SUPREME COURT OF QUEENSLAND

CITATION:	*R v Getawan* [2014] QCA 235
PARTIES:	**R** **v** **GETAWAN, Henry Raymond** (applicant)
FILE NO/S:	CA No 118 of 2014 DC No 523 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	19 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2014
JUDGES:	Holmes and Morrison JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE – PERVERTING THE COURSE OF JUSTICE – where the applicant pleaded guilty to one count of attempting to pervert justice – where the applicant was sentenced to 15 months' imprisonment with immediate parole – where the applicant had been charged with offences including burglary and attempted robbery – where the applicant, while on remand, made numerous telephone calls to his 18 year old fiancée to urge her to dissuade her sister and another friend by threats from giving evidence against him – where the applicant's fiancée did not communicate the threats to the other girls, both of whom gave evidence at the applicant's trial – where the applicant was acquitted – where the applicant contends that the sentencing judge was prejudiced against him – where the applicant contends the sentencing judge did not take into account his early plea of guilty, other mitigating circumstances and the fact the immediate parole release date would have no impact because he faced other charges – whether the sentence was manifestly excessive *Penalties and Sentences Act* 1992 (Qld), s 159A(4A) *R v Harnden* [2003] QCA 340, considered

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

[1] **HOLMES JA**: Having pleaded guilty, the applicant was convicted of one count of attempting to pervert justice and was sentenced to 15 months' imprisonment with immediate parole. He seeks leave to appeal that sentence on the ground that it is manifestly excessive.

The offence

[2] In September 2011, indictments were presented against the applicant for offences including burglary and attempted robbery. Three other people were also charged: the applicant's then 16 year old fiancée, T; her 15 year old sister, M; and their 17 year old friend, C, who had been in a relationship with their brother. After being charged, all three young women gave accounts to police admitting their involvement in the offences and implicating the applicant.

[3] Between 30 April 2013 and 27 May 2013, the applicant, who was remanded in custody at that time, made a number of telephone calls to T (by this time aged 18 years old), which were monitored. In those calls, he attempted to pervert the course of justice by urging T to speak to M and C in order to discourage them from giving evidence at his trial. He suggested various bases on which the young women would be disadvantaged by giving evidence: C and M could not be a part of the bridal party at the intended wedding of the applicant and T; they would be cross-examined about an alleged sexual assault by T's brother; M's evidence would put their brother in jail; his barrister would "chop [M] up"; the applicant's sister would kill M; his relationship with T would end if M gave evidence; he would have to stay away from M if she gave evidence or he would kill her. T gave a statement in which she said that she did not convey any of those messages to C or M, notwithstanding the appellant's repeated instructions to do so. Both C and M gave evidence against the applicant at his trial on 27 May 2013; he was acquitted.

The applicant's antecedents

[4] The applicant was 40 when the offence was committed. He had a lengthy criminal history, much of it for drug possession charges dealt with in the Magistrates Court by fine or community service, street offences and breaches of bail, community service orders and fine option orders. More significant were his offences of dishonesty: in 1995, he was convicted of obtaining payment of a benefit to which he was not entitled and placed on a good behaviour bond for twelve months; in 2012, he was sentenced to various terms of imprisonment between one and five months on two charges of receiving tainted property, two charges of stealing and one charge of unlawful use of a motor vehicle; and in 2013 he was sentenced to time already served (309 days and 208 days respectively) on counts of fraud and receiving tainted property dishonestly. A significant consideration in respect of that sentence was that the period for which he had been held on remand was the product of a number of charges, many of which did not proceed.

The submissions on sentence

[5] The prosecutor referred the sentencing judge to the decision of this court in *R v Harnden.*[1] The applicant in that case was sentenced after a trial to two years' imprisonment on one count of attempting to pervert the course of justice. He had approached his former girlfriend who had given a statement against him in a criminal matter. In their conversation, he twice told her that if she did not retract the statement and he went to jail, he would hunt her down and shoot her on his release. That applicant was 33 years old and had a significant criminal history containing a number of offences of dishonesty, assault and street offences. It was put in mitigation that he had had an abusive and violent childhood; his work history was good; and he had a supportive partner. His application for leave to appeal against his sentence of two years' imprisonment (imposed concurrently with another sentence of fourteen months' imprisonment) was refused. Significantly, two years' imprisonment was the maximum penalty for the offence at that time.

[6] At sentence in the present case, the prosecutor submitted that the time declarable as already served was 17 days between 29 August 2013 and 16 September 2013, while the judge could take into account a further period of 79 days between 11 June 2013 and 29 August 2013, although it was not capable of being declared. He was not in a position to provide the sentencing judge with a pre-sentence custody certificate, notwithstanding the requirement of s 159A(4A) of the *Penalties and Sentences Act* 1992:

> "To help the sentencing court for the purposes of [declaring the time taken to be imprisonment already served] the prosecuting authority must give to the court a presentence custody certificate."

[7] The applicant's counsel sought to distinguish *Harnden* on the basis that it involved a direct threat, whereas the applicant had made threats through an intermediary, which were not in fact delivered. It was an early plea of guilty: the matter had been proceeding to trial only because there was originally a count of perjury, which had been the subject of a nolle prosequi. It was submitted that, taking into account the significant period that the applicant had served on the earlier fraud and receiving counts and the 79 days spent in custody which could not be declared, the sentencing judge should order an immediate release on parole. Counsel pointed out, however, that the applicant remained in custody on receiving charges which were to be dealt with shortly and would also have to apply for bail on other charges on which he was remanded in custody.

