# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v James* [2012] QCA 256 |
| PARTIES: | **R**<br>**v**<br>**JAMES, Morris Allan Momo**<br>(applicant) |
| FILE NO/S: | CA No 112 of 2012<br>DC No 631 of 2011 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Leave s 118 DCA (Criminal) |
| ORIGINATING COURT: | District Court at Townsville |
| DELIVERED EX TEMPORE ON: | 24 September 2012 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 24 September 2012 |
| JUDGE: | Margaret McMurdo P, Holmes JA and Henry J<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **The application is for leave to appeal is refused.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted on a plea of guilty to breaching a domestic violence order – where he punched the complainant at a hospital – where it was the sixth breach of a domestic violence order by the applicant relating to the complainant – where the applicant was sentenced to nine months imprisonment with parole release set after four months in the Magistrates Court – where he appealed to the District Court on the grounds that the sentence was excessive and that the magistrate erred in not setting parole release at the one third mark – where that appeal was dismissed – whether there must be a discount in a head sentence of at least one third on a plea of guilty – whether leave to appeal should be granted<br><br>*District Court of Queensland Act* 1967 (Qld), s 118(3)<br>*Penalties and Sentences Act* 1992 (Qld), s 13(1) |
| COUNSEL: | The applicant appeared on his own behalf<br>B J Merrin for the respondent |

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

**HENRY J:** The applicant was convicted on 7 November 2011 in the Townsville Magistrates Court on his plea of guilty to breaching a domestic violence protection order. He was sentenced to nine months imprisonment and his parole release date set after four months thereof.

He appealed that sentence to the District Court on the grounds it was excessive and that the Magistrate "erred in not imposing a parole release date at the one third mark."

His appeal was dismissed in the Townsville District Court on 4 April 2012.

He now seeks leave to appeal the decision to the Court of Appeal pursuant to *District Court of Queensland Act* 1967 (Qld) s 118(3).

While the general discretion conferred by s 118(3) on this Court to grant or refuse leave to appeal must always be exercised according to the nature of the case, see *Smith v Ash* [2011] 2 Qd R 175 at189 per Fraser JA, such leave is not lightly given. It will usually only be granted where there is a reasonable argument that there is both an error to be corrected and a need to correct a substantial injustice to an applicant, see *Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Ltd* [2008] QCA 100 and *Mbuzi v Torcetti* [2008] QCA 231. Neither is present in this case.

The applicant was served with a domestic violence protection order on 30 August 2011. The order named him as the respondent and his de facto partner as the aggrieved. It contained the mandatory condition that the respondent not commit domestic violence against the aggrieved.

On 1 September 2011, only the day after the service of the order, the aggrieved was at the Townsville Hospital waiting to be tended to for an injury she had sustained when drinking alcohol with her de facto partner, the applicant. She went to the toilet. The applicant waited outside the toilet door. When she exited he punched her in the face causing pain, discomfort and swelling. The applicant left but was located by police and admitted punching the aggrieved.

The assault constituted the breach of the order to which the applicant pleaded guilty. Importantly, it was not his first breach of such orders relating to his de facto partner. His criminal history includes convictions for six previous breaches of domestic violence protection orders in respect of her, the most recent two of which had attracted sentences of six and nine months imprisonment respectively. His criminal history includes other convictions for violence.

Against that background the applicant is very fortunate the police did not state previous breach offences in a notice served with the complaint. If they had that would have increased the maximum penalty to which he was exposed from 12 months to two years per the *Justices Act* 1886 (Qld) s 47(5) and the *Domestic and Family Violence Protection Act* 1989 (Qld) s 80(1). The relevant maximums are now higher under the recently introduced *Domestic and Family Violence Protection Act* 2012 (Qld).

At first instance the prosecution submitted for a head sentence of nine to 10 months with parole release after serving more than one third of the sentence. The applicant's solicitor emphasised the breach was only constituted by one punch but conceded imprisonment was inevitable. He submitted for a sentence of six months imprisonment with parole release fixed after one third of that time in light of what was a timely guilty plea.

In sentencing the applicant to nine months imprisonment with parole release after four months, the learned magistrate had particular regard for the need for general and personal

deterrence and the applicant's history of repeat breaches of domestic violence protection orders.

In the appeal to the District Court the applicant's counsel accepted the head sentence was within range but submitted parole release should have been after the service of three months imprisonment. It was in effect submitted that the sentence actually imposed, particularly the parole release date, was adjusted upwards from what it should have been in order to compensate for the failure of police to allege the applicant's past offending as a circumstance of aggravation to the charge.

The difficulty with that assertion, as the learned District Court Judge correctly found, is that it finds no support in what was said or done by the learned magistrate at first instance.

Further, it is not the law where previous convictions could be, but are not, alleged by notice served with the complaint that the sentencing court is precluded from having regard to such convictions in imposing sentence. The failure to allege them by notice served with the complaint merely bears upon what the maximum penalty for the offence is, see *Justices Act* 1886 (Qld) s 47(5). Whatever that maximum might be, the offender's criminal history will remain one of the matters a sentencing court may have regard to in determining an appropriate sentence. See generally, *Penalties and Sentences Act* 1992 (Qld) s 9(2)(f) and s 11 and in cases of violence see s 9(4)(g).

The applicant's submissions below also appeared to assume that on a plea of guilty resulting in imprisonment there must inevitably be a discount of at least one third of the head sentence in the event of a plea of guilty. Such an outcome may be common, see, for example, *R v Hoad* [2005] QCA 92, but there ought not exist an expectation that it will occur as a matter of course. The sentencing discretion is not so confined. Section 13(1) of the *Penalties and Sentences Act* 1992 (Qld) merely provides that a sentencing court must take a guilty plea into account and may reduce the sentence which would have been

imposed had an offender not pleaded guilty. It does not confine the extent of any reduction, if given, or the means by which it is to be achieved.

No error of approach has been identified in the present case, nor does any error arise by implication from the length of the sentence. The learned District Court Judge noted the offence was committed only a day after the service of the order, in a hospital, upon the same partner in respect of whom the applicant had committed six previous breach offences. In the circumstances it is unsurprising that his Honour concluded the sentence imposed was not excessive.

There exists no error to be corrected and no indication of injustice to the applicant.

I would order that the application for leave to appeal is refused.

**THE PRESIDENT:** I agree. As Justice Henry has explained, this was a serious example of the offence of breach of a domestic violence order. The only mitigating feature was the plea of guilty. Against that was the applicant's shameful criminal history for like offending.

Another exacerbating feature was that this offence occurred in a hospital where the victim, as well as other patients and those tending them, should be entitled to freedom from exposure to such violence. For these reasons, as well as those given by Justice Henry, I agree that the application for leave to appeal must be refused.

**HOLMES JA:** I agree with what has been said by both the President and Justice Henry and I agree that the application for leave to appeal should be refused.

**THE PRESIDENT:** The order is the application for leave to appeal is refused.