SUPREME COURT OF QUEENSLAND

CITATION:	*R v Murray* [2014] QCA 250
PARTIES:	**R** **v** **MURRAY, Kerry Anne** (applicant)
FILE NO/S:	CA No 192 of 2014 DC No 19 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Warwick
DELIVERED ON:	7 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	3 October 2014
JUDGES:	Fraser, Gotterson and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant the application for leave to appeal against sentence.** **2. Allow the appeal.** **3. Set aside the sentence imposed in the District Court.** **4. The applicant is sentenced to imprisonment for nine months with the parole release date fixed at 7 October 2014.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to assaulting a police officer whilst the police officer was acting in the execution of his duty with the circumstance of aggravation that the applicant spat on the police officer – where the applicant was sentenced to 15 months imprisonment to be released on parole after serving 5 months – where s 340(1)(b) of the *Criminal Code* was amended in 2012 to increase the maximum penalty for this offence to 14 years imprisonment – where the applicant is 19 years old and has a one year old child – where the absence of any comparable sentencing decision after the increase in the maximum penalty makes it necessary to refer to earlier cases – whether the sentence was manifestly excessive

Criminal Code 1899 (Qld), s 340

Barbaro v The Queen; Zirilli v The Queen (2014) 88 ALJR 372; [2014] HCA 2, cited
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, cited
R v Barry [2007] QCA 48, considered
R v Brown [2013] QCA 185, cited
R v CBI [2013] QCA 186, cited
R v Chong; Ex parte Attorney-General (Qld) (2008) 181 A Crim R 200; [2008] QCA 22, distinguished
R v King (2008) 179 A Crim R 600; [2008] QCA 1, considered
R v Laskus [1996] QCA 120, considered
R v McConachy [2011] QCA 183, cited
R v McLean (2011) 212 A Crim R 199; [2011] QCA 218, considered
R v Samad [2012] QCA 63, cited

COUNSEL: R East for the applicant
J A Wooldridge for the respondent

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

[1] **FRASER JA:** On 14 July 2014 the applicant pleaded guilty to an offence that on 8 December 2013 she assaulted a police officer whilst the police officer was acting in the execution of his duty, with the circumstance of aggravation that the applicant spat on the police officer. The applicant was sentenced to imprisonment for 15 months with an order that she be released on parole on 13 December 2014, when she will have served five months in custody.

[2] Section 340 of the *Criminal Code* 1899 creates offences called "serious assaults". Relevantly here, s 340(1)(b) provides that "[a]ny person who… assaults, resists, or wilfully obstructs, a police officer while acting in the execution of the officer's duty…is guilty of a crime." The section was amended by Act No. 19 of 2012, with effect from 29 August 2012, to include the following maximum penalty provision:

> "Maximum Penalty–
> (a) for subsection (1)(b), if the offender assaults a police officer in any of the following circumstances –
> (i) the offender bites or spits on the police officer or throws at, or in any way applies to, the police officer a bodily fluid or faeces;
> (ii) the offender causes bodily harm to the police officer;
> (iii) the offender is, or pretends to be, armed with a dangerous or offensive weapon or instrument – 14 years imprisonment; or
> (b) otherwise – 7 years imprisonment."

Before that amendment, the maximum penalty for any serious assault under s 340 was seven years imprisonment.

[3] The applicant has applied for leave to appeal against her sentence on the grounds that the sentence was manifestly excessive and that her "young motherhood was overlooked in the exercise of the sentencing discretion."

Circumstances of the offence and applicant

[4] The circumstances of the offence were described in an agreed schedule of facts. Police officers attended a Warwick address at about 2.00 am on 8 December 2013 in response to reports of a disturbance. The applicant was one of a number of people yelling and swearing in the front yard. She was intoxicated and highly agitated. She verbally abused the complainant police officer and another officer. After she was warned about her behaviour she was detained in relation to a different matter. She attempted to pull away from the officers and was handcuffed and put in the back of a police car. She hit the windows of the car with her handcuffs before being driven to the Warwick watch house. At the watch house the applicant verbally abused the complainant and another officer who escorted her inside. When they reached the charging area, the complainant asked the applicant to take a seat. She refused. The complainant approached the applicant and took hold of her arms to attempt to manoeuvre her into the seat. The applicant spat saliva into the complainant's face, hitting his eyes and mouth. The applicant was then restrained by the complainant and another officer before the complainant left to wash his face.