The sentencing remarks

[8] The sentencing judge remarked that the 309 day period that the applicant had served on remand before being dealt with for the earlier fraud and receiving tainted property charges was longer than those offences would actually have warranted; a fact which he would now take into account. The witnesses with whom the applicant was attempting to interfere were young girls, and he had put pressure on his former fiancée, T. The applicant seemed to operate almost as a Fagin, preying on children to achieve his results. The offence of attempting to pervert the course of justice was to be viewed very seriously, a matter to be reflected in the head sentence. *Harnden* involved, however, a more serious set of facts. His Honour sentenced the applicant to 15 months' imprisonment, fixing the parole release date as the date of sentence.

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1 [2003] QCA 340.

He declared the period of 17 days for which the applicant had been in custody on the charge as time served under the sentence. At the end of his remarks, his Honour observed that because of other matters the applicant would not be released. It would be up to the magistrate dealing with those matters the following week what happened next.

The applicant's submissions in this Court

[9] The applicant complained that the sentencing judge mentioned in his sentencing remarks that one of the girls had given impressive evidence at the robbery trial, also observing during submissions that she "gave it very well, but the jury didn't think so". That indicated, the applicant submitted, prejudice against him. However, his Honour's sentencing remarks should be placed in context. After noting that T's statement was to the effect that she was merely "stringing [the applicant] along", he observed

> "That seems to be consistent with what did happen because those two young girls did give evidence in the trial against you and as I said earlier, one of them gave what I thought to be quite impressive evidence".

It is plain in that context that his Honour was merely emphasising that the witnesses had not been deterred. The applicant also complained of what he said was a "personal slur", presumably a reference to the "Fagin" remark. However, the applicant's behaviour in committing the offence, as a 40 year old dealing with his 18 year old fiancée and intending through her to intimidate the other girls, was manipulative in the extreme. The sentencing judge's observation was apt.

[10] The applicant argued that he should have received a significantly shorter sentence than that imposed in *Harnden*, because the applicant in that case had made a direct death threat to a witness, whereas his threats were conveyed via his fiancée and not actually passed on. Against that, though, is the fact that his conduct was persisted in over some weeks, rather than being limited to a single incident; and, more fundamentally, the applicant in *Harnden* received the highest sentence then available for the offence of attempting to pervert justice. Since that case was decided, the legislature has seen fit to increase the maximum penalty very substantially, to seven years imprisonment.[2] The offence is one of extreme seriousness. As has often been observed, it is a crime which strikes at the heart of the justice system and requires a salutary penalty.[3]

[11] The applicant contended that the sentence was manifestly excessive, having regard to: his early plea of guilty; that this was the first time he had been convicted of a charge of this type; that there was a period between 1999 and 2008 when he had acquired no convictions, as he had been a missionary in Africa; and that the order for his release on immediate parole was rendered nugatory by his having to remain in custody on other charges, an outcome which the sentencing judge could not have intended. His Honour had himself observed that the applicant had spent a long time in jail, although charges had been dropped or significantly reduced.

Conclusions

[12] The sentencing judge did make the observation about the earlier period the applicant had spent on remand and did take that fact into account, although it was entirely

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2 By s 45 of the *Justice and Other Legislation Amendment Act* 2003 (Qld).

3 *R v Harnden* [2003] QCA 340 at [24], [32]; *R v West* [2012] QCA 365 at [29]; *Ranford v Western Australia (No 2)* (2006) 166 A Crim R 451 at 461; *R v Purtell* [2001] NSWCCA 21 at [12].

unconnected with the present charge. The applicant's guilty plea plainly was reflected in a sentence which required no further period in custody; whether he was able to obtain his release on other charges was beyond the sentencing judge's control. His Honour was certainly aware, from his concluding remark, that his order would not result in the applicant's release. The fact that the applicant had managed not to be convicted during a period spent out of the country and had not previously committed an offence of precisely this type indicated a lack of features which might have made his offending worse, rather than amounting to mitigating circumstances.

[13] Finally, the applicant contended that the full extent of his pre-sentence custody was not taken into account. He asserted that the correct pre-sentence custody dates were between 30 April 2013 and 16 September 2013 and between 17 December 2013 and 10 April 2014, the date of sentence. It does not seem, however, that the applicant's asserted dates for the first period can be correct, because 30 April 2013 was the start date for this offence and 27 May 2013 the end date; it seems improbable that he was held in custody in respect of it before he had finished committing it. In addition, the two periods of 208 days and 309 days accepted as time served on his earlier fraud and receiving tainted property offences included a period between 28 November 2012 and 24 June 2013. He cannot, then, have been in custody for no other reason than the present charge before the latter date. The court order sheet shows that when the indictment was presented on 12 December 2013 the applicant's bail on this charge was enlarged, and there is no indication it was ever revoked; so no basis is shown for his claim that the later period should have been declared.

[14] It is unsatisfactory that no pre-sentence custody certificate was before the court at first instance, but I would not be prepared to act on the applicant's assertion that there was some period wrongly not taken into account. Counsel for the respondent on the appeal undertook to have the relevant certificate provided to the applicant. If indeed he should be able to substantiate some error in relation to the pre-sentence custody declared, he can apply to the court which sentenced him for a re-opening of the sentence under s 188 of the *Penalties and Sentences Act* 1992 on the basis that it was decided on a clear factual error of substance.

[15] The head sentence imposed on the applicant of fifteen months' imprisonment was within a proper exercise of discretion, having regard to the circumstances of the offending and his previous criminal history. Mitigating factors, such as there were, were clearly accorded very substantial weight, resulting in the setting of an immediate parole release date. The considerable lenience of that sentence is unaffected by the fact that the applicant remains on remand for other offences.

Order

[16] I would refuse the application for leave to appeal against sentence.

[17] **MORRISON JA:** I have had the advantage of reading the reasons of Holmes JA and agree with those reasons and the order she proposes.

[18] **ATKINSON J:** I agree with the reasons for judgment of Holmes JA and the order proposed by her Honour.