SUPREME COURT OF QUEENSLAND

CITATION:	*R v Martin* [2014] QCA 80
PARTIES:	**R** **v** **MARTIN, Michael Denby** (applicant)
FILE NO/S:	CA No 151 of 2013 DC No 2420 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	15 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	2 April 2014
JUDGES:	Holmes and Morrison JJA and Ann Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – COSTS – where in the Magistrates Court the applicant was convicted on his pleas of guilty to 41 offences, including using a carriage service to make a threat to kill against a police officer, a solicitor and a magistrate – where the applicant was given a head sentence of two years imprisonment with a parole release date set at one-third – where pursuant to s 222 of the *Justices Act* 1886 the applicant appealed his conviction and sentence to the District Court on the sole ground that his sentence was manifestly excessive – where before the learned primary judge the applicant requested he be given a suspended sentence instead of parole – where the primary court proceedings were adjourned three times for the benefit of the applicant – where the applicant failed to appear on the fourth occasion the matter set down for hearing – where the learned primary judge struck out the applicant's appeal at the application of the respondent for want of prosecution and failure to appear – where the learned primary judge ordered the applicant pay the respondent's costs of the appeal including all adjournments – where the applicant seeks leave to appeal to this Court against the decision of the learned primary judge – where the applicant's only matter

that he wished to agitate before the Court of Appeal was the costs order – where the applicant contends that the costs order will cause him financial hardship – whether the learned primary judge erred in making the costs order

District Court of Queensland Act 1967 (Qld) , s 118
Justices Act 1886 (Qld), s 222

COUNSEL: The applicant appeared on his own behalf
D Meredith for the respondent

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

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

[2] **MORRISON JA:** This is an application for leave to appeal pursuant to s 118 of the *District Court of Queensland Act* 1967. The application is made in respect of the decision of the learned primary judge, on 13 May 2013, to dismiss the applicant's appeal to that Court from his conviction and sentence in the Magistrates Court on 31 May 2012.

History

[3] The applicant was sentenced on 31 May 2012 following his guilty plea to 41 offences. The offences, and the penalties imposed, were as follows:

(a) two counts of stalking his ex-partner – in each case two years imprisonment;

(b) two counts of assault occasioning bodily harm, in respect of his ex-partner – in each case two years imprisonment;

(c) 26 counts of breaching a domestic violence order – in respect of all counts, 12 months imprisonment;

(d) five counts of using a carriage service to make a threat to kill, against a police officer, a solicitor and a magistrate – two years imprisonment;

(e) six counts of using a carriage service to menace or harass, in respect of two police officers and his ex-partner – 12 months imprisonment;

(f) one count of breaching bail conditions, by failing to appear – convicted but no further punishment imposed.[1]

[4] The magistrate imposed a head sentence of two years imprisonment, and all sentences were ordered to be served concurrently. A total of 127 days pre-sentence custody was declared. The applicant was placed on a domestic violence family protection order in favour of his ex-partner, that order to last for five years. The magistrate set 15 September 2012 as the applicant's parole release date, that is, after serving one-third of the head sentence, and taking into account his pre-sentence custody.

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1 AB 146-149.

The magistrate's sentence remarks

[5] The sentencing hearing took place over two days, on 3 May and 31 May 2012. By the end of the first day the magistrate had made it clear that he was not amenable to a "plea bargain" which had been agreed between the parties, involving a total penalty of six months imprisonment, with three months to be served.[2] Neither party was armed with comparative sentences on that occasion, and that was the main reason for adjourning it to 31 May. The hearing did not end well for the applicant, with him describing the proceedings as "a joke" and a "Fuckin' circus", and calling the magistrate a "Fuckin' idiot".[3]

[6] On 31 May a deal of time was spent on a close examination of a substantial number of authorities which were said by one side or the other to be comparative cases. Once again the magistrate was pressed with the fact that the guilty plea had been entered on the basis of an agreement with the prosecutor that they would make submissions in favour of a six month penalty, with only 50 per cent to be served.[4] Once again the magistrate emphasised that he was not amenable to a penalty of that sort.[5]