[5] The complainant attended Warwick Base Hospital and provided a blood sample. Negative results were obtained for hepatitis and HIV. Negative results were also obtained on a further test in June 2014. The complainant is to be tested once more in December 2014. The prosecutor informed the sentencing judge that the complainant did not want to provide a victim impact statement, he was still undergoing disease testing with one test remaining, and this had provided concern and a lot of stress for him.

[6] The applicant was 19 years old when she committed the offence. She has a baby who was one year old when the sentence was imposed. When the applicant was 16 years old she was reprimanded in the Children's Court, with no conviction recorded, in mid-May 2011 and again in mid-June 2011. The first appearance concerned six public nuisance offences and one offence of obstructing a police officer. The second appearance concerned six public nuisance offences. The applicant is an indigenous person who had grown up without the opportunities that many in the community take for granted. She completed Grade 12 at school and worked at a shop before having her child. She lived with her family in Dalby and was in a relationship with her child's father. When the applicant committed the offence she was at her mother-in-law's house and had became upset and intoxicated during a domestic dispute. The applicant did not have any diseases. She wrote a letter of apology to the complainant in which she acknowledged that what she had done was disgusting and that there was no excuse for her actions, she expressed her sorrow to the police officer and her disgust in herself, and she expressed a hope for some forgiveness. The applicant entered a plea of guilty at the first opportunity.

The sentence hearing

[7] At the sentence hearing the prosecutor emphasised the applicant's history of offending when she was a juvenile, the escalation in her offending in this much more serious offence, and the complainant police officer's stress and concern whilst

he was awaiting test results. Defence counsel acknowledged the serious features of the offence and that the officer would be undergoing tremendous stress and worry. He referred to the applicant's personal circumstances and argued that the separation of the applicant from her child whilst the applicant was incarcerated was a real punishment for both of them. The prosecutor and defence counsel both made submissions about previous sentencing decisions and the effect of the recent increase in the maximum penalty for this offence from seven to 14 years imprisonment.

[8] The sentencing judge described the circumstances of the offence and some of the applicant's personal circumstances. He referred to the applicant's child only in remarks that at the time of the offence "you had a four or five month old baby" and that "at the time that you were drunkenly abusing and spitting on this officer in the front yard of the house, somewhere else in Warwick, perhaps in that house, was your four or five month old child." After referring to sentencing decisions, the sentencing judge noted that after those decisions Parliament increased the maximum penalty for the offence from seven years imprisonment to 14 years imprisonment, thereby indicating the grave concern Parliament held about the seriousness of offences of this nature. The sentencing judge observed that the Court should listen when Parliament speaks. He stated that he had taken account of all of the submissions and the applicant's early plea of guilty.

Submissions on appeal

[9] In this Court the applicant's counsel acknowledged the serious features of the offence and he referred also to mitigating factors: the applicant was still a teenager when she offended and when she was sentenced; she entered an early plea of guilty (the significance of which must be tempered by the fact that there was an overwhelming case against the applicant because the offence was recorded on CCTV and witnessed by another officer); she had written a letter of apology to the police officer; she was a young mother whose child was about one year old at the time of sentence; and her incarceration and separation from the child represented a further, real punishment. Counsel pointed out that the applicant's prior convictions occurred two and a half years prior to this offence when she was a juvenile, and they were relatively minor.

[10] The applicant's counsel acknowledged that the increase in the maximum penalty must be taken into account but he submitted that it did not automatically follow that head sentences imposed before the increase should be doubled. He argued that an analysis of the comparable sentencing decisions, all of which pre-dated the increase in the maximum penalty, demonstrated that the sentence was outside the sentencing judge's discretion. Counsel argued that the applicant's status as a young mother with a young child was taken into account only in the context of condemning her ability as a mother. He argued that hardship to an offender's child may be taken into account when the offender is the mother of young children or imprisonment would result in the children being deprived of parental care.

