proceeding.

[3] The matter was tried in the District Court at Brisbane on 22 August 2017. The prosecution case concluded in the morning. The appellant did not give or call evidence. After addresses and the summing up, the jury retired at 3.47 pm that day. At 5.22 pm they returned and delivered a verdict of guilty.

[4] The appellant was sentenced on the following day. It was ordered that he be imprisoned for 12 months suspended after two months for an operational period of 12 months.

[5] On 20 September 2017, the appellant filed a Form 26 by which he appealed against the conviction and applied for leave to appeal against the sentence.[1]

[6] Although the appellant was legally represented by counsel and his instructing solicitor at the trial and the sentence hearing, he is now self-represented. He is a citizen of New Zealand. By virtue of the sentence that was imposed, his visa was cancelled.[2] He applied for revocation of the cancellation.[3] Upon his release from custody, he was taken into immigration detention while his application was determined. He remained in immigration detention for six months. The revocation application was ultimately refused. The appellant was then deported to New Zealand where he currently resides. He appeared before this Court by telephone link for the hearing of his appeal and leave application.

Circumstances of the offending alleged in the Crown case

[7] The appellant's son was charged with criminal offences on 28 July 2014. The offences alleged against him included assault occasioning bodily harm, rape, unlawful wounding and threatening violence, all occurring within the context of a turbulent domestic relationship of about 12 months duration. He was taken into custody.

[8] The complainant, Damian Campbell, had known the appellant's son and his partner for about a year. They were introduced to him through a mutual friend. They moved into the complainant's house in about April 2014.

[9] The son was abusive towards his partner. She moved out on 30 June 2014. The son had an altercation with her father when he called to pick up her belongings. Later, the son reprimanded the complainant for having given the father access to the premises. The son then packed some bags into his vehicle and drove off.

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1 AB 146-148.

2 *Migration Act* 1958 (Cth) ("MA") s 501(3A).

3 Pursuant to MA s 501CA.

[10] On the day after the son was charged, a forensic examination was undertaken at the complainant's house. On the same day, the complainant provided a seven-page sworn statement to police which was taken by Senior Constable JL Sowden.[4] The statement included detail of physical and verbal exchanges between the appellant's son and his partner.

[11] Proceedings against the appellant's son were commenced in the Magistrates Court at Caboolture on 29 July 2014 and listed for mention on 2 September 2014. He was committed for trial on 7 November 2014. The trial began in the District Court at Brisbane on 15 June 2015 and concluded on 22 June 2015.

[12] At the appellant's trial, S.C. Sowden testified that on 16 June 2015, the complainant engaged him in conversation outside the courtroom in which the trial of the appellant's son was taking place. The complainant made accusations about threatening conduct on the part of the appellant that had occurred some months beforehand. As a result of what the complainant told him, S.C. Sowden took the complainant across to police headquarters and obtained a statement from him. He then informed the prosecutor of what he had been told by the complainant.[5]

[13] In cross examination, S.C. Sowden acknowledged that he had had some contact with the complainant during the period from 29 July 2014 to 15 June 2015. He further acknowledged that the complainant had not made a complaint to him about the appellant on those occasions of contact.[6]

[14] The complainant testified that he had given a statement to police concerning the appellant's son and his partner on 29 July 2014. He said that, later, on a day close to Christmas 2014, he was sitting in his front yard with a friend, John. They were talking. The appellant pulled into the complainant's driveway and sat in his car for five to 10 minutes until John left. The appellant then hopped out of the car and approached the complainant.

[15] In his evidence in chief, the complainant gave the following account of a conversation that then took place between them:

> "I said, "Hello. How are you going?" And he said, "Not good. I've spoken to Milan. He's received your statement, and he's not happy."… Milan wasn't happy with my statement, and that he was going to implement in manufacturing drugs with another person in town, who has been previously caught doing that. And I just laughed at him, and said, "That's bullshit," because I never did it. He said that Milan's going to kill me, get my kids taken off me, and – I think the word was "sink" me. And I asked him if he was threatening me, and he said, no, he wasn't; he was just passing on from Milan, what Milan said. And I said to him – well, I wasn't happy about myself being given threats. I said – and I wasn't the only one who made statements, anyway. And he said, "Yes, I know; I'm going to visit Corey and Michelle after this. Ryan's statement wasn't bad, but Michelle – I'm going to make her withdraw hers.""[7]

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4 Exhibit 2: AB 112-119.
5 AB 29 Tr 1-22 ll1-19.
6 AB 24 Tr 1-17 ll26 – AB 25 Tr 1-8 l4.
7 AB 31 Tr 1-24 l44 – AB 32 Tr 1-25 l15.

