SUPREME COURT OF QUEENSLAND

CITATION:	*R v Smyth* [2019] QCA 239
PARTIES:	**R** **v** **SMYTH, Cheyenne Elizabeth Karen** (applicant)
FILE NO/S:	CA No 177 of 2019 DC No 141 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 27 June 2019 (Ryrie DCJ)
DELIVERED ON:	5 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	8 October 2019
JUDGE:	Philippides and McMurdo JJA and Boddice J
ORDERS:	**1. Leave to appeal be granted.** **2. Leave to adduce further evidence be granted.** **3. The appeal against sentence be allowed.** **4. The sentences below be set aside.** **5. The applicant be resentenced:** **(a) On count 1, to 12 months imprisonment.** **(b) On count 2, to 2 years 6 months imprisonment.** **(c) On count 3, to 6 months imprisonment.** **The sentences of imprisonment are to be served concurrently. Convictions are recorded in respect of each count.** **6. The five days served in custody between 27 June 2019 and 2 July 2019 are declared as time served in respect of those sentences of imprisonment.** **7. The applicant's parole release date is set at the date of these orders.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS OF INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of attempted entering premises

with intent to commit an indictable offence, one count of armed robbery, in company, and one count of unlawfully using a motor vehicle to facilitate the commission of an indictable offence – where the applicant was sentenced to two years imprisonment on the count of armed robbery in company and lesser, but concurrent, terms of imprisonment for the remaining counts – where the applicant's parole release date was set at the three months mark – whether the sentencing judge erred by proceeding on the basis that any application to Queensland Corrective Services by the applicant to have her infant child accommodated with her in custody would be processed quickly, would be approved and the infant child would be accommodated with the applicant whilst in custody – whether the imposition of a sentence requiring actual imprisonment rendered the sentence manifestly excessive, having regard to the applicant's circumstances

R v Cutrona [2013] QCA 373, considered
R v Dullroy and Yates; Ex parte Attorney-General (Qld) [2005] QCA 219, considered
R v Mitchell [2005] QCA 178, considered
R v Sherman [2007] QCA 322, considered

COUNSEL: J B Horne for the applicant
S J Hedge for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **PHILIPPIDES JA:** For the reasons given by Boddice J, I agree with the orders proposed by his Honour.

[2] **McMURDO JA:** I agree with Boddice J.

[3] **BODDICE J:** On 30 April 2019, the applicant pleaded guilty to one count of attempted entering premises with intent to commit an indictable offence, one count of armed robbery, in company, and one count of unlawfully using a motor vehicle to facilitate the commission of an indictable offence. All offences had been committed on 5 February 2018.

[4] On 27 June 2019, the applicant was sentenced to two years imprisonment on the count of armed robbery in company and lesser, but concurrent, terms of imprisonment for the remaining counts. The applicant's parole release date was set at 27 September 2019.

[5] The applicant seeks leave to appeal her sentence. Should leave be given, she relies on two grounds.

[6] First, that the sentencing judge erred by proceeding on the basis that any application by the applicant to have her infant child accommodated with her in custody would

be processed quickly, would be approved and the infant child would be accommodated with the applicant whilst in custody.

[7] Second, that the imposition of a sentence requiring actual imprisonment rendered the sentence manifestly excessive, having regard to the applicant's circumstances.

Offences

[8] The offences involved two separate occasions of offending. On each occasion, the applicant was in the company of two males.

[9] The offence of attempted entering premises with intent to commit an indictable offence arose out of the first occasion. At 5.00 am on 5 February 2018, the applicant and the two males approached a convenience store at Greenslopes. All were wearing hooded jumpers pulled up over their heads to conceal their faces. The two male offenders were also wearing balaclavas. One of the male offenders was armed with a baseball bat. The convenience store was locked and the store employee did not open the door. The applicant and the two males left the scene in a motor vehicle which had been stolen the previous day. That motor vehicle was the subject of the count of unlawfully using a motor vehicle to facilitate the commission of an indictable offence.

