SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gordon* [2012] QCA 334
PARTIES:	**R** **v** **GORDON, John Gilbert** (applicant)
FILE NO/S:	CA No 198 of 2012 DC No 1057 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	4 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	23 November 2012
JUDGES:	Holmes, White and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – RELEVANT FACTORS – NATURE AND CIRCUMSTANCES OF OFFENDER – AGE OF OFFENDER – ELDERLY OFFENDER – where applicant pleaded guilty to 11 counts of unlawful use of postal service contrary to s 471 of *Criminal Code* 1995 (Cth) and one count of unlawful possession of weapons contrary to s 50 of *Weapons Act* 1990 (Qld) – where applicant was sentenced to two and a half years imprisonment to be released after eight months – where applicant was 81 years of age at sentence and in poor health – where applicant had already served 17 weeks and one day at application hearing – whether sentence was manifestly excessive in all the circumstances – whether applicant ought to be released forthwith *Corrective Services Act* 2006 (Qld), s 176 *Crimes Act* 1914 (Cth), s 16A(2) *Criminal Code* 1995 (Cth), s 471.10(1), s 471.11(1), s 471.12, s 471.15(1) *Police Powers and Responsibilities Act* 2000 (Qld), s 471(3) *Weapons Act* 1990 (Qld), s 50(1)(b) *R v CC* [2004] QCA 187, cited *R v Finlay* (2007) 178 A Crim R 373; [2007] QCA 400, considered

R v Guthrie (2002) 135 A Crim R 292; [2002] QCA 509, cited
R v Irlam; ex parte Attorney-General (Qld) [2002] QCA 235, cited
R v Janz [2008] QCA 55, considered
R v Markusic [2004] QCA 249, considered
R v S (1998) 100 A Crim R 80; [1998] QCA 44, cited

COUNSEL: C W Heaton SC for the applicant
S M Ryan for the respondent

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

[1] **HOLMES JA:** I agree with the reasons of White JA and the order she proposes.

[2] **WHITE JA:** The applicant pleaded guilty in the District Court at Brisbane to 11 counts relating to the unlawful use of the postal service contrary to s 471 of the *Criminal Code* 1995 (Cth) and one count on ex officio indictment of the unlawful possession of weapons contrary to s 50 of the *Weapons Act* 1990 (Qld). He was sentenced the following day, with the longest sentence being imprisonment for two and a half years for each of six counts of causing an explosive to be carried by post contrary to s 471.15(1) of the *Criminal Code*, to be released after eight months on a $500 recognisance to be of good behaviour for three years.

[3] A convenient table in the applicant's counsel's[1] written submissions sets out the offences, their dates and the sentence imposed in respect of each and is reproduced here:

Count	Date of offence	Offence	Sentence imposed
1	1 November 2007 – 15 November 2007	Use postal service to cause offence: s 471.12 *Criminal Code (Cwth)*	6 months' imprisonment. No recognisance release fixed.
2	10 February 2009 – 19 February 2009	Use postal service to menace: s 471.12 *Criminal Code (Cwth)*	6 months' imprisonment. No recognisance release fixed.
3	10 March 2009 – 18 March 2009	Causing an explosive to be carried by post: s 471.15(1) *Criminal Code (Cwth)*	2 and a half years' imprisonment, to be released after 8 months, on a $500 recognisance to be of good behaviour for 3 years.
4	1 August 2009 – 10 August 2009	Using postal service to make a threat to kill: s 471.11(1) *Criminal Code (Cwth)*	6 months' imprisonment. No recognisance release fixed.

[1] Ms Laura Reece of counsel; Mr Carl Heaton SC of counsel appeared on the hearing.