[7] The magistrate's sentencing remarks occupied 27 pages of transcript.[6] Having recorded the nature of the offences in a general way[7] the magistrate recited the mitigating matters that he was taking into account. These included: the pleas of guilty; the effect that imprisonment would have upon the applicant, his family and his occupation; his health problems including stress related anxiety and depression, and anger management; the lack of any criminal history of similar assaults, stalking, the use of the carriage service, or failing to appear; his completion of various programs whilst in custody, including a domestic abuse program; the length of time held in custody; and his election to have the stalking charges dealt with in the Magistrates Court.[8]

[8] The magistrate then recorded the aggravating circumstances in relation to the seriousness and number of the offences. They included:

(a) that the previous sentencing options had resulted in no deterrent effect upon him, and therefore imprisonment was the appropriate penalty;

(b) a complete "lack of remorse";

(c) that the offences had been carried out for his personal gain;

(d) the need for deterrence, and to protect the community from "your persistent criminal activity";

(e) the fact that his criminal history indicated he would continue to commit offences, and that some of the offences had been committed whilst on probation or on bail; and

(f) that he was "a person quite clearly not suitable for further community based orders".[9]

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2 AB 113, 116 and 117.
3 AB 119.
4 AB 123.
5 AB 125.
6 AB 128-153.
7 The full detail of the offences is recorded at AB 100-111.
8 AB 129-130.
9 AB 130-132.

[9] The magistrate also dealt with the threats to kill a magistrate, police officer and a solicitor, and stated that the applicant's conduct:

> "… here demonstrated an exceptionally high level of persistence in not only assaulting the complaint [sic] aggrieved but also the relentless harassment of her and continued threats to kill the solicitor representing the complainant and then threats to kill a police officer involved in the investigation and ultimately threats to kill a judicial officer."[10]

[10] The magistrate then reviewed the comparative cases at some length before imposing the sentences recorded above.

[11] Once again the hearing did not end on a good note, with the applicant saying to the magistrate: "I'll see you in here anyway the CMCs after you. … I'm glad they are. The fucking CMCs going to get you."[11]

The proceedings before the learned primary judge

[12] The applicant instituted an appeal pursuant to s 222 of the *Justices Act* 1886.[12] The sole ground was that the sentence was manifestly excessive. By the time the matter came on for hearing before the learned primary judge, two applications[13] had been filed by the respondent, seeking to strike out the appeal for failure to comply with the time for filing outlines of argument.

[13] On 25 March 2013 the applicant appeared by telephone. He told the learned primary judge that he was in New South Wales and could not appear that day.[14] It was understood as an application to adjourn, which was not opposed by the prosecutor.[15] The applicant made it clear that the only relief he sought was that the balance of the sentence yet to be served, be suspended. This was because by then he had already served the eight months actual custody, and a further six months on parole.[16] The primary judge explored whether the matter might be resolved that day, and questioned whether there was any real difference in having a suspended order rather than parole.[17] The applicant explained that there were difficulties in being allowed to attend in Queensland because of his parole order, and that the problem with being on parole instead of on a suspended sentence, was the time it took to get approval to move from state to state. He explained that his job might require him to move to another state at short notice, and the response time from the parole authorities was too long.[18]

[14] The learned primary judge pointed out that it was not as simple as the applicant wished it to be, and that he (the primary judge) would have to be satisfied that the magistrate erred in placing him on parole, rather than suspending the sentence.[19] His Honour went on to explore the possibility that if the prosecuting authorities were given a little time, they may agree to allow the appeal and impose a suspended

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10 AB 139.
11 AB 153.
12 See AB 195.
13 Filed 5 October 2012 (AB 199) and 1 March 2013 (AB 200).
14 AB 155.
15 AB 155.
16 AB 155-157.
17 AB 157.
18 AB 158.
19 AB 158.

sentence.[20] For that reason the matter was adjourned to the following day, with the applicant to appear again by telephone.[21]

[15] On 26 March the prosecutor's position was made clear, namely that there was no error by the magistrate and the sentence could not be demonstrated to be manifestly excessive.[22] After permitting the applicant to make a number of submissions in a general way the primary judge eventually said that there were two options, namely adjourning the hearing of the appeal in which case the applicant would have to come to Brisbane to appear, or the applicant could withdraw his appeal.[23] His Honour made it clear that if the appeal was to proceed, it would have to be adjourned with a personal appearance required on the adjourned day, because "I'm not satisfied today that I can conduct this appeal with you over the telephone".[24]

