SUPREME COURT OF QUEENSLAND

CITATION:	*R v Barry* [2011] QCA 119
PARTIES:	**R** **v** **BARRY, Christine Ellen** (applicant/appellant)
FILE NO/S:	CA No 300 of 2010 DC No 360 of 2010 DC No 382 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	7 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	24 May 2011
JUDGES:	Fraser and Chesterman JJA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence granted;** **2. Appeal against sentence allowed;** **3. Sentence varied by reducing to two years the term of imprisonment imposed for the unlawful wounding offence on the ex officio indictment;** **4. The sentence imposed and orders made at first instance are otherwise confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted on her plea of guilty of unlawful wounding and breaching a suspended sentence – where the sentence of three years imprisonment for the unlawful wounding was ordered to be served cumulatively upon the three remaining years of suspended imprisonment – where the effective head sentence was six years imprisonment with a parole eligibility date after 19 months – where the applicant's life had been dominated by alcohol and violence and the applicant had a concerning criminal history – where the applicant argued that the sentencing judge failed to apply the totality principle – whether the sentence was manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 9(2)(l), s 9(2)(m), s 147

Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, considered
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, applied
R v Clements (1993) 68 A Crim R 167; [1993] QCA 245, cited
R v Friday [2005] QCA 440, cited
R v James [2000] QCA 477, cited
R v MAK (2006) 167 A Crim R 159; [2006] NSWCCA 381, considered
R v Norden [2009] 2 Qd R 455; [2009] QCA 42, applied
R v Tyson [2006] QCA 483, cited

COUNSEL: C Morgan for the applicant/appellant
M Connolly for the respondent

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

[1] **FRASER JA:** The applicant was convicted on her plea of guilty of the offence of unlawful wounding. On 8 November 2010 she was sentenced to three years imprisonment for that offence. Her conviction of the offence constituted a breach of the terms of a sentence of four years imprisonment, suspended after 12 months, which had been imposed on 9 March 2009 for an offence of causing grievous bodily harm. The sentencing judge ordered the applicant to serve the three remaining years of suspended imprisonment cumulatively upon the three years imprisonment imposed for the unlawful wounding offence. His Honour declared 265 days pre-sentence custody as time served under the sentence and fixed a parole eligibility date of 10 September 2011 (after the applicant has served 19 months of the overall sentence of six years imprisonment).

[2] The applicant seeks leave to appeal against the sentence on the ground that it is manifestly excessive.

Circumstances of the offence

[3] In February 2010 the then 39 year old applicant was drinking with the complainant, her 39 year old boyfriend, around the kitchen table at a friend's house. After some hours the applicant was involved in an argument with the complainant, apparently because she was jealous of another woman in the house. The applicant obtained a knife from the kitchen and stabbed the complainant in the neck, forearm, and stomach. She stabbed him again in the shoulder as he fell to the ground. After the applicant first stabbed the complainant he threw a punch which might have connected with the applicant's mouth. The complainant and others took the knife from the applicant and restrained her until police arrived. The police observed that she was intoxicated.

[4] The complainant sustained a puncture wound about 2 cm deep to his abdomen, another puncture wound about 2 cm deep to his neck, and a laceration to his right

shoulder which required sutures. There was no other evidence about the injuries or their effect upon the complainant. The relationship between the applicant and the complainant remained on foot after the offence.

The applicant's personal circumstances

[5] The applicant told a psychologist that she generally lived with her sister but sometimes lived at a park. She had a concerning criminal record.

[6] On 16 July 1992 in the Doomadgee Magistrates Court the applicant was convicted of assault occasioning bodily harm whilst armed with an offensive weapon. She was ordered to perform 50 hours community service and a 12 month protection order was made against her. On 19 October 1998 in the Mt Isa Magistrates Court she was convicted of assaulting a police officer. No conviction was recorded and she was fined. On 24 March 2004 she was convicted of unlawful wounding committed on 23 October 2003 and sentenced to 12 months imprisonment, wholly suspended for an operational period of two years and six months. Between the date when she was sentenced for that offence and May 2008, the applicant's criminal history concerned mainly public nuisance and alcohol related offences.

[7] On 9 March 2009 she was convicted of the grievous bodily harm offence she committed on 9 May 2008, for which she was sentenced to imprisonment for four years suspended after 12 months. The circumstances of that offence were similar to the circumstances of the offence with which the Court is now concerned. In each case the applicant stabbed her partner. The man she stabbed in the 2008 offence had been very violent towards her. According to a history in the psychologist's report, there was a pattern of the applicant forming significant relationships with men who then behaved very violently towards her. The applicant told the psychologist that the complainant in the present matter was also a violent man, who had earlier threatened and assaulted her. There was, however, no suggestion that the applicant committed this offence in response to any such threat or assault. The psychologist reported his opinion that the applicant would profit from a domestic violence education program and an alcohol rehabilitation program.