The appellant was at the complainant's house for 10 to 20 minutes. What the appellant said scared him.[8]

[16] The complainant also said that he was acquainted with the appellant through his son, Milan, and that the appellant had called at his house after police had detained his son, in order to collect the latter's belongings. It was before the complainant had given his seven page statement to S.C. Sowden. On that occasion, the appellant was at the house for the whole of the day.[9]

[17] In cross examination, the complainant rejected suggestions that the appellant had not passed on threats to him or intimidated him.[10] He also rejected suggestions that the appellant had not said to him that the son would implicate him in drug production; that he had not made threats about the complainant's children; and that he had not said that he was going to visit Michelle or anyone else to get them to withdraw their statement.[11]

[18] The complainant did not accept a proposition that the appellant had been to his house on two or more occasions.[12] He disagreed that on the occasion when the appellant called to remove his son's belongings, he and the appellant discussed drugs and the appellant asked him if he was a drug user.[13]

[19] The complainant also disagreed that the appellant had then asked him about a man named Clint.[14] However, he accepted that he knew such a man but rejected suggestions that Clint was a drug dealer either then or when the appellant had called at his house. He said that Clint had ceased to be a drug dealer about six months before the appellant called.[15] As well, the complainant rejected a suggestion that the appellant told him that it would be in the best interests of his children for the complainant "not to hang around" Clint.[16]

[20] The complainant agreed that he had been a drug user for a short time in 2016. In October that year, he had been convicted of possessing methylamphetamine and of failing to take reasonable care and precaution in relation to a syringe. He also agreed that he had been convicted of a dishonesty offence in 2008.[17]

[21] The cross examination of the complainant addressed the accuracy of his account of what the appellant said to him and the reliability of his memory of it. He said that his account was as word perfect as it could be to his knowledge.[18] It was put to him that in April 2017 (at the appellant's first trial in which the jury were unable to agree on a verdict), he had been examined under oath about his recollection of the conversation with the appellant and that he had answered that he could not say that his recollection then was word perfect. He accepted that that was the answer he had given on that occasion.[19] He went on to add that he could not now say that his

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8 AB 32 Tr 1-25 ll16-36.
9 Ibid ll38-45.
10 AB 33 Tr 1-26 ll27-36.
11 Ibid l41 – AB 34 Tr 1-27 l9.
12 AB 34 Tr 1-27 ll11-18.
13 AB 35 Tr 1-28 ll1-6.
14 Ibid l8.
15 Ibid l10 – AB 36 Tr 1-29 l3.
16 AB 36 Tr 1-29 ll5-8.
17 Ibid ll10-40.
18 AB 37 Tr 1-30 ll24-37.
19 AB 38 Tr 1-31 l29 – AB 39 Tr 1-32 l33.

recollection was "100 per cent accurate".[20] He agreed that there was a possibility that he could be mistaken because "everyone makes mistakes".[21]

[22] The complainant agreed that he had not had further contact with the appellant after the threatening conversation.[22] He next saw him in the courtroom at his son's trial. The complainant said that he had been subpoenaed to attend the trial and that he was nervous about giving evidence at it.[23]

[23] It was put to the complainant, and he agreed, that he had had opportunities to tell S.C. Sowden when the latter served him with the subpoena and the prosecutor at a pre-trial conference about any threat made to him by the appellant. He accepted that he did not inform police or the prosecutor about the threats until he came to court and saw the appellant.[24]

[24] The complainant agreed that during the conversation in his yard, the appellant had not raised his voice or shaken his fist. He disagreed with a suggestion that the appellant had driven off normally, saying that he drove off "pretty angrily".[25]

[25] The complainant was also asked about a conversation that he had had with the appellant when the latter called to pick up his son's belongings. It was put to him that the appellant gave him "some advice" about any statement that he might give to police. He agreed that the appellant then told him to tell the truth but added that he had also told him to "do what's best for (his) children".[26]

[26] In re-examination, the complainant said that he did not complain about the appellant's threats earlier because he did not want to cause trouble for him. However, when he saw the appellant in the courtroom, it scared him.[27]

[27] The Crown adduced in evidence a disc on which had been recorded a six-minute telephone conversation that took place between the appellant and his son, Milan, in the early afternoon on 23 August 2014.[28] The son was then in custody at the Arthur Gorrie Correctional Centre. The conversation was recorded on the ARUNTA system. Both participants were aware that their conversation was being monitored.