[11] The applicant's counsel also contended that the appropriate sentence was six to nine months imprisonment, with release on parole upon the hearing of the application in circumstances in which the applicant had served more than two months in custody. The submission about the available range of sentences should be disregarded. In *Barbaro v The Queen; Zirilli v The Queen* (2014) 88 ALJR 372 at 377 [28], French CJ, Hayne, Kiefel and Bell JJ (Gageler J dissenting) held that a "conclusion

that an error has (or has not) been made neither permits nor requires setting the bounds of the range of sentences within which the sentence should (or could) have fallen" and that, if a sentence is set aside on the ground that it is manifestly excessive or manifestly inadequate, fixing a different sentence in the re-exercise of the sentencing discretion "neither permits nor requires the re-sentencing court to determine the bounds of the range within which the sentence should fall".

[12] The respondent's counsel argued that the sentencing judge was aware that the applicant was a mother of a one year old child, a fact which had been clarified in the course of submissions in mitigation. It was not submitted at the sentence hearing that the child would not adequately be cared for by the child's father or other family members. Because actual custody was in any event required, the relevance of any additional family hardship resulting from an additional period of incarceration beyond that for which the applicant contended was negligible. This case was unlike *R v Chong; ex parte Attorney General (Qld)* [2008] QCA 22, in which a mother sentenced on Mornington Island was given immediate parole in circumstances in which she was still breast feeding her child, the breast feeding would have to cease immediately if she were taken into custody, there were no facilities for the baby to be breast fed in custody, the baby could not be flown to the prison with her, the offender was a responsible mother of seven children, and her removal to the mainland far away from the children without any practical means of personal contact or visits was significant. Nor was there any other evidence that the applicant's child would suffer exceptional hardship upon her incarceration, such as in *R v McConachy* [2011] QCA 183. The respondent's counsel submitted that the applicant's motherhood could not overwhelm the requirement that retribution and deterrence be taken into account in the sentence. She argued that the applicant had failed to identify any error in the exercise of the sentencing discretion.

[13] Both counsel referred to decisions concerning the effect of increases in maximum penalties for offences.

Consideration

[14] The sentencing judge referred to the circumstance that the applicant was the mother of a young child only in the context of an apparent criticism of her conduct as a parent and in a passage which mistakenly assumed that the child was in Warwick. There was no evidence on that topic; the applicant's baby might instead have been with the applicant's family in Dalby where the applicant lived. Even so, there is no sufficient basis for disregarding the sentencing judge's statement that he had taken into account of all of the submissions for the applicant. I do not accept the ground of appeal that the applicant's young motherhood was overlooked by the sentencing judge. The real question is whether or not the sentence was manifestly excessive, or in other words whether the sentence "is unreasonable or plainly unjust" such that it should be inferred "that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance": *House v The King* (1936) 55 CLR 499 at 505.

[15] The applicant acknowledged the seriousness of her offence in her letter of apology to the police officer. The most serious features of her offence were that it was a deliberate and disgusting act, it was committed against a police officer who was merely doing his lawful duty, it showed a contempt for lawful authority which was greater than in some other cases because it occurred in a police station, and the police officer experienced and may still be experiencing anxiety whilst awaiting test results.

[16] It is also plain that the maximum penalty of 14 years imprisonment for this offence must be taken into account. As Gleeson CJ, Gummow, Hayne and Callinan JJ observed in *Markarian v The Queen* (2005) 228 CLR 357 at 372 [31], "careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick." Whilst it is to be expected that the increase in the maximum penalty for the particular offence of which the applicant was convicted will lead to more severe penalties for that offence (see *R v Benson* [2014] QCA 188 at [36] per Morrison JA), "[i]t does not necessarily follow from the fact of an increase in the maximum penalty that all such offences committed after the amendment came into effect should attract a higher penalty than they previously would have" (*R v Samad* [2012] QCA 63 at [30] per Wilson AJA). Nor should a doubling of the maximum penalty necessarily result in a doubling of sentences at all levels (see *R v SAH* [2004] QCA 329 at [12] – [13].) The respondent's counsel endorsed the following remarks I made in *R v CBI* [2013] QCA 186 at [19] about an increase in a different maximum penalty:

