SUPREME COURT OF QUEENSLAND

CITATION:	*Witness "J" v Callanan* [2014] QSC 31
PARTIES:	**WITNESS "J"** (applicant) **v** **CALLANAN** (respondent)
FILE NO/S:	SC No 11113 of 2013
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	24 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	24 February 2014
JUDGE:	Dalton J
ORDER:	1. **Vacate that part of order made on 19/11/2013 imposing a sentence of 5 months imprisonment.** 2. **Substitute an order imposing a sentence of 30 days imprisonment.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – RELEVANT FACTORS – HARDSHIP – TO OFFENDER – OTHER FACTORS - CIRCUMSTANCES OR CONDITIONS OF IMPRISONMENT – where facts arise after order - whether harsh conditions of imprisonment and solitary confinement are material to the length of imprisonment imposed PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – UNIFORM CIVIL PROCEDURE RULES – JUDGMENTS AND ORDERS – AMENDING VARYING AND SETTING ASIDE - where the prisoner is subject to conditions once incarcerated which were raised in sentencing hearing – whether the prisoner is "entitled" to appropriate relief within the meaning of rule 668(1) of the *Uniform Civil Procedure Rules* 1999
COUNSEL:	MJ Copley QC for the respondent
SOLICITORS:	Gatenby Criminal Lawyers for the Applicant Crime and Misconduct Commission for the Respondent

HER HONOUR: On 19 November 2013 an application to punish for contempt pursuant to section 199 of the CMC Act 2001 came before me in the applications list. The contempt was admitted and both sides asked for the sentence to be dealt with that day. I imposed a sentence of five months imprisonment for the contempt. Neither side made reference to the conditions to which the man I sentenced would be subject once incarcerated.

On 12 December 2013 Applegarth J published the decisions in Attendee X, Attendee Y and Attendee Z [2013] QSC 340, 341 and 342 respectively. These were decisions on applications to punish for contempt pursuant to section 199. Applegarth J sentenced X to 28 days, Y to 28 days and Z to 42 days imprisonment. Applegarth J considered the facts in X, Y and Z to be comparable to the facts before me on 19 November 2013 – X, paragraph 17; Y, paragraph 17 and Z, paragraph 16. He indicated that he would have imposed a similar sentence to the sentence I imposed had it been expected that the sentence would have been served in normal prison conditions. However, Applegarth J reduced the sentence in X, Y and Z to account for the fact that the sentences would be served by attendees X, Y and Z under a regime which was unusually harsh. It is described at paragraph 28 in the decision of X, 28 in the decision of Y and 27 in the decision of Z. A description of the regime was contained in a document in evidence before Applegarth J called "Southern Queensland Corrective Centre Detention Unit Management" dated 29 October 2013: see paragraphs 28 of decision X and Y and 27 of decision Z. Having regard to the harsh conditions in which attendees X, Y and Z, would be held Applegarth J sentenced X to 28 days, Y to 28 days and Z to 42 days imprisonment. Z had a lengthy criminal history and a history of imprisonment for offences involving violence: see paragraph 13. Neither Y nor X had any relevant criminal history, and both were in their early twenties: see paragraphs 12 of X and 14 of Y.

This morning I heard an application by witness J pursuant to rule 668(1) of the UCPR. By section 199(9) of the CMC Act the UCPR is to govern applications to this court to punish for contempt. The factual basis for the application before me this morning was that between 4 December 2013 and 30 January 2014 the applicant has been subject to the same regime as was contemplated for attendees X, Y and Z. I am satisfied as a matter of fact that is so. The respondent's material is to the effect that witness J has been subject to something called the Intensive Suppression Strategy during this time: see paragraph 9 of court document 4. While it has a different name from the document which was in evidence before Applegarth J, the Intensive Suppression Strategy prescribes the same, or a substantially similar, regime to regime relevant to the decisions in X, Y and Z – compare the extracts in X, Y and Z already referred to, and exhibit 4 to court document 4 before me.

6The applicant relies on rule 668(1)(b) on the assumption that the Intensive Suppression Strategy did exist as at 19 November 2013, but alternatively relies on rule 668(1)(a) as applicable if that assumption is incorrect. My view is that it makes no difference whether subsection (a) or subsection (b) is relied upon. The outcome of this application must be the same.

