SUPREME COURT OF QUEENSLAND

CITATION:	*R v Benson* [2014] QCA 188
PARTIES:	**R** **v** **BENSON, David Richard** (applicant)
FILE NO/S:	CA No 31 of 2014 DC No 484 of 2014 DC No 6 of 2014 DC No 19 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Hervey Bay
DELIVERED ON:	8 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	20 June 2014
JUDGES:	Fraser and Morrison JJA and Philippides J Separate reasons for judgment for each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence granted.** **2. Set aside that part of the orders made on 7 February 2014 that the offender be imprisoned for a period of 18 months, and in lieu thereof order that the offender be imprisoned for a period of 18 months to be served cumulatively upon the sentence imposed in the Magistrates Court on 14 October 2011.** **3. Otherwise reaffirm the sentence imposed on 7 February 2014.** **4. The Registrar of the District Court amend the Verdict and Judgment Record to include the additional offence of Serious Assault which the Applicant was convicted of on 7 February 2014.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant pleaded guilty to one count of serious assault with circumstances of aggravation and four summary offences – where the applicant had an

extensive criminal record including convictions for assault – where at the time that the offences the subject of this application were committed the applicant was on probation and parole – where in relation to the serious assault the applicant was sentenced to 18 months imprisonment with a parole eligibility date set at one-third and 158 days of pre-sentence custody were declared – where in relation to the summary offences a conviction was recorded and the applicant was not further punished – where s 156A *Penalties and Sentences Act* 1992 (Qld) was not considered – where s 156A requires the applicant serve any further term of imprisonment cumulatively upon any unexpired portion of the earlier sentence – whether the application for leave to appeal should be granted – whether the sentence imposed was manifestly excessive

Corrective Services Act 2006 (Qld), s 190(2)(c), s 193(3)(b), s 209
Penalties and Sentences Act 1992 (Qld), s 156A, s 190(2)(c), s 193(3)(b)

R v Craigie [2014] QCA 1, cited
R v KAC [2010] QCA 39, cited

COUNSEL: The applicant appeared on his own behalf
J A Wooldridge for the respondent

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

[1] **FRASER JA:** I agree with the reasons for judgment of Morrison JA and the orders proposed by his Honour.

[2] **MORRISON JA:** This is an application for leave to appeal against a sentence imposed on 7 February 2014 for an offence of serious assault with circumstances of aggravation. The applicant was sentenced to 18 months imprisonment with an order that he be eligible for parole after serving six months (on 2 March 2014). As part of the sentencing process 158 days of pre-sentence custody was declared as time served under the sentence.

[3] At the same time the applicant also pleaded guilty to summary offences arising out of the same facts, namely assaulting a police officer in the execution of the officer's duty (three charges) and committing a public nuisance. In respect of the summary offences the applicant was convicted, but not further punished.

Circumstances of the offending

[4] On 29 April 2013 several police officers responded to a report of a disturbance between the applicant and a female companion. After attending to the companion, the applicant having departed, they identified that the applicant was on the corner of two nearby streets outside a hotel. When the applicant saw the police he walked off down one of the streets. The officers followed, two on foot and one in the car, but eventually all three officers (Smith, Aitken and Fulcher) were in the police vehicle.

[5] When they located the applicant, Smith and Aitken got out of the police vehicle and asked the applicant to stop. He ignored them and kept walking. The applicant had scratches and dried blood on his face, and appeared dishevelled. Smith and Aitken continued to tell the applicant to stop, when he suddenly turned and approached Aitken in an aggressive manner and shouted, "fuck off" in her face.

[6] Smith told the applicant to calm down and that the officers wanted to talk to him. The applicant then pushed Smith in the chest with both hands, causing Smith to walk back a couple of steps to the edge of the road. At the time the applicant shouted at Smith words to the effect of "what are you going to fucking do about it." At that point Smith pulled out some capsicum spray.