The sentence

[8] The sentencing judge referred to the applicant's "unenviable record of offending", noted that she had been "both victim and perpetrator in serious violent offences on many occasions" and observed that the offence was a serious offence which, in the applicant's case, came soon after her conviction for a very serious offence of a similar type. The sentencing judge took into account the applicant's early plea of guilty and also noted that she had a most unfortunate life, in which alcohol and violence had "dominated [her] existence" in recent years, and that violence had been a feature of her life for very many years.

[9] In light of the applicant's history and the very short period during which she was at large before re-offending, and the serious nature of that offending, the sentencing judge considered that it was not unjust to order that the applicant serve the whole of the suspended sentence imposed on 9 March 2009. The sentencing judge assigned the same reason for concluding that the sentence of three years imprisonment which his Honour imposed on the unlawful wounding charge should be served cumulatively upon the activated term of the suspended sentence.

The parties' submissions

[10] The applicant argued that the sentencing judge should have moderated the head sentence to reflect the fact that it was imposed cumulatively upon the suspended sentence of three years imprisonment. The applicant conceded that three years imprisonment was within the discretion of the sentencing judge for the offence of unlawful wounding, but submitted that it was at the top of the appropriate range in the circumstances of this offence. The applicant argued that the sentencing judge failed to give sufficient weight to the applicant's plea of guilty to an ex officio indictment, her disadvantaged background and personal circumstances, and other mitigating features.

[11] Counsel drew attention to the submission by the prosecutor at sentence that the appropriate sentence for the unlawful wounding offence was two to three years imprisonment, and that the period should be reduced in the event that the activated suspended sentence was ordered to be served cumulatively. Defence counsel had submitted that if the sentencing judge invoked the whole three year suspended sentence then she would support the Crown submission of a total head sentence of four years. The prosecutor did not make any contrary submission.

[12] The respondent argued that the offence was very serious, involving as it did the use of a knife and multiple blows. The sentence imposed was not manifestly excessive having regard to the applicant's concerning history for offences of serious violence, and the fact that this offence was committed within a short time of being released from the custodial portion of the earlier sentence and within the operational period of the suspended term. The sentencing judge gave appropriate credit for all of the mitigating factors and set the parole eligibility date after approximately one quarter of the custodial sentence of six years had been served. The respondent accepted that the head sentence of three years imprisonment for unlawful wounding was toward the higher end of the range but submitted that this offence was one of the more serious examples of the offence.

[13] The respondent conceded that the head sentence might have been reduced further to reflect the "totality principle" and submitted that the minimum in those circumstances would be a sentence for the unlawful wounding offence in the order of two years imprisonment. The respondent argued, however, that the totality principle was appropriately addressed by the imposition of the early parole eligibility date.

Consideration

[14] In *Mill v The Queen*,[1] the High Court referred to the "totality principle", which requires a sentencer to review an otherwise appropriate aggregate sentence:

> "The totality principle is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences. It is described succinctly in Thomas, *Principles of Sentencing*, 2nd ed. (1979), pp. 56-57, as follows (omitting references):
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> > 'The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed

[1] (1988) 166 CLR 59 at 62-63.

> and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is "just and appropriate". The principle has been stated many times in various forms: "when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong["]; "when … cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences".'
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> See also Ruby, *Sentencing*, 3rd ed. (1987), pp. 38–41. Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred.
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> The totality principle has been recognized in Australia. In *Reg. v. Knight*, the Full Court of the Supreme Court of South Australia (Walters, Zelling and Williams JJ.) said, in a joint judgment:
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> 'it seems to us that when regard is had to the totality of the sentences which the applicant is required to undergo, it cannot be said that in all the circumstances of the case, the imposition of a cumulative sentence was incommensurate with the gravity of the whole of his proven criminal conduct or with his due deserts. To use the language of Lord Parker L.C.J. in *Reg. v. Faulkner*, "at the end of the day, as one always must, one looks at the totality and asks whether it was too much".'" (citations omitted)

[15] That principle remained relevant even though the process of activating the suspended imprisonment under s 147 of the *Penalties and Sentences Act* 1992 (Qld) was separate and different from the process of imposing the sentence for the unlawful wounding offence. In each process it was necessary for the sentencing judge to take into account the fact and effect of the other process,[2] so that in determining the sentence for the wounding offence the sentencing judge was obliged to take into account the activated term of suspended imprisonment.[3]

[16] In *R v MAK*, Spigelman CJ, Whealy and Howie JJ discussed two matters which underlie the totality principle:

> "The severity of a sentence is not simply the product of a linear relationship. That is to say severity may increase at a greater rate than an increase in the length of a sentence. As Malcolm CJ said in *Clinch v The Queen* (1994) 72 A Crim R 301 at 306:

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2 See *R v Norden* [2009] 2 Qd R 455 at 459 [12]–460 [16] per Holmes JA.