There is a question of law as to whether this applicant is "entitled" within the meaning of the rule. Sentencing is of course a discretionary process. The applicant has no absolute right to any particular outcome on a sentence. Although, of course, everyone sentenced has the right to have all relevant facts considered and weighed in the sentencing discretion.

The Court of Appeal in Rankin [1999] 2 Qd R 435 dealt with the meaning of the word "entitled" in rule 668. The point was squarely raised in that case. It was argued that, "The order, made by the Full Court itself, was founded on facts coming to light which were not of such a character as to create an absolute entitlement; as here, they were only such as would create an entitlement to favourable consideration." The court held, "The words 'entitle' and 'entitled' in O45 r1 [the predecessor to r668] are capable of referring to instances in which the person seeking relief has to depend on a favourable exercise of discretion and claims no absolute right to relief; the appellant's principle submission must be rejected." – [9]

In my view, the applicant here is entitled within the meaning of rule 668. The matter he relies upon as not having been discovered, or as arising after sentence, is plainly one which is material to the proper exercise of the sentencing discretion.

The respondent argued that the conditions in which the applicant has been incarcerated were such that, had they been known at the time I sentenced the applicant they could not reasonably have been taken into account by me in the exercise of my sentencing discretion and that therefore: (1) they could not give the applicant an entitlement to relief within the terms of rule 668(1)(a) or (b), and (2) even if they did give the applicant such an entitlement, that would mean that I would not exercise my discretion to make any different order pursuant to rule 668(2). I reject that argument and will explain why.

The respondent's material shows that after having been taken from my court on the 19th of November 2013 the applicant was taken to the Southport watch-house and then to the Brisbane Correctional Centre on 22 November 2013. On 22 November 2013 it is sworn that the applicant was placed on a Safety Order pursuant to section 53(1) of the Corrective Services Act. Then on 4 December 2013 the applicant was placed on what the respondent's deponent calls a "fresh Safety Order" and transferred to the Woodford Correctional Centre. Coincidently, on the same day – 4 December 2013 – the applicant came under the Intensive Suppression Strategy, which the respondent's deponent describes as "the applicable departmental policy for the management of prisoners identified to be members of a criminal motorcycle gang," – [9] – court document 4. Paragraph[10] of court document 4 says that the Intensive Suppression Strategy is, "no longer used by the Department." The affidavit is sworn 4 February 2014 but no date is given for that policy ceasing. The Intensive Suppression Strategy applied to the applicant from 4 December 2013 until 31 January 2014. On that latter date, he became subject to an Intensive Management Plan. From the copy in evidence, it seems that that plan is something which had been in existence since 2012.

Under section 53(1) of the Corrective Services Act, the Chief Executive may make a safety order for a prisoner if (a) a doctor or psychologist advises that there is a risk of the prisoner harming himself or someone else or (b) the Chief Executive reasonably believes there is a risk of the prisoner harming or being harmed by someone else or the Chief Executive reasonably believes that the safety order is necessary for the security or good order of the correctional services facility. It was this latter requirement, that is that the Chief Executive reasonably believed that Witness "J" ought to be subject to a safety order because that was necessary for the security or good order of the correctional services facility, which was relied upon by the respondent before me.

There was no evidence before me that the requirements of section 53(1)(b)(ii) of the Corrective Services Act had been validly complied with. The copies of the safety orders in the material were unsigned. I note that they are only said to be copies, not the originals. The copies before me were not on their face signed by the Chief Executive or a delegate of the Chief Executive, if indeed the power under section 53 can be delegated. There was no other affidavit material to the effect that the Chief Executive or a delegate had turned their mind to this issue. The material does not record the belief of the Chief Executive or a valid delegate as to any relevant matter. And the safety orders themselves do not record any basis for anyone having a belief, let alone a reasonable belief, in relation to this applicant. The documents smack of a policy or rule applied to any member of a criminal motorcycle gang. They look like standard form documents which have been incompletely modified to take account of this prisoner's circumstances.

None of this was to the point, the respondent submitted. I am not engaged on any task of administrative review. I should reason thus. Every prisoner sentenced is within the purview of section 53(1) of the Corrective Services Act. Any prisoner sentenced may be incarcerated in harsher than usual conditions pursuant to that section of that act. The existence of the section and the potential for a prisoner to be the subject of a safety order pursuant to it cannot, therefore, properly affect a sentencing discretion.