[16] There followed an exchange about the responsiveness of the parole authorities after which his Honour then said:

> "Well, if you wish to pursue this appeal, the appeal will be heard in the District Court at some time. You will be required to appear in Court. It is totally unsatisfactory attempting to conduct an appeal over the telephone, and, furthermore, totally unsatisfactory when you have no documentation about what the parole authorities will or won't do with your work commitments, and no documentation from your present employer about your requirement to leave, as you call it, at the drop of a hat."[25]

[17] His Honour then made it clear that documentary evidence relating to the applicant's employment, the necessity to leave one state for another for work purposes, and information from the parole authorities was required, if the applicant was intending to press the points which he had raised orally.[26]

[18] In the course of making arrangements to ensure that submissions were available to the applicant at his email address, and finding a time for the appeal to be heard, this exchange occurred between the learned primary judge and the applicant:

> "HIS HONOUR: Where are you located, Mr Martin?
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> APPELLANT: Near – near New Castle [sic].
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> HIS HONOUR: Sydney is near New Castle [sic] and so is Moree and a whole lot of other places. Where are you located? Are - - - - -
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> APPELLANT: Hexham.
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> HIS HONOUR: - - - - - you being coy about this?
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> APPELLANT: Hexham."[27]

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20 AB 158-159.
21 AB 158, 160.
22 AB 162.
23 AB 167.
24 AB 168.
25 AB 170.
26 AB 170-171.
27 AB 175.

[19] The appeal was eventually set down for hearing on 22 April 2013. The applicant indicated he was sure he could get his information by that time, and the primary judge told him, "you'll be required to appear".[28]

[20] The matter resumed on 22 April, at which time the applicant did not appear in person, but by telephone. The applicant said that he was in Toowoomba and unable to attend. A letter from the applicant's parole officer was tendered by the prosecutor. It revealed that on 25 March the applicant was not in New South Wales but had travelled to Queensland to take up his job offer.[29] His Honour took the view that the applicant's answer recorded in the passage at paragraph [18] was a misstatement. It was clear that his Honour thought that he had been misled.[30]

[21] Once again, his Honour considered that he could not hear the appeal with the applicant appearing by telephone, and he would therefore set the matter down for hearing. Notwithstanding the prosecutor's application to strike the matter out because of the non-appearance, the appeal was set down for 13 May and the applicant was told, "You will need to be present, and bring with you any documentation you wish to rely upon".[31] The applicant was also warned twice that if he proceeded with the appeal and it was unsuccessful, a costs order may be made against him.[32]

[22] Once again the hearing did not end well, with the applicant telling his Honour that, "I don't believe I'll get a fair hearing anyway, so I'll just go to a higher Court because the judicial procedure of this is just stretching out",[33] and in answer to his Honour's reminder that the applicant needed to be present and bring his documentation so that the appeal would be heard, "Well, you may as well forget it. I will go to the higher Court."[34]

[23] On 13 May the applicant did not appear, by telephone or otherwise. The Court was informed that the prosecutor had been in touch with the parole officer and he had informed that the applicant "indicated he was going back to Newcastle to assist his partner to move and wasn't going to be in Queensland as of today."[35] In response to the prosecutor's application to strike out the appeal, his Honour said: "Yes. I strike out the appeal."[36] His Honour went on, however, to give reasons for his decision.

The primary judge's reasons

[24] The learned primary judge read out an email which had been sent by the applicant on 8 May.[37] In it the applicant revealed that he had made "a formal complaint to the office of the Attorney[-]General about this matter in particular against the Judge."[38] He went on to state that he had no transport to get to Brisbane and "In light of my complaints against this Judicial Officer it would not be appropriate that it is heard

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28 AB 177.
29 AB 182.
30 AB 183-185.
31 AB 187.
32 AB 185, 186.
33 AB 187.
34 AB 187.
35 AB 190.
36 AB 190.
37 AB 191. The text of the email is at AB 215.
38 AB 215.

by this Judge."[39] After making various complaints about the magistrate and the police officers, he said: "I am seeking the Judge discharge himself from this matter due to what could be construed a conflict of interest due to my complaint."[40]