5	25 September 2009 – 5 October 2009	Causing an explosive to be carried by post: s 471.15(1) *Criminal Code (Cwth)*	2 and a half years' imprisonment, to be released after 8 months, on a $500 recognisance to be of good behaviour for 3 years.
6	10 May 2010 – 17 May 2010	Hoax (explosive and dangerous substance): s 471.10(1) *Criminal Code (Cwth)*	6 months' imprisonment. No recognisance release fixed.
7	1 July 2010 – 10 July 2010	Use postal service to cause offence: s 471.12 *Criminal Code (Cwth)*	6 months' imprisonment. No recognisance release fixed.
8 & 9	20 October 2010 – 5 November 2010	Causing an explosive to be carried by post: s 471.15(1) *Criminal Code (Cwth)*	2 and a half years' imprisonment, to be released after 8 months, on a $500 recognisance to be of good behaviour for 3 years.
10 & 11	1 November 2010 – 9 November 2010 [for count 11, 16 November 2010]	Causing an explosive to be carried by post: s 471.15(1) *Criminal Code (Cwth)*	2 and a half years' imprisonment, to be released after 8 months, on a $500 recognisance to be of good behaviour for 3 years.
12	11 November 2010	Unlawfully possess 10 or more weapons: s 50(1)(b) *Weapons Act* 1990 (Qld)	8 months' imprisonment

[4] As is clear, the applicant's offending took place between 1 November 2007 and 9 November 2010 with some escalation in activity in the latter part of 2010.

[5] The applicant does not dispute the sentence of two and a half years imprisonment. He contends that he ought not to have been required to serve any time in actual custody due to the combination of his age – 81 years at sentence – and poor health. Alternatively, the applicant contends that the 17 weeks and one day he has now served in prison is an appropriate period of actual incarceration and he ought to be released forthwith. In requiring him to serve eight months of the two and a half year head sentence the applicant contends that the primary judge's sentencing discretion miscarried and he imposed a manifestly excessive sentence.

[6] The applicant has no criminal history which predates his arrest on these matters. He has one conviction for contravening an order requiring him to give identifying particulars under s 471(3) of the *Police Powers and Responsibilities Act* 2000 committed on 17 November 2010 for which he was fined $200 and a conviction not recorded.

Circumstances of offending

[7] Sentencing proceeded on an agreed statement of facts. In summary, the applicant sent 11 letters to a number of public figures and one private individual over the three year period containing either actual explosives or correspondence that contained a threat to kill, a bomb hoax or a communication that a reasonable person would find menacing. None of the letters was signed by the applicant or had a forwarding address and thus the identity of the author was unknown to the recipients of the mail articles. Due to this anonymity, investigators were unable to locate the author of the letters for a number of years. However, the letter, the subject of count 7, addressed to the Leader of the Opposition in the Commonwealth Parliament, as a result of forensic examination by the Australian Federal Police, set a train of investigation in progress. After a 14 month investigation police executed a search warrant at the applicant's residential address. The applicant cooperated in the search and a number of documents containing samples of his handwriting were seized.

[8] During the search a large quantity of ammunition was discovered in the applicant's bedroom including 0.22 calibre cartridges and plain detonators of the same make and brand as were contained in the posted envelopes the subject of the charges.

[9] Also in his bedroom police found a 12-gauge single barrel shotgun, a 12-gauge double barrel shotgun, a 0.410 break action shotgun, four 0.22 rifles (various), an air rifle and two silencers.

Particulars of charges

[10] Count 1 - The first mail article was received on 15 November 2007 at Parliament House, Canberra addressed to the then Leader of the Opposition. The envelope was opened by an administrative staff member. It contained a letter, a portion of which stated:

> "… we, The Star of David are ready to destroy every Catholic Church worldwide including the Vatican … after this happy event, every foreigner in every country will be shot if they don't flee to their homeland …"

[11] Count 2 - On 19 February 2009 mail was received at the post office box of the Catholic Archbishop of Brisbane. It was opened by an administrative assistant and contained a letter which in part stated:

> "Remember the bomb (3 sticks of gelly) back in the early 1980 [sic]. Well this time it will be a truck load … even the Vatican will be hit with 3 huge bombs. Saint Marys at South Brisbane will pick up the pieces of you and your monastery. A curse be upon you and church …"

[12] Count 3 - On 5 November 2010 the Archbishop of Brisbane received mail at his post office box which was opened by an assistant and found to contain a letter and a 0.22 calibre bullet inserted into a detonator which was inserted into a piece of cardboard. A portion of the letter stated:

> "If one cent of Anna Bligh [sic] $130m goes to any Catholic school, you'll need it to bury the kids. You won't see the next bullets come."

[13] Count 4 - On 10 August 2009 an envelope was received at Parliament House, Brisbane addressed to the then Premier. That envelope was opened by the correspondence coordinator for the Premier's office and contained a letter, a portion of which stated:

> "… your lives will be terminated in March next year … we have saved our bullet and detonator this time as we will use them later."