[7] At that time Fulcher was walking towards the applicant from the opposite side. As he approached the applicant turned around and in response to Fulcher telling him to "calm down and settle down", the applicant yelled at Fulcher to "get fucked".

[8] Due to the applicant's demeanour and aggressive behaviour, Fulcher grabbed the applicant's shirt and arm in an attempt to restrain him. At that point the applicant was standing on the steps of a business office, and was a few steps above Fulcher. The applicant punched Fulcher in the left eye, causing immediate pain. The applicant wrapped both of his arms around the back of Fulcher's neck and pulled him towards the applicant. Fulcher felt as if the applicant was trying to choke him and had difficulty breathing. He then felt the applicant's finger hook deep into his left eyeball, causing substantial pain. At that point Aitken grabbed the applicant's arm to pull his hand away from Fulcher's face.

[9] Fulcher continued to wrestle with the applicant, and wrapped his arms around the applicant's body in an attempt to restrain him. In that process Fulcher fell to the ground whilst still interlocked with the applicant. Fulcher felt immediate substantial pain to his left thigh and saw that the applicant was biting his leg. Smith struck the applicant on the back of the head with a closed fist, two or three times, before kneeing the applicant in the top of the head about four times, in an attempt to get the applicant to let Fulcher go.

[10] Fulcher heard Smith yell, "spray" a few times, before his face was filled with the spray and he lost vision. Fulcher continued to hold on to the applicant, and told the applicant to release his arms. The applicant did not do so. Fulcher managed to slip from the applicant's hold.

[11] Smith and Aitken restrained the applicant and handcuffed him. As Fulcher's vision cleared from the spray he saw blood covering his police pants, shoes and shirt, and he had blood on his face.

[12] More police officers arrived to assist. They observed the applicant was spitting and blowing blood from his mouth and nose and yelling and swearing at the police officers. The applicant told police he was positive for Hepatitis C.

[13] The applicant was transported to the Maryborough watchhouse, then to the Maryborough hospital for treatment, and then back to the watchhouse. Fulcher was taken by ambulance to the Maryborough Base Hospital where he was treated for the following injuries:

(a) bite on the upper left thigh – no breach of the skin;

(b) lacerations to his left knuckles; and

(c) mild redness of the left eye with a small bruise on the lower left eyelid.

[14] Fulcher undertook testing for Hepatitis C, including blood tests that were to continue for approximately six months.

The applicant's circumstances

[15] The applicant was born on 29 December 1970 and was thus about 42 at the time of the offences. When he was seen at the Maryborough hospital on the day of the offences he gave some history indicating a little of his own background. This included that he had Hepatitis C, was a previous intravenous drug user and a smoker, and had a history of anxiety depression.

[16] A medical report was tendered at the sentencing hearing and that also indicates something of his background and condition. It states that his current medical management is with "Intermittent Explosive D/O Poly Substance abuse Cluster B personality with antisocial and borderline features and a chronic active Hepatitis C".[1] He had at some previous time been seen by a psychiatrist and was on medications, trying to change his lifestyle from one on drugs, focussing on healthy behaviour.

[17] The applicant's counsel informed the court of the following matters concerning the applicant's condition and antecedents:

(a) he had been diagnosed with bipolar depression and had mental health issues from about 2010, when he was medicated with various medications including sodium valproate;[2]

(b) the applicant had outstanding warrants to answer in South Australia and whilst he was on bail in respect of those charges he was involved in an incident where he was allegedly assaulted by three men with baseball bats and hospitalised; as a result of that he fled South Australia and arrived in Queensland.[3]

The applicant's prior criminal history

[18] The applicant had a very extensive criminal record and traffic record at the time of the offences. He had convictions in Queensland, New South Wales, South Australia, the Northern Territory and Tasmania, and warrants were in existence in Victoria in relation to alleged drug offences. The offences and convictions commenced in 1984 and occurred with a deal of frequency over most of the intervening years until 2013. The entries are too extensive to set out in full and therefore it is convenient to refer only to those involving offences of violence.[4] So far as Queensland is concerned the applicant had convictions for assault related offences in 1998 (two counts), an assault occasioning bodily harm whilst armed in 2011, and an assault against a police office (three counts) in 2011. Each of those convictions resulted in a prison term.