> "Those changes in the sentencing regime for this offence, especially the substantial increase in the maximum penalty, are significant. It is to be expected that they would produce a general increase in the severity of sentences, rendering the earlier cases of little utility as comparable sentencing decisions. That is so even though, as the applicant submitted, the increase in the maximum penalty should not necessarily be reflected in proportionate increases in sentences."
> (I have omitted the citations to cases in that passage.)

[17] In this case the absence of any comparable sentencing decision after the increase in the maximum penalty makes it necessary to refer to the earlier cases, if only to shed light upon the circumstances in which the increased maximum was enacted. The relevant decisions were analysed in *R v Brown* [2013] QCA 185. It is not useful in this case to refer to decisions in which the penalty reflected spitting at a police officer as well as other significant assaults. I will discuss only the decisions in which the penalty was wholly or at least very substantially attributable to spitting at a police officer, namely, *R v Laskus* [1996] QCA 120, *R v Barry* [2007] QCA 48, *R v King* (2008) 179 A Crim R 600, and *R v McLean* (2011) 212 A Crim R 199. In each of those cases the offender pleaded guilty.

[18] In *Laskus*, the Court refused leave to appeal against four months imprisonment suspended after two months for an operational period of 12 months. Byrne J dissented, holding that "immediate imprisonment was far too severe a sanction having regard to the circumstances of the offence and the personal circumstances of the offender… a momentary loss of temper and control by a young, pregnant first offender who, albeit inappropriately, perceived that her explanations of an entitlement to the $60 [about which there was a dispute] were being unreasonably rejected by the police officer." The maximum penalty was then three years imprisonment. It was increased to seven years imprisonment in 1997. Unlike the applicant, that offender was not regretful and she did not offer any apology to the police officer for her actions. Although that offender was pregnant, her imprisonment did not involve the increased burden suffered by the applicant of being separated from her baby. The circumstance that the applicant's imprisonment would separate her from her baby was certainly relevant to sentence even though it was not nearly as significant as the

quite exceptional circumstances in *R v Chong; ex parte Attorney-General (Qld)* or those in *R v McConachy*. Having regard to all of those circumstances whilst giving full weight to the increase in the maximum penalty from three years imprisonment to 14 years imprisonment, the fact that the sentence in *Laskus* was found to be not manifestly excessive provides no support for the sentence imposed upon the applicant.

[19] In *Barry*, the Court refused leave to appeal against a sentence of six months imprisonment with a parole release date after one month. When that offender was intoxicated she spat in the face of a police officer and bit his hand and, when they were in police premises, she again spat in the face of the police officer. On both occasions the spit went into the police officer's mouth and eyes. The officer learned that the offender had said that her partner was Hepatitis C positive, which aggravated the officer's stress and other adverse effects. The offender had a previous conviction of assaulting police during a public confrontation. Whilst it is true that, like the applicant, that offender had a child (a four year old) from whom she would be separated whilst in prison, the circumstances of her offence were much more serious than the applicant's offence. The maximum penalty has since doubled, but the applicant's head sentence is two and a half times longer than that imposed in *Barry*. More significantly still, the period which the applicant is required to spend in custody before release upon parole is five times longer than the corresponding period in *Barry*. Because the decision in *Barry* was only that her sentence was not manifestly excessive it does not necessarily follow that the applicant's sentence is manifestly excessive, but *Barry* does not supply any support for the applicant's sentence.