[14] Count 5 - On 5 October 2009 a further envelope was received at Parliament House, Brisbane addressed to the Premier. It was opened by a receptionist and contained a letter and a 0.22 calibre bullet inserted into a detonator in a piece of cardboard. Written on the piece of cardboard were the words:

> "The next one is bigger and faster for you and your sons … easy target … out or else …"

[15] Count 6 - On 17 May 2010 an envelope addressed to the owner of a motel was received and opened by the general manager. The letter within the envelope stated in part:

> "… any motel in Australia who houses [asylum seekers], will bear the bombs and as a result pieces of your motels will land in Canberra … We should have sent a bomb with this letter, but that will come later …"

[16] Count 7 - On 10 July 2010 an envelope was received at Parliament House, Canberra addressed to the Leader of the Opposition. It was opened by an administrative assistant and contained a letter, a portion of which stated:

> "We have just successfully injected a deadly poison into the water supply of the Motel at Boondal … We will wipe all foreigners of [sic] Australian Soil real soon. Curse them all with an agonizing death … 1 man shall make 10,000 flee."

[17] Count 8 - On 5 November 2010 an envelope addressed to the Reserve Bank Governor was received at the Reserve Bank of Australia in Sydney. It was opened by the Governor's personal assistant and contained a letter and a 0.22 calibre bullet inserted into a detonator which was inserted into a piece of cardboard.

[18] Count 9 - On 5 November 2010 an envelope addressed to the Prime Minister was received at Parliament House, Canberra and opened by a receptionist. The envelope contained a letter to the effect that all refugees would be shot. The envelope also contained a 0.22 calibre bullet inserted into a detonator which was then inserted into a piece of cardboard.

[19] Count 10 - On 9 November 2010 an envelope was received at the Westpac Bank head office in Sydney addressed to the bank's chief executive officer. The envelope was opened by a receptionist and contained a letter stating, amongst other things:

> "… the next bomb will do the job …"

It also contained a 0.22 calibre bullet inserted into a detonator which was inserted into a piece of cardboard.

[20] Count 11 - On 16 November 2010 an envelope was received at the Commonwealth Bank Building in Sydney addressed to that bank's chief executive officer. The envelope was opened by a mail room worker and contained a letter and

a 0.22 calibre bullet inserted into a detonator which, in turn, was inserted into a piece of cardboard.

[21] After police had conducted the search of the applicant's home on 11 November 2010 the applicant voluntarily attended at his local police station and participated in a record of interview. He made full admissions to sending the envelopes including their contents and said that he intended the recipients of these communications to take notice of the message contained in each. He was charged and issued with a notice to appear.

Submissions below

[22] The prosecutor submitted for a head sentence of 18 months to two years imprisonment in respect of each of the six offences of causing an explosive to be carried by post and a sentence of six to nine months imprisonment for the less serious postal offences. The maximum penalty for counts 1, 2 and 7 is two years imprisonment and/or a $13,200 fine; the maximum penalty for counts 3, 5, 8, 9, 10 and 11 is 10 years imprisonment and/or a $66,000 fine; the maximum penalty for counts 4 and 6 (using the postal service to threaten to kill a person and to induce a false belief that an explosive would be left in a place) is 10 years and/or a $66,000 fine. The maximum penalty for the *Weapons Act* offence is 10 years imprisonment or a $55,000 fine.

[23] The prosecution submissions noted that the detonators in and of themselves were sensitive and could be fired by accidental impact and there was, thus, potential for actual harm to befall the recipients of those letters. The prosecutor submitted that a condign penalty was required to reflect the seriousness of the offending and the need for both personal and general deterrence. The prosecutor tendered a number of schedules relating to comparative sentences pursuant to each of the charges. There were no comparable sentences dealing with the offence of causing an article containing an explosive to be carried by post. The prosecutor informed the court that this was the first prosecution under s 471.15(1) of the *Criminal Code* (Cth). He submitted that a short period of immediate custody was appropriate[2] acknowledging that the applicant had medical problems.

[24] The primary judge indicated at the commencement of the defence submissions that he queried a sentence of 18 months to two years for the more serious charges as too low.