[19] In New South Wales the applicant had assault related convictions as follows:

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1 AB 81.
2 AB 23.
3 AB 24.
4 There are many other offences and convictions including driving offences, property offences, drug offences and fraud.

(a) assault: 1989, 1990 (three counts), 1993, 1994, 1996, and 2000;

(b) assaults occasioning bodily harm: 1990, 1996 and 1998; and

(c) domestic assault: 1992 (two counts).

The offences in 1998 and 2000 resulted in terms of imprisonment.

[20] In Tasmania the applicant was convicted of common assault in 2009, resulting in a prison sentence.

[21] In addition to those mentioned above, convictions also occurred for damage to property in 1993 and 1997 (New South Wales) and 2011 (four counts, Queensland).

[22] To the foregoing must be added the fact that the offences the subject of this application were committed whilst on probation and on parole and on 14 October 2011 he had been convicted of four offences of dangerous operation of a vehicle, four offences of wilful damage, assaulting a police officer (two counts), failing to stop (five counts) and stealing. A 30 month sentence was imposed, with a parole eligibility date of 28 November 2011. The stealing offence resulted in a three year probation period. On the same date he was convicted of failure to appear and a three year probation period was imposed. On 20 June 2012 he was released on parole. Following his arrest in relation to the convictions the subject of this application, he was returned to custody on 30 April 2013 and his parole was suspended. As a consequence he served out the final four months (approximately) of his remaining parole period.

[23] The prosecutor pointed out to the learned sentencing judge that after the applicant was dealt with in Queensland, it was most likely he would have to return to face charges in other states where there were existing warrants for his arrest. That included outstanding warrants in South Australia relating to charges of aggravated assault and aggravated serious criminal trespass.[5] The applicant had been extradited to South Australia on 5 July 2012 to answer those warrants but he subsequently returned to Queensland. However, when he returned to Queensland he did not make contact with Queensland Corrective Services to inform them of his return, as required under his travel permit.[6]

Ground of appeal and applicant's contentions

[24] The sole ground of the proposed appeal is that the sentence was manifestly excessive "because by ordering a parole eligibility date it does not give proper recognition of my plea of guilty".[7] That point was developed in argument in this way:

(a) the learned sentencing judge imposed a sentence of 18 months and fixed a parole eligibility date at 2 March 2014 which was approximately one month after the sentence but six months after he was first taken into custody in respect of these charges; in that way the sentencing judge took into account the 158 days that he had been in custody solely in respect of this matter (about five months) and added on an extra month to get a total of six months which reflected the usual one-third discount given for a guilty plea;

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5 AB 69.
6 AB 69.
7 AB 83.

(b) because the applicant's parole was cancelled and he served out the balance of that sentence, namely four months until it expired on 2 September 2013, this had the effect that the 18 months for the current offence was effectively cumulative upon his previous sentence;

(c) the applicant's counsel advanced a submission that if a parole eligibility date was set "it will be a period of around six months before he can even apply or the process is undertaken before he would even be considered for parole";[8]

(d) that would have the practical effect that the applicant would not be able to get parole for six months after the sentence, with the consequence that, taking into account the pre-sentence custody, he would have effectively been sentenced to 18 months, to serve 12 months and not the six months which the learned sentencing judge had in mind; and

(e) that had the effect of making the sentence cumulative and therefore crushing.