[25] His Honour referred to the transcripts of the hearings leading up to 13 May, observing that they revealed "the extreme and erratic nature of [the applicant's] behaviour".[41] His Honour recorded that the adjournments had been granted for the benefit of the applicant, so that he could provide material to support his arguments. His Honour then noted that the appeal was not actually against the sentence being manifestly excessive, but confined only to the substitution of a suspended sentence for the remaining period on parole.[42] His Honour then recorded the reasons for that submission, namely the inability to move at short notice for work purposes because of the operation of the parole system.[43] His Honour observed that:

> "It is apparent – it is tolerably clear to him that his argument was that new circumstances had arisen since the sentence, and for that reason the sentence should be varied in the way in which he requested."[44]

[26] His Honour went on:

> "It is unthinkable, in my view, that such an appeal would be considered without some independent material quite apart from the assertions of the applicant. I repeat again, his behaviour via telephone, as much as one can gauge, was erratic and sometimes worryingly aggressive. A review of the transcript will disclose that he often made allegations against anyone whom, it seems, thwarted his desires. Not only were adjournments granted by me for his benefit, but every opportunity has been given him to support his appeal by independent evidence or material. The prosecution, I should say, who represent – the prosecuting authorities who represent the respondent in these proceedings have likewise made enquiries which seem to suggest or are likely to suggest that the bald assertions made by the applicant are not indeed correct."[45]

[27] His Honour then referred to the misleading answer concerning the applicant being at Hexham when he was, in fact, in Queensland. In this respect his Honour observed that that fact was contrary to the very basis of the applicant's assertion that he would not be able to leave the state in a timely way. His Honour found that the answer was a lie.[46]

[28] His Honour concluded his reasons with this:

> "As I say, he has been given every opportunity. I am now not required to decide whether I would allow the appeal. However, I should say that on the material placed before me up to today by the

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39 AB 215.
40 AB 215.
41 AB 191.
42 AB 191.
43 AB 191.
44 AB 192.
45 AB 192.
46 AB 192.

> applicant, the conduct of the appeal, the curiosity of him saying that he was in New South Wales when in fact in Queensland on the 25th of March, 2013, would all lead me to have concluded should I have had to decide the appeal, that it should be dismissed."[47]

[29] An application was made for costs, to which his Honour acceded, saying: "The order I made is that the applicant pay the respondent's costs of this appeal including all adjournments".

The application to this Court

[30] An application for leave to appeal was filed on 13 June 2013.[48] Various grounds were listed in that application:

(a) the primary judge misunderstood the applicant's reasons for having the sentence changed from parole to a suspended sentence;

(b) the primary judge did not give the applicant time to appear, as he did not request if a date was free;

(c) the applicant had evidence to present that the Court did not see.[49]

[31] At the hearing of his application the applicant, again appearing by telephone, stated that the only matter that he now wished to agitate was the order for costs. That was because of the fact that in the time which had since elapsed, the applicant was beyond the completion date of his parole. There would, as the respondent submitted, be no utility in varying the sentence to suspend an order, when that time had already passed.

[32] The applicant's outline of argument[50] raised several points which were directed at the costs order made by the learned primary judge. They were:

(a) the order would cause financial hardship, for various reasons to do with debts incurred or accrued during his period of imprisonment, and Family Court proceedings concerning access to his son;

(b) that on 25 March he had just started employment and had no leave to take so that he could go to Brisbane to attend in person; also that he had no driver's licence or vehicle, and found it hard to attend court in Brisbane;

(c) that he had represented himself and felt bullied; he had "attended by telephone twice and was under the impression that the matter would be dealt with on the second occasion";

(d) that the order for costs had been prompted by the learned primary judge.

Discussion

[33] There is no substance in the grounds raised by the applicant. The reasons given by the learned primary judge reveal that he understood perfectly well the applicant's reasons for having the sentence varied from parole to a suspended sentence.

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47 AB 192.
48 AB 219.
49 AB 219.
50 Filed 5 March 2014.