[25] Defence counsel initially submitted that the appropriate range for the counts of sending explosives through the mail was between 12 and 18 months imprisonment to be suspended immediately, that is, the applicant should serve no actual time in custody. He contended for a wholly suspended sentence for the weapons offence. In the course of his submission he conceded that the range he contended for was on the low side but still maintained an immediate suspension was appropriate.

[26] Defence counsel informed the court that the applicant had taken the detonators from his employer in Victoria in 1950 to use when fishing. He had been an assistant powder monkey with the Water Supply Commission and had been through some demolition training. He contended that the detonators would not detonate unless they were hit with a hammer. The applicant's conduct was submitted to be "a rant"

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[2] AR 16 and AR 22.

venting his anger in respect of certain matters with which he disagreed. His counsel said "he knows that what he has done is very silly" and added, "but also knows that what he has done is very serious".[3]

[27] The applicant was a widower with two adult children. He was engaged to a woman aged 90 who had health difficulties for whom he was a carer. A number of medical documents concerning the applicant's health were tendered. An interventional cardiologist had reported about 12 months earlier that the applicant was seen at the Prince Charles Hospital in November 2007, referred by his local general practitioner, for undifferentiated chest pain. He had previously had a coronary artery bypass graft operation, hypertension, dyslipidemia, gastrooesophageal reflux and anxiety. Tests showed some electrocardiographic changes and the applicant was to have a CT coronary angiogram . He had discharged himself against medical advice prior to the investigation "apparently because he had to leave hospital as he was planning an overseas trip the following month".[4] The applicant was seen at the outpatient clinic on 12 May 2011 and noted to be in atrial fibrillation. He attended electrical DC cardioversion which was successful.

[28] By letter dated 22 June 2012 the applicant's general practice doctor identified his medical conditions as "multiple, complex and chronic". He described the applicant's cardiac condition as causing him daily symptoms including chest pain which required daily medication and regular visits to his doctor to monitor the response and management of his condition. The applicant was described as still having an irregular heart rhythm. He was noted to have

> "significant degenerative osteoarthritis of multiple joints including lumbar back and knee joint region; causing daily pain and discomfort".[5]

[29] The applicant had been hospitalised on several occasions since being charged.

[30] The primary judge was informed that the applicant took 13 tablets a day for his various medical conditions. His counsel conceded that, notwithstanding the applicant's health difficulties, he could not submit that the state of his health was so parlous that he might not be able to be managed within the corrective services environment.

Sentencing approach

[31] The primary judge adjourned pronouncing sentence until the following day, 26 July 2012. His Honour noted that although the language employed by the applicant might be discerned to be that of a crank, the receiver of such mail would have been put in fear and the threats would be taken very seriously. His Honour noted that on six occasions the applicant had sent explosives through the post and, although directed at political or commercial leaders, those letters were opened by people who worked for them and it was they who were put in danger. His Honour emphasised the need for general deterrence and the seriousness with which such conduct was regarded.

[32] As to the mitigating factors, the primary judge noted the applicant's cooperation from the outset with the investigation and the administration of justice. His Honour

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3 AR 27.
4 AR 92.
5 AR 94.

referred to the applicant's caring role for his companion as he was required to by s 16A(2)(p) of the *Crimes Act* (Cth), but said it should not overwhelm other important considerations. He then considered the applicant's own medical concerns noting his principal medical conditions and numerous medications. His Honour added:

> "Your counsel did not submit that your health is such that incarceration would place an extraordinary burden on you. I act on the basis that the Corrective Services department would be entirely capable of catering to your health needs."[6]

[33] Mr Heaton SC, for the applicant, submitted that his Honour applied the wrong test as defence counsel had not submitted that incarceration would "place an extraordinary burden" on the applicant. This was no more than a recognition by his Honour that an offender's health deficits will not, in the absence of an unmanageable condition, call for an otherwise appropriate sentence of actual imprisonment not to be imposed.

[34] The primary judge rejected the submissions of counsel about the appropriate range of punishment for sending explosives through the post. He accepted that the applicant's conduct was not the most serious, potentially, of its kind, but did regard that it "cut across the value placed by the community in important social institutions" such as the post. His Honour acknowledged the applicant's cooperation once detected, his pleas of guilty, his age and other personal matters and, for the personal mitigating factors, he ordered release at less than the customary (in Queensland) one-third of the sentence, at eight months.