[25] The sentence for which the applicant would contend in the event of his application being successful was 12 months imprisonment with the same parole eligibility date (i.e. after serving six months).[9]

The approach of the learned sentencing judge

[26] During the course of submissions on sentencing the applicant's counsel raised the fact that there was authority of this Court which bound the learned sentencing judge to impose a parole eligibility date, rather than a fixed release date, because the applicant had committed the offence while on parole. It was then submitted that if a parole eligibility date was imposed, it would be a period of around six months before he would end up being considered for parole in which case the time actually served would not properly reflect the normal discount for a plea of guilty.[10] What was urged was a 12 month sentence suspended immediately so that the applicant could return to South Australia and surrender himself to authorities there. Part of the submission made was that the applicant could be extradited even if a parole eligibility date was imposed. Further, the fact that there were outstanding warrants in South Australia was something that might potentially hamper the applicant's parole prospects.[11]

[27] The sentencing remarks make it clear that the learned sentencing judge was well aware of the contention advanced. Having reviewed various matters including the injuries inflicted upon the police officer his Honour said:

> "It seems to me that the appropriate sentence, head sentence, is one of 18 months. I'm told that I can only fix a parole eligibility date and Ms Prskalo has eloquently urged upon me that because of various problems which he will face, so far as a parole eligibility is concerned,

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8 AB 26 and 31.
9 Applicant's Outline of Submissions, filed 2 Jun 2014, para 15.
10 AB 26.
11 AB 26.

> that I should suspend the sentence. Then again it seems to me that if there are those difficulties which she has outlined, and I accept there's force in what she tells me, again it's very much of your own making. It seems to me you are someone who does need supervision on your release and for that reason alone I would not be prepared to make a suspended sentence.
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> Insofar as the matters – the indictable matters is concerned I order that you be imprisoned for 18 months. I fix your parole eligibility date as the 2nd of March 2014 which is, I think, six months after that – you were taken into custody which reflects one third which is I think is common place [sic] now in respect of reflecting pleas of guilty. I declare that you've been in custody, solely in respect of this matter, for 158 days …".[12]

[28] After the orders were made the applicant's counsel pressed the contention again, on the basis that she may not have made her submission clearly enough, that the applicant would not be able to get parole for six months and therefore there should be a moderation of the head sentence because otherwise the effect would be to sentence him to 18 months to serve 12 months. The learned sentencing judge's responses[13] plainly reveal that his Honour fully understood the submission being made, and the principle behind it. That did not deter the applicant's counsel from pressing the matter again, pointing out that because prisoners were required to apply for parole six months in advance, the applicant would effectively serve 12 months. If that were so, and the 12 months reflected the one-third discount, the head sentence was notionally around three years.[14]

[29] His Honour then said that he understood what was being said, but was not minded to change the order he had made.

Discussion

[30] The applicant's contentions face a number of hurdles borne out of the serious nature of the offences, the applicant's deplorable criminal record and the fact that the offences were committed whilst on probation and parole.

[31] First, the circumstances of the offence reveal a serious assault on police officers carrying out their duty. The assault was verbal as well as physical and injury was caused to one police officer in particular. Even though the applicant's bite did not break the skin, the fact that the applicant has Hepatitis C would have caused considerable anxiety, as the officer's victim impact statement revealed. It must be borne in mind that the applicant used his fingers to gouge into the officer's eye as well as biting his left leg. The victim impact statement reveals that the officer has had to undergo periodic tests before it will be established that he is clear of infection with Hepatitis C. The possibility of that infection has had an impact on his interaction with his family as well as an impact upon his professional life.

[32] Secondly, the offence was a serious one, committed by the applicant as a mature man, with an extensive criminal history which includes convictions for offences of violence. His criminal record, as well as the circumstances in which these offences

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12 AB 30-31.
13 AB 31 and 32.
14 AB 32.

were committed (whilst on parole and probation) clearly point to the applicant's poor history in terms of compliance with supervision orders. In those circumstances the respondent submits, and rightly so, that matters of personal deterrence were significant and the learned sentencing judge was entitled to consider the applicant's prospects of rehabilitation as questionable.