I reject this submission for two reasons. First, where it is known that a prisoner will be subject to harsher conditions during incarceration, including pursuant to a safety order made under section 53(1), for example, if it is known that a prisoner is an informer or suffers from a medical condition which will result in protective custody or solitary confinement, that is a matter which is routinely and properly taken into account on sentence. Had the fact that the applicant would – sorry, had the fact that the Department of Corrective Services would place the applicant in solitary confinement, pursuant to section 53(1), been known at the time of sentence, that too could probably have been taking into account, by me, when imposing sentence in just the same way as I would have taken into account the fact that a safety order, involving solitary confinement, might be made because the prisoner was an informer, or suffered from a medical condition.

Secondly, the factual basis for the respondent's submission is simply not made out on the material before me. Whatever the status of the safety orders purportedly made pursuant to section 53(1) of the Corrective Services Act, this applicant was incarcerated in solitary confinement and on the very restrictive conditions described in the prisoner's affidavit and in the document which evidenced the Intensive Suppression Strategy, and the basis for this was the application of the Intensive Suppression Strategy to this prisoner because that was departmental policy. That is clear beyond doubt from paragraph 9 of court document 4. The application of this Intensive Suppression Strategy had nothing to do with section 53(1) or any reasonable belief about this prisoner. There is no evidence, at all, that there is any connection between the Intensive Suppression Strategy and section 53(1) of the Corrective Services Act or the safety order purportedly made in pursuance of that section. That is, the Intensive Suppression Strategy applied independently as a result of departmental policy. The Intensive Suppression Strategy is, as I say, the same as, or very similar to, the regime to which X, Y and Z were subject. It involves solitary confinement and it was conceded to be harsher in its application to this prisoner than the regime applicable because of the safety orders purportedly made in relation to this prisoner pursuant to s53(1) of the Corrective Services Act.

Had I known of the application of the Intensive Suppression Strategy at the time I sentenced this prisoner, I would have had regard to it as a matter material to the length of imprisonment appropriate. The relevance of harsh conditions of imprisonment and solitary confinement are well known and are detailed at length by Justice Applegarth in the decisions X, Y and Z. I shall not repeat them. Guided by the same type of considerations as he described, had I known of the applicability of the Intensive Suppression Strategy to this prisoner I would have imposed a sentence of 30 days imprisonment on the 19th of November 2013.

Accordingly I exercise my discretion pursuant to rule 668(2) of the UCPR to vacate that part of the order I made on 19 November 2013 imposing a sentence of five months imprisonment and substitute an order imposing a sentence of 30 days imprisonment. The remaining terms of the order made on 19 November 2013 should remain the same. All right. Are there any other orders?

MR GATENBY: Not that I can think of, no.

HER HONOUR: All right. Thanks, Mr Gatenby. Mr Copley?

MR COPLEY: Just one for the sake of completeness that it might be prudent to order that the 30 days imprisonment commenced on and from the 19th of November 2012 – 2013. If you just leave it as it is – it's really just mentioned in an effort to make sure we don't have to come back again.

HER HONOUR: Yes. I actually worried about that in working out what I'd say.

MR COPLEY: It's clear enough from your Honour's reasons.

HER HONOUR: I think the order is clear because it vacates the order and substitutes an order but I'll certainly place on record that the intent is that the 30 days imprisonment commence on 19 November 2013 and is thus now exhausted.

MR COPLEY: Thank you.

HER HONOUR: So that that's perfectly clear.

MR COPLEY: Yes.

HER HONOUR: All right. All right, then. We can adjourn, I think.

MR COPLEY: As to the question of publication.

HER HONOUR: Yes.

MR COPLEY: There's nothing that your Honour has said, to – from what I heard that would be of difficulty with your Honour publishing the ruling but you might, when you just correct it, correct the first sentence, because you referred to an application that you heard on 19 November 2003.

HER HONOUR: Did I?

MR COPLEY: Yes.

HER HONOUR: I have a long memory. I think I called 668 688 a couple of times too, but anyway. Those kind of things will just be picked up in the revision.

MR COPLEY: Thank you. Your Honour.

HER HONOUR: All right. Thank you both. Would you adjourn the court, please, Mr Bailiff.