[28] During the telephone call, the appellant and his son discussed the "forensics" around the complainant's house and the police "trying to get (the complainant) to say something". The son told the appellant to "tell (the complainant) to fucking say nothing you fucking idiot". The appellant replied that that is what the complainant had done; he had told police that he "heard nothing, saw nothing". The son then told the appellant to "talk to (the complainant) about it" and "tell him exactly what to say". He also told the appellant to say the same thing to "Ryan and Michelle" and to "tell 'em to say zip".

[29] The appellant went on to tell his son that he believed that the police had already used scare tactics on Ryan, Michelle and the complainant. The police had told the

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20 AB 39 Tr 1-32 ll35-40.
21 Ibid ll42-45.
22 AB 40 Tr 1-33 ll1-10.
23 Ibid ll12-23.
24 Ibid l22 – AB 41 Tr 1-34 l34.
25 AB 42 Tr 1-35 ll4-16.
26 Ibid l18 – AB 43 Tr 1-36 l2.
27 AB 43 Tr 1-36 ll14-20.
28 Exhibit 1. A transcript of the recording, which was provided to the jury, is exhibit MFI "C": AB 136-142.

complainant that he could not lie or else they would hold him accountable in court. The son told the appellant to make sure he spoke to them. The son added that he was going to court the following week. He implored the appellant not to text them. The appellant responded "No, I've got to go up and see 'em". The son then told the appellant to "get up there before 2 September".

[30] It was admitted that the appellant visited his son at the Arthur Gorrie Correctional Centre on six occasions in late 2014. The first was on 18 October and the last on 22 December.[29]

The grounds of appeal against conviction

[31] There are two grounds of appeal against conviction stated in the Form 26. They are:

1. The verdict is unreasonable or cannot be supported having regard to the evidence.

2. My legal representatives failed to follow instructions.

[32] It is convenient to consider the respective grounds in that order.

Ground 1

[33] **Appellant's submissions:** In brief written submissions, the appellant contended that he had been falsely accused. The complainant, he said, was neither trustworthy or reliable. He had a criminal record. The appellant maintained that he and others had heard the complainant say that it was the police who had coerced him into providing false testimony under threat of harm to his children.

[34] The appellant argued that the recorded telephone conversation did not provide "undisputed proof" that his son directed him to threaten the complainant. He said that his son pleaded with him to speak with the complainant but never directed him to pass on the alleged threats.

[35] The appellant also sought to support this ground by applying for leave to adduce evidence by way of affidavit sworn by his friend and former carer, Ms MT Snowden, and by another of his sons, Nelson Dixon. A grant of leave was opposed. I would refuse leave for the reasons which are given in the discussion of this ground.

[36] **Respondent's submissions:** The respondent submitted that on the evidence before them, it was open to the jury to have been satisfied beyond reasonable doubt of the appellant's guilt. The complainant's account of what the appellant had said to him was not contradicted by any witness. The ARUNTA telephone call evidenced a request by the son that the appellant go and visit the complainant to discuss what the latter would tell police, and agreement by the appellant to do so. That evidence supported the complainant's account that the appellant visited him and discussed with him what he would tell police about the son's conduct.

[37] Further, the respondent noted that the delay until June 2015 in reporting the threats to police had been put to the complainant and he had given an explanation for it which the jury had heard.

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29 Exhibit MFI "B" paragraph 10: AB 135.

[38] **Discussion:** I refer first to the evidence which the appellant sought leave to adduce. In her affidavit sworn on 15 May 2019, Ms Snowden spoke of three occasions on which she accompanied the appellant to the complainant's residence. No dates for the visits were given. She described the first visit as the one on which the complainant alleged that the appellant had passed on threats to him. She said that she was present for the entire conversation between the appellant and the complainant and no threat was made. According to Ms Snowden, this visit took place before a subsequent visit in which they took a trailer to collect the son's belongings.

[39] In his affidavit sworn on 17 May 2019, Nelson Dixon spoke of a visit with his father to the complainant's residence to pick up his brother's belongings. Again, no date for the visit was given. Mr Dixon said that at the time police were present undertaking a search of the residence.

[40] In each instance, the content of the affidavit was of the nature of new evidence. It concerned events which were said to have occurred prior to the appellant's trial and were within the knowledge of the deponent at the time when the appellant was tried.

