SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mathieson* [2005] QCA 313
PARTIES:	**R** **v** **MATHIESON, Nellda Jae** (applicant/appellant)
FILE NO/S:	CA No 199 of 2005 DC No 326 of 2005 DC No 107 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	26 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	23 August 2005
JUDGES:	McPherson and Jerrard JJA and Fryberg J Separate reasons for judgment of each member of the Court, McPherson and Jerrard JJA concurring as to the orders made, Fryberg J dissenting
ORDERS:	**1. Application for leave to appeal against sentence granted** **2. Appeal against sentence allowed** **3. Sentence imposed below on counts 1 and 2 varied in each case by reducing the head sentence of imprisonment from 12 months to six months and by reducing the period before suspension of the imprisonment from four to two months** **4. Period of suspension reduced from 18 months to 12 months**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – FACTUAL BASIS FOR SENTENCE – assault occasioning bodily harm – offences committed against police officer whilst resisting arrest – whether 12 month sentence suspended after four months for operational period of 18 months manifestly excessive *Criminal Code* 1899 (Qld), s 339(1), s 340(b)

R v Conway [2005] QCA 194; CA No 121 of 2005, 10 June 2005, considered
R v Wotton & Bourne; ex p Attorney-General [1999] QCA 382; CA Nos 215 & 216 of 1999, 9 September 1999, considered

COUNSEL: C Heaton for the applicant
B G Campbell for the respondent

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

[1] **McPHERSON JA:** The applicant for leave to appeal was sentenced to imprisonment for 12 months suspended for 18 months after serving 4 months on each of one count (count 1) of serious assault contrary to s 340(b) of the Code, and a second count (count 2) of doing bodily harm contrary to s 339(1) of the Code. She was also sentenced to concurrent terms of 1 month for obstructing police and 2 months for assaulting police. In addition she was convicted, but not further punished, for consuming liquor in a public place, and under the *Police Powers and Responsibilities Act 2000* for refusing to state her name when required to do so.

[2] Very early in the morning at about 3.50 am the applicant was seen by police constables John Curry and Donna Burley standing in the roadway in the town of Ingham arguing with someone. A car coming along the street needed to swerve to avoid hitting them. The police asked them to move off the roadway, but the applicant, who was drinking from a can of rum UDL and was intoxicated, became aggressive and used abusive language to the police. She refused when asked to state her name, saying that she did not have to tell them anything.

[3] The police officers told her she was under arrest and began to walk her back to their patrol car. When the complainant Const Donna Burley tried to place the applicant in the car, she clamped her fingers round the top of the door and refused to get in. The complainant tried to prise her fingers off, whereupon the applicant grabbed the complainant's hair and forcibly tugged it backwards, pulling an earring out of her ear. With Const Curry's assistance, the applicant was pushed on to the passenger seat still holding on to Const Burley's hair. When they tried to get her legs into the vehicle, she kicked Const Curry in the shoulder and head. The applicant then struck Const Burley several times in the face with her closed fist and, in the process of trying to make her release her grip, tore some of the hair out of Const Burley's scalp. At the watchouse she remained aggressive and unco-operative, although later she pleaded guilty to all offences.

[4] The applicant, aged 25 or 26, is the mother of two boys aged 7 and 3½, of whom she is the sole carer, the father having left some time before. She attended Ingham High School to grade 11 and has worked in two stores in the town as well as being for a time the cook at a cattle station nearby. She was forced to give up working in order to care for her children, and now receives the sole parent's benefit. She has, however, continued to do voluntary work in the school tuckshop. She has only one previous conviction, which was for behaving in a disorderly manner in December 2002 for which she was fined $75.00.

[5] This incident took place on a rare occasion on which the applicant was able to find a baby sitter for her children thus enabling her to go out. She and a woman friend went out together and drank too much. She became involved in an altercation with the person with whom she was seen in the road by the police, who it seems falsely claimed to be a police officer.

[6] Her behaviour on this occasion is said to have been out of character. However it had fairly serious consequences for Const Donna Burley. Afterwards, she suffered from severe headaches for 4-5 days, during which she could not tolerate bright light or noise and was unable to focus her sight or read anything for 5-6 days. If she looked sideways, or up or down, she became dizzy. Her face and nose, where she was hit, was extremely tender, and for some weeks she could not wear sunglasses. A year later she was still complaining of pain on touching her nose. She was unable to return to work for 8 days and had difficulty sleeping. As a result she lost some night shift allowance she would have earned. She says she became disillusioned with the police service because she could not understand why this had been done to her. The doctor who attended her on 29 August 2004 confirmed that he found bruising and tenderness in various parts of the complainant's body where she was struck or injured.