Sentencing error

[35] Mr Heaton submitted that the sentencing discretion miscarried because the primary judge gave insufficient weight to the applicant's health in combination with his age and in the context of the applicant's cooperation with law enforcement agencies, his pleas of guilty, his long life without any criminal convictions and his role as carer for his partner.

[36] Ms Ryan, for the respondent, noted that there was no evidence that the applicant's health was deteriorating in custody more than was anticipated at the time of sentence. She noted that the applicant commenced his offending shortly after he was first referred to the Prince Charles Hospital in 2007 and continued to commit these offences whilst he was suffering from the health conditions in respect of which he sought sympathetic consideration.[7] She conceded that in some cases old age of itself might warrant a merciful approach to sentencing, particularly, for example, if the term of imprisonment were lengthy,[8] submitting, however, that age of itself cannot constitute a mitigating factor.

Discussion

[37] Section 16A(2)(m) of the *Crimes Act* 1914 (Cth) requires a sentencing court to take into account, amongst other things, the age and physical condition of the offender.

[38] In *R v Markusic*[9] the 73 year old offender was sentenced to imprisonment for five years to be suspended after 18 months for an offence of dangerous operation of

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6 AR 50.

7 *R v Guthrie* [2002] QCA 509 per Mullins J at [45].

8 *R v Markusic* [2004] QCA 249; *R v S* (1998) 100 A Crim R 80 and *R v CC* [2004] QCA 187.

9 [2004] QCA 249.

a motor vehicle with the circumstance of aggravation that he was adversely affected by alcohol and caused grievous bodily harm to others. That sentence, as noted by Mackenzie AJA, represented a 40 per cent reduction from the half point of the sentence and was more than would ordinarily be allowed for the early plea and "other conventional factors in the [offender's] favour". The court considered that, accordingly, mitigation for age was appropriately allowed for by a discount of that order.

[39] The effect of ill health on an offender was considered by this court in *R v Janz*.[10] That offender suffered from cerebral palsy. The sentencing court had received medical evidence about the offender's considerable difficulties in a corrections setting. He had been sentenced to 10 and a half years imprisonment with the result that he would serve 80 per cent of that sentence. Mackenzie AJA referred to *R v Irlam; ex parte A-G (Qld)*[11] and said:

> "… the principle that ill-health is a mitigating factor in circumstances where imprisonment will lead to additional burdens beyond those experienced by others is qualified by the observation that:
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> > 'That feature must not be allowed to overwhelm appropriate reflection of the grave nature of offences like these'.
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> *R v Guthrie* [2002] QCA 509, which follows *Irlam*, also says:
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> > 'It must be relevant to the weight to be given to the ill-health of the offender that the offending was committed by the offender while suffering from the same conditions for which he seeks sympathetic treatment on the sentencing.'"[12]

In *Janz* the court noted that there was no evidence to suggest that during the lengthy remand period that offender had been unable to manage his incarceration.

[40] This court in *R v Finlay*[13] considered the combined effect of age (74 years) and health problems (heart disease) in reviewing a sentence of 10 years. Holmes JA observed:

> "It was appropriate that his Honour recognise age as a consideration by sentencing at the bottom of the range, but it would have been wrong to allow that feature to override the gravity of the offence and the need for deterrence."[14]

As to the offender's health problems, her Honour observed:

> "Should the situation in fact change by way of some sudden deterioration in the appellant's health, the possibility exists of an application for an exceptional circumstances parole order under s 176 of the *Corrective Services Act* 2006 (Qld) …"[15]

That must be the case here.

[41] The primary judge was mindful of the applicant's age and health condition when he sentenced him and he took due account of those two factors when he set the release

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10 [2008] QCA 55.
11 [2002] QCA 235.
12 At [52].
13 [2007] QCA 400.
14 At [70].
15 At [69].

date after eight months on a two and a half year sentence, that is, after serving just under 27 per cent of the sentence. One-third, which is the ordinary practice in this State to take account of a timely plea of guilty, good character and other mitigating circumstances, would have seen release after 10 months. It cannot be said that in reducing the time to be served to eight months that the primary judge failed to give adequate recognition to those factors which are the basis of the application for leave to appeal against sentence.

[42] I would refuse the application.

[43] **GOTTERSON JA:** I agree with the order proposed by White JA and with the reasons given by her Honour.