[41] It is well settled that the test for admission of new evidence is that, combined with the evidence at trial, it shows the accused to be innocent or raises a reasonable doubt as to his guilt.[30] The evidence in the two affidavits does not meet this test. That is because the complainant's incriminating testimony concerned an occasion when the appellant visited his residence and spoke to him alone in his front yard. No one else was present. Significantly, the two affidavits do not contain evidence which precludes, or renders unlikely, the opportunity for the appellant to have called at the complainant's residence and spoken to him alone and in their absence. Evidence by either of them of the content of conversations between the appellant and the complainant in their presence does not, of course, achieve that. Accordingly, leave to adduce the evidence in their affidavits ought be refused.

[42] I would add that Ms Snowden's affidavit contained both hearsay and opinion evidence to which objection was foreshadowed. It is unnecessary to determine the admissibility of that evidence. As well, there were inconsistencies between her evidence and the sequence of events put to the complainant in cross examination.

[43] I now turn to the ground itself. I have undertaken a review of the evidence adduced at trial, significant aspects of which I have already set out in these reasons. I have concluded that upon the whole of the evidence, it was open to the jury to have been satisfied beyond reasonable doubt of the appellant's guilt.

[44] In particular, there was no issue at trial that the complainant was a witness in a judicial proceeding against the appellant's son and that the alleged threatening conduct was without reasonable excuse. It was open to the jury to accept the complainant's challenged, but uncontradicted, evidence despite his prior convictions and the absence of corroboration. His evidence was sufficient to establish that the appellant caused a detriment to the complainant and that the appellant's purpose was to retaliate against him for providing the witness statement against the son and to influence the evidence that the complainant might give in the son's trial. The ARUNTA telephone call was strong evidence that the appellant had been persuaded by

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30 *R v Hodges* [2018] QCA 92; [2019] 1 Qd R 172 per Philippides JA at [28] (Gotterson JA and Daubney J agreeing).

his son to visit the complainant for the purpose of influencing the latter's testimony. The jury may have inferred that the appellant and his son had discussions to the same effect when the appellant visited his son at the correctional centre. As well, it was open to the jury to accept the complainant's stated rationale for not reporting the threats made to him earlier.

[45] For these reasons, this ground of appeal has not been established.

Ground 2

[46] **Appellant's submissions:** In written submissions, the appellant referred to what he perceived to be criticisms of the defence case advanced by his solicitor, Mr Stuart Bale, and his then counsel at his first trial in April 2017. As to the trial in which he was convicted, his complaints are that he had wanted to adduce evidence from witnesses that would have shown that the complainant's statements were not accurate and that he wished to testify himself. He had told Mr Bale and his trial counsel this. His request to adduce evidence from others was ignored. He was directed that he was not to give evidence. That, he was advised, would allow defence counsel to address last.

[47] By a notice filed on 23 July 2019, the appellant applied for leave to adduce evidence by way of an affidavit sworn by him on 23 July 2019 detailing the above. He also applied for an order that Mr Bale attend court "to answer questions in reply to (the appellant's) affidavit". Both applications were opposed. The fate of the leave application was reserved; however, the application for the order was refused at the hearing. In my view, the leave application ought also be refused. The reasons for both refusals are set out in the discussion which follows.

[48] **Respondent's submissions:** The respondent submitted that the appellant misapprehended the impact that evidence from other witnesses might have had. Had Ms Snowden or Mr Nelson Dixon given admissible evidence in terms of their respective affidavits, it would have not materially impaired the Crown case. In respect of the appellant not giving evidence, the respondent submitted that the appellant had not demonstrated that his legal representatives had acted incompetently. There were sound reasons for advising him not to testify.

[49] **Discussion:** In order to ground a viable appeal, it is insufficient for the appellant to allege merely that his legal representatives did not follow his instructions at trial. He must demonstrate that it was incompetent for them not to have done so and that his prospects of acquittal were harmed as a result. Any perceived criticism of the conduct of the defence at the appellant's first trial is, of course, irrelevant to that.

[50] For the reasons given, it would not have assisted the appellant's defence for either Ms Snowden or Mr Nelson Dixon to have testified. So far as his giving evidence is concerned, the appellant does not complain, for example, that his legal representatives did not discuss with him that it was open to him to give evidence in his defence. In his affidavit, the appellant said that three days before the trial, Mr Bale told him "he wasn't going to put me in the chair", and no more. That, in itself, is insufficient to ground an argument for incompetence on Mr Bale's part. Moreover, it is readily understandable why the appellant would have been advised not to testify. The ARUNTA call was powerful evidence against the appellant that he would have had difficulty explaining or, worse still, would have been compounded in cross examination.