[10] The offence of armed robbery, in company, was committed some twenty minutes later. The applicant and the two males drove to a convenience store at Tarragindi. All three entered the store. Their faces were covered and the two males were armed, one with a knife, the other with a baseball bat. The applicant was not armed at all. The applicant was aware one male had a baseball bat at the time of entering the convenience store. It was accepted on sentence that the applicant did not know that the other male had a knife.

[11] When inside the store, the male with the baseball bat ordered the employee to sit on the ground before directing him to open the cash register. The male with the knife then knocked the employee to the ground before jumping the counter. The applicant took the money from the cash register. All three left in the same motor vehicle.

[12] The applicant's fingerprint was found at one of the scenes and there was CCTV footage. The applicant subsequently took part in a recorded interview with police. In that interview, the applicant told police she had been using drugs at the time. The applicant admitted entering the Tarragindi store and taking the money. The interview only dealt with that offence. The applicant declined a subsequent interview in relation to the Greenslopes store.

Sentencing remarks

[13] The sentencing judge noted there were aggravating features in the applicant's conduct. The applicant knew what was going to happen as she had been involved in the earlier attempt to enter the convenience store at Greenslopes and, using the same modus operandi, had then entered the Tarragindi convenience store with a covered face. Whilst the applicant was not armed, the applicant was aware that one of the males was armed with a baseball bat. Whilst there was not sophistication in the armed robbery in company, there was a degree of arrangement in respect of

offending which would have been frightening and alarming. Convenience stores are also "soft targets".[1]

[14] The sentencing judge noted there were mitigating factors. The applicant was still a young person, being aged 26 at the time of the offences and 27 at the date of sentence, with no relevant criminal history. The applicant was also the mother of three children, having only recently given birth to her third child. Difficulties associated with that premature birth had meant the child remained in hospital having only recently been discharged home to the applicant's care. The sentencing judge noted the importance of bonding and attachment for the normal wellbeing of a newborn.

[15] The sentencing judge accepted the applicant had pleaded guilty and was not herself armed, but observed this was a serious example of the offence of armed robbery in company, particularly as the applicant actually went inside the convenience store and did so whilst under the influence of drugs. The sentencing judge noted there was no evidence, other than the applicant's assertion, that she was now abstaining from illicit drugs.

[16] After observing that hardship and distress to be experienced by the family of an offender cannot be allowed to overwhelm factors such as retribution or deterrence, the sentencing judge accepted that the unusual hardship that might well be caused to a child on the incarceration of a child's parent was relevant, but concluded that the serious nature of the offending, which did not just involve one isolated incident, necessitated the applicant serve a period of actual imprisonment.

[17] In doing so, the sentencing judge observed that babies were entitled to go with their mothers for periods of time in custody and that that application could be made forthwith, particularly where there was a baby of tender age, such as the applicant's little baby.

Applicant's submissions

[18] The applicant submits that leave to appeal ought to be granted because the sentencing judge imposed the sentence of actual imprisonment on an incorrect assumption that the applicant's application to have her baby accommodated with the applicant in custody would be successful, when there was no evidence before the court about the likely success of that application and no evidence of any considerations which might impact upon that success. The absence of that evidence meant the sentence proceeded on a speculative basis and constituted an error in the exercise of the sentencing discretion.

[19] The applicant accepts that hardship to an offender or an offender's family cannot shield an offender from actual imprisonment in an appropriate case, but submits that where the offender is a mother of a very young child and imprisonment will result in that young child being deprived of parental care, the degree of hardship caused by imprisonment is an exceptional factor, particularly in the case of the applicant's baby, who had been required to remain in hospital for the first three weeks after birth.

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1 Sentencing remarks, Ryrie DCJ (27 June 2019) at 3/33.

[20] The applicant further submits that whilst a period of actual imprisonment may have ordinarily been appropriate in a case of serious armed robbery in company, non-custodial sentences are within the permissible exercise of a discretion, particularly in respect of offenders such as the applicant, who was young and with no relevant criminal history.

[21] In support of these submissions, the applicant seeks leave to adduce fresh evidence. That evidence relates to steps taken by the applicant to have her baby cared by her whilst in custody, the lack of a suitable carer in the absence of such a successful application and that the applicant was granted bail pending appeal on 2 July 2019.