[33] Thirdly, no attack is made upon the learned primary judge's refusal to impose a suspended sentence. Given the matters mentioned above, no attack could reasonably be made in that respect. His Honour expressed it in this way:

> "It seems to me you are someone who does need supervision on your release and for that reason alone I would not be prepared to make a suspended sentence."[15]

[34] That being so, his Honour's options were constrained. Both the prosecutor and the applicant's counsel submitted there was binding authority which dictated that, because the offences were committed whilst on parole, only a parole eligibility date could be fixed, and not a fixed date for release. Accepting that to be so, as the learned sentencing judge did, he was then confronted with the fact that the applicant had already been in custody for some five months (158 days) as at the date of sentencing. That being so, the only options open in terms of setting a parole eligibility date were to:

(a) select 2 March 2014, thus reflecting a parole eligibility date at six months from the start of custody and thus ultimately reflecting the one-third approach to recognise the plea of guilty; or

(b) set an earlier parole eligibility date, such as at the date of sentencing, namely 7 February 2014.

[35] If the second alternative was followed, however, that would have had little practical effect on the situation which confronted the applicant. His contentions before this Court are based upon the fact that it will take some time to achieve parole and that he will, therefore, have served a substantial proportion of the 18 month sentence by the time parole is achieved. However, that would be the case in any event if the parole eligibility date had been set as at the date of sentencing. This Court was not provided with any material which would shed light on whether, in the time since being sentenced, the applicant had actually made any application for parole.[16] In that circumstance it is difficult to conclude that there has been any real impact upon the applicant by reason of the parole eligibility date selected by the learned sentencing judge. It follows that it is difficult to conclude that any error was involved.

[36] Fourthly, the applicant's contentions are that in the circumstances where parole could not be obtained for some six months after the date of sentencing, the overall sentence should have been reduced to, say, 12 months so that less time would be served overall once parole is achieved. I am not persuaded by this contention. Whether parole is actually achieved is a matter for the parole authorities, as is any time delay consequent upon the way in which they perform their responsibilities. To take the approach which the applicant urges would have the result that by giving weight to

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15 AB 31.

16 Under the *Corrective Services Act* 2006 (Qld), s 190(2)(c) permits a prisoner to apply for parole at any time within 180 days before the parole eligibility date. The period of six months allowed by s 193(3)(b) for the Parole Board to decide such an application is a maximum period. See *R v Craigie* [2014] QCA 1, at [19].

those matters an inadequate sentence would be imposed. Absent consideration of the contended six month delay in being able to apply for parole, it could not be said that 18 months imprisonment was an excessive penalty in the circumstances of the particular offences, the applicant's history (particularly of offences of violence and against police), and his poor level of compliance with previous supervisory orders. One must bear in mind that this assault, involving the risk of the victim being infected with Hepatitis C, was one carried out in a violent way against police officers performing their duty. Further, the maximum penalty for that offence was 14 years imprisonment. The introduction of a circumstance of aggravation to the offence of serious assault, and the increase in its maximum penalty, both effective in August 2012, reveal that the legislature had determined that offences of this sort should attract a greater penalty. In those circumstances I am not persuaded that 18 months would be excessive, but I am of the view that 12 months would be inadequate.

[37] Fifthly, in my view the learned sentencing judge was correct in considering that if the applicant faced difficulties in securing parole, they were difficulties which were very much of his own making. The applicant's deplorable history, which demonstrate breaches of supervisory orders, and the fact that the current offences were committed whilst on parole and probation, were the product of the applicant's own conduct. That history and conduct may well present difficulties in securing parole, but that is not something which the court can cure.

[38] For these reasons I do not consider that the applicant's contentions should be accepted.