[51] In summary, the appellant's affidavit did not provide an evidential basis for a viable ground of appeal based on incompetence of his legal representative. Leave to file it was therefore refused as was an order that Mr Bale attend court to be examined by the appellant.

[52] For these reasons, this ground of appeal has also not been established.

Disposition – conviction appeal

[53] Since neither ground of appeal has succeeded, the appeal against conviction must be dismissed.

The sentence application

[54] The proposed ground of appeal against sentence is that in all the circumstances, it is manifestly excessive. The appellant did not advance any specific legal argument in support of this ground in his written submissions. He did, however, refer to his visa cancellation, time in immigration detention and deportation. It was apparent from what the appellant said at the hearing that he was concerned that at his sentence hearing, no reference had been made to the visa cancellation and its consequences for him that the sentence that was to be imposed would have.

[55] Significantly, the appellant did not contend that a sentence of 12 months imprisonment was not supported by sentencing decisions for comparable offending. It is therefore unnecessary to review the sentencing decisions to which the respondent has referred as supporting it. I would add that the sentence of 12 months imprisonment triggered the operation of s 501(3A) of the *Migration Act* 1958 (Cth) ("MA") in mandating ministerial cancellation of the appellant's visa. It would have been improper to impose a lesser sentence in order to circumvent the operation of that provision.[31]

[56] The appellant's sense of grievance appears to relate to the period that he was required to spend in actual custody.

[57] A perusal of the transcripts for the sentence hearing and the sentencing remarks discloses that no reference was made to relevant provisions of the MA and how their operation may have affected the appellant. In *R v Norris; Ex parte Attorney-General (Qld)*[32] and *R v GBD*,[33] this Court has held that deportation may be a relevant matter in mitigation of a sentence when it makes the period of incarceration more onerous and also where, upon release, the fact of imprisonment would deprive the offender of the opportunity of permanently residing in Australia, so long as the prospect of deportation or its impacts are not merely speculative. Further, absent evidence of prejudice to the offender in those ways, account should be taken of the impact of likely deportation on the efficacy of court ordered parole and the impact on the offender's rehabilitation that immigration detention following release from custody on a fixed date, might have.

[58] Had the appellant's counsel addressed on those factors, his Honour would no doubt have considered them. There is no apparent reason why they were not addressed.

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31 *R v S* [2001] QCA 531; [2003] 1 Qd R 76 per McPherson JA at [5] (Thomas JA and Mullins J agreeing).

32 [2018] QCA 27; [2018] 3 Qd R 420.

33 [2018] QCA 340.

Thus the appellant does have a legitimate grievance that, as a result of neglect on the part of his counsel, factors relevant to sentence were not considered.

[59] The question that next arises is whether the appellant has been prejudiced by the neglect. It is to be answered by a consideration of whether upon a resentence of the appellant in which those factors are taken into account, some lesser sentence would be imposed. I have come to the conclusion that it would not for the following reasons.

[60] The appellant's suspended sentence required him to spend only two months of a 12 month sentence in custody. That is well short of the six months that he would have to have served for parole eligibility conformably with the approach commonly adopted of requiring half the sentence to be served where an offender has been convicted after a trial.

[61] Were a starting point adopted which required six months to be served in actual custody, then it would be mitigated to allow for the MA considerations. Any allowance in the appellant's case ought not exceed four months in my view.

[62] It need be borne in mind that the appellant's offending was serious. It harmed both the complainant and the public interest in the orderly administration of criminal justice. It was deserving of a sentence that required at least two months to be served in actual custody.

Disposition – sentence application

[63] In the absence of demonstrated prejudice and consistently with the decision of the High Court in *Kentwell v The Queen*,[34] an appeal against sentence would be dismissed. His application for leave to appeal the sentence ought therefore be refused.

Orders

[64] I would propose the following orders:

1. Leave to adduce further evidence refused.

2. Appeal against conviction dismissed.

3. Application for leave to appeal against sentence refused.

[65] **MORRISON JA:** I have read the reasons of Gotterson JA and agree with those reasons and the orders his Honour proposes.

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34 [2014] HCA 37; (2014) 252 CLR 601 per French CJ, Hayne, Bell and Keane JJ at [43].