3 See also *Penalties and Sentences Act* 1992 (Qld), s 9(2)(l) and (m).

> ... the severity of a sentence increases at a greater rate than any increase in the length of the sentence. Thus, a sentence of five years is more than five times as severe as a sentence of one year. Similarly, while a sentence of seven years may be appropriate for one set of offences and a sentence of eight years [may] be appropriate for another set of offences, each looked at in isolation. Where both sets were committed by the one offender a sentence of 15 years may be out of proportion to the degree of criminality involved because of the compounding effect on the severity of the total sentence of simply aggregating the two sets of sentences.
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> The second matter that is considered under the totality principle is the proposition that an extremely long total sentence may be 'crushing' upon the offender in the sense that it will induce a feeling of hopelessness and destroy any expectation of a useful life after release. This effect both increases the severity of the sentence to be served and also destroys such prospects as there may be of rehabilitation and reform."[4]

[17] The totality principle was potentially applicable here. The reasons why the sentencing judge did not accept the parties' submissions that the term for the wounding offence should be reduced by application of that principle are found in his Honour's reasons for activating the whole of the suspended imprisonment and ordering the sentence on the unlawful wounding offence to be served cumulatively upon the activated term. Notwithstanding the serious disadvantages faced by the applicant and the mitigating factors, the sentencing judge considered that the applicant's criminal history, the fact that she committed this serious offence only shortly after she was released from prison, and the fact that she did so whilst the suspended sentence was hanging over her head, demanded the aggregate term of six years imprisonment with the early parole eligibility date.

[18] The sentencing judge was plainly right to take those matters into account. They did weigh against any reduction of the sentence. I also accept that the sentencing judge might have made some allowance for the totality principle in the early parole eligibility date, although that is speculative. Furthermore, the mere fact that an aggregate term of imprisonment is not reduced to take into account the totality principle does not necessarily demonstrate error in the sentencing process. The totality principle does not require such a reduction in every case. In some cases of multiple offending the offender should not be given the benefit of that merciful approach.[5]

[19] On balance, however, I respectfully conclude that the sentencing judge should have acceded to the parties' submissions and applied the totality principle by reducing the term of imprisonment for the wounding offence. The sentencing judge did not refer to some factors which supported that approach. Whilst the absence of a victim impact statement did not justify an inference that there was no adverse impact upon the complainant, the applicant's relationship with the complainant continued after the offence and there was no suggestion that the complainant's injuries were serious or resulted in permanent adverse effects. That might have been merely fortuitous,

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4 (2006) 167 A Crim R 159 at 164 [16]-164 [17].

5 See *R v MAK* (2006) 167 A Crim R 159 at 164 [17]; *R v Clements* (1993) 68 A Crim R 167 at 175.

but it was nonetheless material. It is also relevant that three years imprisonment for this example of the offence was at or toward the top of the range of appropriate sentences.[6] Bearing in mind also the mitigating factors to which the sentencing judge did advert, the proper conclusion is that the failure to reduce the otherwise justifiable sentence of three years imprisonment resulted in the aggregate period of imprisonment exceeding the "just and appropriate measure of the total criminality involved".[7] That was so notwithstanding the early parole eligibility date fixed by the sentencing judge.

[20] In sentencing the applicant afresh, I would reduce the sentence for the wounding offence to two years imprisonment. However, I would not make any adjustment to that parole eligibility date. Under the sentence I propose the applicant will become eligible for parole after she has served 19 months in custody, which is one month less than one third of the aggregate five years imprisonment. In the circumstances of this case, such a sentence provides an appropriate measure of the applicant's total criminality whilst making allowance for her early plea, cooperation with the authorities, and other mitigating factors.

Proposed orders

[21] In my opinion the appropriate orders are:

1. Application for leave to appeal against sentence granted.
2. Appeal against sentence allowed.
3. Sentence varied by reducing to two years the term of imprisonment imposed for the unlawful wounding offence on the ex officio indictment.
4. The sentence imposed and orders made at first instance are otherwise confirmed.

[22] **CHESTERMAN JA:** I agree with the orders proposed by Fraser JA for the reasons given by his Honour.

[23] **CULLINANE J:** I agree with the reasons of Fraser JA in this matter and the orders he proposes.

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6 See *R v James* [2000] QCA 477; *R v Friday* [2005] QCA 440; *R v Tyson* [2006] QCA 483.

7 *Postiglione v The Queen* (1997) 189 CLR 295 at 307-308.