[7] The sentencing judge was referred to *R v Wotton & Bourne; ex p Attorney-General* [1999] QCA 382; CA Nos 215, 216 of 1999, 9 September 1999 where this Court considered a sentence of 9 months imprisonment suspended for 2 years imposed on each of two offenders who pleaded to charges of assault occasioning bodily harm and serious assault at Palm Island. What made those offences threatening was that the police were surrounded by some 30 to 40 people who had been drinking. The accused Bourne incited the other accused Wotton to hit the policeman who was restraining him. When his fellow police officer went to his aid, Bourne struck her from behind rendering her unconscious. She was three to four months pregnant at the time. The policeman himself was knocked to the ground and was also kicked and punched by Wotton and rendered unconscious.

[8] Stressing the acknowledged need to protect police officers from violence committed against them in carrying out their duties, the Court of Appeal allowed the Attorney's appeals. Bourne was sentenced to 12 months imprisonment suspended for two years after serving six months. Wotton was sentenced to 12 months suspended for two years after serving three months. Wotton was in some respects in a position similar to the applicant here. He was a young man, without previous convictions, who had children to care for. He had done much to express his remorse, surrendering himself to police immediately after the incident and apologising personally to the female police officer, as well as offering a statement to assist in the prosecution of Bourne. No apology was offered here, which may help to explain the slightly lower sentence of three months imposed in Wotton's case compared with that now before us. It may be mentioned in passing that the sentencing judge was the same in both that and this appeal.

[9] Mr Heaton of counsel, who appeared for the applicant on appeal, submitted that *R v Wotton & Bourne* was not authority for saying that assaulting a police officer in the execution of his or her duty necessarily entails a prison sentence. Possibly not; but McMurdo P remarked in *R v Conway* [2005] QCA 194; CA No 121 of 2005, 10 June 2005, "police officers acting properly and reasonably in the execution of their duty must know they have the support of the community and the

protection of the courts". That was a case in which a sentence of imprisonment for 12 months was reduced to one suspended after three months. The police officer there was much more severely injured including sustaining a fractured nose as well as suffering post-traumatic stress disorder. The offender had a limited criminal history, but the Court was impressed by his work history and his personal achievements; and, although he did not plead guilty, the trial was deliberately restricted to a "narrow point of legal construction" of the *Police Powers Act and Responsibilities Act 2000*.

[10] By comparison with *R v Wotton* and *R v Conway*, the applicant here seems to me to have been dealt with rather severely. I would not be prepared to go the length of setting aside the prison sentence altogether, as was urged by Mr Heaton on appeal. On the other hand, I consider both the head sentence and the period to be served before the suspension takes effect as excessive, especially having regard to the plea of guilty, to the applicant's otherwise good history and to her personal circumstances.

[11] I would accordingly allow the appeal and vary the sentence on counts 1 and 2 in each case by reducing the head sentence of imprisonment from 12 months to six months and by reducing the period before suspension of the imprisonment from four to two months. The period of suspension should also be reduced from 18 to 12 months. The sentences on the other offences, which are concurrent, may be allowed to remain as they are.

[12] **JERRARD JA**: In this application I have read the reasons for judgment and orders proposed by McPherson JA, and respectfully agree with those.

[13] **FRYBERG J:** In my judgment neither the head sentence imposed below nor the operational period for which part of that sentence was suspended was manifestly excessive. On the other hand when one compares the circumstances of the case with those of *R v Wotton and Bourne; ex parte Attorney-General*[1], the period of four months actual imprisonment does seem severe. My inclination would have been to have suspended the sentence after two or perhaps three months.

[14] Whether that produces the consequence that the sentence imposed by the trial judge was manifestly excessive I need not determine. The sentence is to be varied to the extent and for the reasons expressed by McPherson JA. Even if the period of actual imprisonment makes the sentence manifestly excessive, I would vary it only by halving that period. Consequently I must dissent from the order proposed.

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1 [1999] QCA 382.