Respondent's submissions

[22] The respondent submits that the sentencing remarks reveal neither specific error nor manifest excess. The sentencing judge did not sentence on the basis that an application to have the baby whilst in custody would be successful. The sentencing judge simply observed that an application could be made forthwith. Further, the sentencing judge carefully weighed the principles regarding hardship likely to be caused as a result of incarceration and applied those principles in the exercise of the sentencing discretion. There was no error in the application of those principles.

[23] The respondent further submits that, in circumstances where there is no challenge to the overall head sentence, a sentence requiring the applicant to serve three months actual custody is not manifestly excessive. The applicant's offending involved serious offences, including an armed robbery committed in company, whilst the applicant was using methylamphetamine. There was no evidence, other than self-reporting, that the applicant was now drug free. Against that background, a sentencing requiring the applicant to serve but one eighth of the head sentence in actual custody afforded substantial leniency evidencing an appropriate recognition of the applicant's relative youth, lack of criminal history and family circumstances.

Consideration

[24] The applicant's contention that the sentencing discretion was infected by specific error is relied upon in support of both grounds. The applicant concedes that absent the establishment of that specific error, it will be difficult for the applicant to succeed in establishing that the sentence was manifestly excessive.

[25] That concession is rightly made in the circumstances of the present case. The applicant engaged in offending involving two separate convenience stores, knowing that on each occasion at least one of the male offenders was armed with a baseball bat. In the case of the armed robbery in company, the applicant entered the premises and actively participated by removing the money from the cash register. Whilst the applicant was not armed and was the mother of a very young child, absent identification of a specific error in the sentencing principles, an exercise of the sentencing discretion requiring that the applicant serve a period of actual imprisonment, evidenced neither a misapplication of principle nor resulted in a sentence which was plainly unjust.

[26] An effective head sentence of two years imprisonment, with a parole release date after serving three months in actual custody, for such offending was lenient, particularly when regard is had to the aggravating feature of the applicant's active participation in the armed robbery in company, and the lack of independent evidence of

rehabilitation from the use of illicit substances. A conclusion that such a sentence was lenient is supported by a consideration of the comparable authorities referred to at sentence.[2]

[27] There is, however, substance in the applicant's contention that the sentencing discretion was infected by specific error, namely, that it was exercised on the assumption the applicant would be reunited with her baby whilst in custody.

[28] In the sentencing remarks, the sentencing Judge said, in relation to a submission by defence counsel that the sentence imposed not include a requirement that the applicant serve actual imprisonment:

> "There is provision, as I am aware, and I am conscious that where babies are entitled to go with their mothers for periods of time in custody with their mothers and those applications can be made forthwith, particularly where there has been an incarceration where a baby may well be of tender age, such as your little baby."[3]

[29] The use of the word "entitled" is consistent with the sentencing Judge having proceeded on the assumption that an application by the applicant for her baby to be with her whilst incarcerated would be successful.

[30] The respondent's contention that the words "those applications can be made forthwith" support a conclusion that the word "entitled" is not to be given its ordinary meaning is not consistent with the sentencing Judge's own words. It is also not consistent with a consideration of the circumstances in which the issue of the applicant having her baby with her whilst incarcerated arose in the course of the sentencing hearing.

[31] At the sentencing hearing, defence counsel submitted that a consequence of a sentence requiring actual custody would be that the applicant would be separated from her newborn child for a period of time, significantly impacting upon the attachment that child might have to its mother. At that point, there occurred the following exchange:

> "HER HONOUR: How old is the baby, though?
>
> MR MORGANS: Well, I understand, about three weeks.
>
> HER HONOUR: Three weeks, okay. Well, there is provision, within the Queensland prison system, to take mothers with babies, as you know, as early as and as young as three weeks.
>
> MR MORGANS: Yes.
>
> HER HONOUR: Up to age five, as I understand, unless it's changed.
>
> MR MORGANS: Your Honour, I have the same understanding, but there would, of course, be ---

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2 *R v Mitchell* [2005] QCA 178; *R v Dullroy and Yates; Ex parte Attorney-General (Qld)* [2005] QCA 219; *R v Sherman* [2007] QCA 322; *R v Cutrona* [2013] QCA 373.