Correction to orders imposed

[39] Upon his apprehension for these offences the applicant's parole was suspended on 1 May 2013. From that date until 2 September 2013 (the then full-time discharge date under the sentence) the applicant was being held in custody under the sentence imposed in the Magistrates Court on 14 October 2011, and was not serving a period of imprisonment that could be declared as time served under the current sentences.[17]

[40] Upon conviction of the current offences on 7 February 2014 the applicant's parole was cancelled pursuant to s 209 of the *Corrective Services Act* 2006. The evidence before this Court from the Department of Corrective Services[18] is that the applicant, as at the date of his sentence on 7 February 2014, had two days remaining to be served under the sentence imposed on 14 October 2011. That was constituted by the day of the commission of the offences and the day prior to his parole order being suspended on 1 May 2013. The effect of the conviction on 7 February 2014 was to extend the full-time discharge date of the sentence imposed on 14 October 2011 to 9 February 2014, being two days after the sentence was imposed.[19]

[41] Section 156A of the *Penalties and Sentences Act* 1992[20] provides that the learned sentencing judge was required to order the applicant to serve any further term of imprisonment cumulatively upon any unexpired portion of the earlier term of imprisonment imposed on 14 October 2011.[21]

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17 The period from 3 September 2013 to 6 February 2014, being the day prior to the sentence hearing, as well as one earlier day (30 April 2013) was declared as time served.

18 Annexure "B" to the Respondent's Outline of Submissions, filed 17 June 2014.

19 Page 2 of Annexure "B" to the Respondent's Outline of Submissions.

20 As it stood at the time the applicant was sentenced on 7 February 2014.

21 This is because the offence of Serious Assault under s 340 of the *Criminal Code* is an offence in Schedule 1 to the *Penalties and Sentences Act* 1992. Therefore, s 156A is applicable.

[42] It appears that the learned sentencing judge was not alerted to the application of s 156A, nor to the two days which were yet to be served under the sentence imposed on 14 October 2011. The sentence imposed by his Honour should have, by operation of s 156A, been ordered to be served cumulatively upon the prior sentence.

[43] However, even though that error was made, and should be corrected, it is not an error which would have made any material difference to the sentence imposed by the learned sentencing judge. It therefore does not mean that this Court should exercise its own sentencing discretion afresh.[22] If that error is corrected it will only have the effect of extending the full-time discharge date by two days and will have no effect on the parole eligibility date.

Correction of Verdict and Judgment Record

[44] The respondent has drawn to this Court's attention that the Verdict and Judgment Record for the summary offences is incorrect.[23] It records only three charges (two of assault and one of public nuisance), but there is a fourth, namely serious assault.[24] The record indicates that the applicant was arraigned on this fourth charge and the allocutus was administered in relation to this charge.[25] The prosecution during the sentencing hearing,[26] and the learned primary judge in sentencing the applicant,[27] both referred to there being four summary charges.

[45] I am satisfied that the Verdict and Judgment Record that records the summary offences is incomplete and would direct the Registrar of the District Court to correct this omission.

Conclusion and orders

[46] For the reasons given above I would correct the error caused by the omission to deal with the effect of s 156A and the cumulative effect of the order, but otherwise refuse the application. The orders I propose are:

1. Grant the application for leave to appeal against sentence.

2. Set aside that part of the orders made on 7 February 2014 that the offender be imprisoned for a period of 18 months, and in lieu thereof order that the offender be imprisoned for a period of 18 months to be served cumulatively upon the sentence imposed in the Magistrates Court on 14 October 2011.

3. Otherwise reaffirm the sentence imposed on 7 February 2014.

4. The Registrar of the District Court amend the Verdict and Judgment Record to include the additional offence of Serious Assault which the applicant was convicted of on 7 February 2014.

[47] **PHILIPPIDES J:** I agree with the orders proposed by Morrison JA for the reasons set out in his Honour's judgment.

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22 *R v KAC* [2010] QCA 39 per Keane JA at [17]-[18].
23 AB 15.
24 AB 12-13.
25 AB 18.
26 AB 17.
27 AB 30.