Further, when the matter was originally set for hearing on 22 April 2013, that was a day expressly agreed to by the applicant.[51] However, on 22 April the applicant did not appear in person, but by telephone, and gave no satisfactory explanation for his inability to do so. What was said by the applicant was in an email sent on 19 April 2013[52] which was, "I can not attend this Monday as I have not yet accrued the amount of leave required to take a day off (payslip attached)".[53] He went on, "I am seeking that this matter be adjourned or I am quite prepared to attend by phone as I cannot get time off as I have no leave and am being trained in my new role".[54] Yet the applicant had nearly a month's notice of the day, and had agreed to that day. When the matter was set for 13 May, the applicant did not object that he could not attend, but rather responded with assertions that he would not get a fair hearing and therefore he would go to a higher court.[55]

[34] Insofar as these matters were reflected in the applicant's written outline, they do not advance the applicant's contention. Ultimately the applicant chose not to appear on the final day of hearing. In relation to the hearing on 13 May the applicant's email[56] asserted "I have no transport to get to Brisbane",[57] and he sought that the matter be transferred to Toowoomba. However, the information from the applicant's parole officer was that the applicant had gone to Newcastle to assist his partner to move.[58] The evidence suggests that he went to Newcastle instead. He had been warned twice by the learned primary judge, on 22 April, that if he pressed the appeal and failed, a costs order could follow.[59] Further, he was aware that applications had been filed seeking to have the appeal struck out. If there were truly matters concerning financial hardship the applicant should have attended and raised them on 13 May.

[35] A close review of the transcript does not support the suggestion that the applicant was bullied on the occasions that he appeared by telephone. In fact, the learned primary judge's characterisation of his approach as aggressive was appropriate, as the comments and exchanges recorded in paragraphs [5], [11] and [22] demonstrate.

[36] As for the suggestion that the learned primary judge prompted the application for costs, there is no substance in the complaint. His Honour enquired whether there was an application for costs, and the prosecutor made one. The prospect of an order for costs had been foreshadowed by his Honour on at least two occasions.

[37] Finally, the applicant constantly referred to evidence he might produce, not least of which was evidence relating to his employment contract and from the parole authorities to show the difficulties with getting a timely response to his request to travel for work purposes. However, none was ever produced. Even on the hearing of his application in this Court, nothing was produced.

[38] There are, therefore, no grounds upon which the applicant could succeed in his application for leave to appeal. It was plainly open to the learned primary judge to

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51 AB 176.
52 AB 212.
53 AB 212.
54 AB 212.
55 This is an assertion that seems to be reflected in the email sent on 8 May: AB 215. That email recorded that the applicant had made a formal complaint about the learned primary judge and was seeking to have him discharge himself.
56 AB 215.
57 AB 215.
58 AB 190.
59 AB 185, 186.

strike out the appeal in circumstances where it had been at least twice set down for hearing, and on no occasion had the applicant appeared in person or produced the documents which he said would underpin his case.

[39] Further, I am by no means satisfied that if the appeal had been heard, the applicant could have succeeded. By the time his appeal was listed for hearing, he made it plain that the only aspect remaining was the substitution of a suspended order for the parole order. Given the magistrate's very careful analysis of the facts and comparative sentences, and given his very damning findings as to the applicant's conduct and likelihood of reoffending,[60] in my view it was unlikely that the magistrate's order would have been disturbed by the learned primary judge. Indeed, the learned primary judge said as much when he said in his reasons:

> "However, I should say that on the material placed before me up to today by the applicant, the conduct of the appeal, the curiosity of him saying that he was in New South Wales when in fact in Queensland on the 25th of March, 2013, would all lead me to have concluded that should I have had to decide the appeal, that it should be dismissed."[61]

[40] In respect of the order for costs, the only point taken by the applicant in the hearing before this Court was that because of his financial constraints, that order was burdensome. That is not a ground for finding that the learned primary judge erred in making the order in the first place. The applicant did not prosecute his appeal in an appropriate way, and offered no adequate explanation for his failure to appear when it was finally set for hearing on 13 May 2013. No material was placed before his Honour which would have indicated that the exercise of his discretion required some amelioration because of financial hardship on the applicant's part. Further, whilst it is true to say that the first two appearances on 25 and 26 March were adjourned in part because of the difficulties of conducting an appeal where one party appears by telephone, it is equally the case that the learned primary judge was not prepared to act on the applicant's submissions without supporting documentation, which he did not have. His Honour was therefore right to characterise the adjournments as being for the applicant's benefit.

Conclusion

[41] I would refuse the application for leave to appeal.

[42] **ANN LYONS J:** I agree with the reasons of Morrison JA and the order proposed.

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60 As to which see paragraphs [7]-[9] above.

61 AB 192.