3 AB29/20.

HER HONOUR: You know ---

MR MORGANS: --- a period of time in which she would be separated while she makes that application for that child to be allowed into the correctional facility.

HER HONOUR: Yes, and they would be able to do that fairly quickly, I think, in terms of a young child ---

MR MORGANS: Yes.

HER HONOUR: --- that age ---"[4]

[32] That exchange is consistent with the sentencing Judge proceeding on the assumption that an application within the Queensland prison system for mothers to take babies into custody would be successful and be dealt with "fairly quickly". Neither assumption had any evidentiary basis.

[33] Each assumption formed the basis upon which the sentencing Judge exercised the sentencing discretion. That basis was crucial to the consideration of hardship to be occasioned to the applicant's newborn child, in the event of actual incarceration. As the sentencing Judge observed, the applicant's circumstances were borderline and hardship to a little baby might "mean the difference between being put into custody and not".[5]

[34] As there was no factual basis for either assumption and each assumption materially affected the sentencing Judge's consideration of the question of hardship on the applicant's newborn child, the exercise of the sentencing discretion miscarried in the present case. Accordingly, it is necessary to re-exercise the sentencing discretion.

[35] In re-exercising the sentencing discretion, relevant factors include not only the serious nature of the applicant's offending and the mitigating factors in her favour, such as her relative youth, her lack of relevant criminal history and the cooperation shown by her pleas of guilty.

[36] Another factor is the further affidavit material. The respondent properly conceded that that evidence was relevant, in the event of a re-exercise of the sentencing discretion. In those circumstances, I would grant the applicant leave to adduce that further evidence.

[37] A consideration of that further affidavit material supports a conclusion that there are continuing difficulties associated with an available primary carer, should the applicant serve actual custody, and there is a continued lack of evidence as to the prospects of success of any application by the applicant to have the care of her baby whilst in custody.

[38] Those circumstances raise the question of the unusual hardship to be caused to the applicant's baby on her incarceration. Whilst a consideration, such as the practical means of breastfeeding a baby was not relevant in the applicant's case, an equally practical consideration in the applicant's case is that as a consequence of her baby

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4 AB17/37 – AB18/14.

5 AB28/45.

being born prematurely, the applicant and her baby had not been together for the first three weeks of the baby's life. During that time, the baby was an inpatient in the neonatal unit of the hospital. That factor was significant, in the context of the letter from the social worker tendered on sentence, as to bonding and attachment being crucial to the emotional wellbeing of the newborn, now that she had been discharged home, and the essential presence of the primary carer to develop that parental relationship.

[39] Balancing all of those factors, and having regard to the purposes of sentencing, including the need for general and personal deterrence, I would resentence the applicant to imprisonment for 12 months on count 1, imprisonment for two years and six months on count 2 and imprisonment for six months on count 3. Those sentences are to be served concurrently.

[40] Whilst the sentence imposed on Count 2 is greater than imposed at first instances, it properly reflects the seriousness of the applicant's offending conduct. Further it is not unfair to impose a higher sentence as the applicant acknowledged the risk of that occurrence and did not seek to withdraw her application in that event.

[41] Allowing for the exceptional circumstance of the hardship to be attended to the applicant's prematurely born child should the applicant be required to serve actual custody, I would fix the applicant's parole release date at the date of these orders.

Orders

[42] I would order:

1. Leave to appeal be granted.
2. Leave to adduce further evidence be granted.
3. The appeal against sentence be allowed.
4. The sentences below be set aside.
5. The applicant be resentenced:
   (a) On count 1, to 12 months imprisonment.
   (b) On count 2, to 2 years 6 months imprisonment.
   (c) On count 3, to 6 months imprisonment.

   The sentences of imprisonment are to be served concurrently. Convictions are recorded in respect of each count.
6. The five days served in custody between 27 June 2019 and 2 July 2019 are declared as time served in respect of those sentences of imprisonment.
7. The applicant's parole release date is set at the date of these orders.