[20] In *King*, a 30 year old Irish man with no prior convictions was sentenced to six months imprisonment suspended after three months for an operational period of two years for spitting blood and phlegm on to a police officer's face and into his mouth whilst that offender was in the rear of a police van. (He was also given a concurrent term of imprisonment of two months for a common assault earlier in the same evening in the course of a scuffle with a security officer, but this seems to have been a relatively minor offence.) The Court set aside the sentence and resentenced the offender to four months imprisonment suspended after two months for an operational period of two years. de Jersey CJ gave the leading judgment. The former Chief Justice began his analysis with "…the proposition that those who treat a police officer in this way should ordinarily expect to be imprisoned, meaning actual imprisonment." de Jersey CJ concluded that, "[e]ven allowing for the serious and disgusting nature of the offence, the effrontery of its being committed against a police officer and the consequent need for serious deterrence, the question arises whether in selecting, say, nine months, the judge started from too high a level of penalty." He referred to *Laskus*, *Barry*, and *R v Hamilton* [2006] QCA 122 (in which an assault upon police officers which involved swinging punches, hitting the complainant officer in the head and torso, and spitting, attracted a sentence of nine months imprisonment suspended after three months) and found that the sentencing judge had fallen into error. The mitigating circumstances which de Jersey CJ took into account as justifying interference with the sentence were that the offender, who had been heavily intoxicated at the time, suffered from a depressive illness, he had written to the police officer apologising and giving an assurance that he had no communicable disease, he pleaded guilty at any early stage, and he was a relatively young man with no relevant prior criminal history.

[21] The applicant has a criminal history, albeit that before this offence she had not offended for two and a half years since her relatively minor offences as a juvenile.

However, at 19 years of age she is much younger than the 30 year old offender in *King*, she and her baby suffer the increased punishment of their separation whilst incarcerated, and she was remorseful and apologised. The doubling of the maximum penalty from seven years to 14 years is obviously incapable of accounting either for the applicant's head sentence of nearly four times the length of the head sentence in *King* or the applicant's pre-release period of two and a half times the length of the pre-release period in *King*.

[22] In *McLean*, an 18 year old Palm Islander with a history of street offences spat in the face of a police officer while being put into a police van and immediately asked the officer, "how did you like that boy". Saliva was sprayed over the officer's entire face and went into his mouth and eyes in such quantity that he felt blinded. The offender was sentenced to six months imprisonment and to a lesser concurrent sentence for one count of wilful damage to property, with the imprisonment to be suspended after two months for an operational period of two years. The Court allowed the offender's appeal but varied the sentence only by substituting release on parole after two months for the sentencing judge's order suspending the sentence after the same period. That offender, who was not intoxicated at the time of the offence, declined to be interviewed by police. He did not express any remorse for his offending and White JA referred (at [31]) to his "calculated defiance and contempt". The effect on the police officer was significant. He was required to undergo blood tests and five further tests over six months at a hospital and he was "extremely concerned" that he had contracted hepatitis B. At the time of the sentence hearing the officer was still greatly concerned when he was dealing with offenders. That offence was markedly more serious and the offender's personal circumstances were markedly less favourable than in the applicant's case, yet the applicant's head sentence and her pre-release period are two and a half times longer than in *McLean*.

[23] For present purposes the most significant decisions are those in which the Court re-sentenced on appeal, namely *King* and *McLean*. Taking into account the differences in circumstances I have mentioned, the applicant's sentence is so far out of kilter with the sentences in those cases, even when the fullest possible allowance is made for the increase in the maximum penalty, as to indicate that the sentencing judge must have erred (see *Barbaro v The Queen* (2014) 88 ALJR 372 at 379 [41] and the cases there cited). That indication is confirmed by reference to the circumstances of this particular offence and the applicant's personal circumstances. Both the head sentence of 15 months imprisonment and the period before release on parole of five months in custody for this 19 year old mother of a one year old baby are manifestly excessive.

[24] As to the appropriate period of actual custody, whilst there is no doubting the relevance of the maximum penalty for this particular offence and the requirement to take into account the perceived need for a deterrent sentence, it is worth repeating here an observation by a very experienced sentencing judge and Chief Justice, de Jersey CJ, in *R v King* (2008) 179 A Crim R 199:

> "In cases like this, it is often the fact of imprisonment rather than the particular duration of the term imposed which secures the necessary deterrence."

[25] In all of the circumstances, the appropriate head sentence is nine months imprisonment. The applicant has already served nearly three months (two months and 24 days) in custody. That period is certainly sufficient to fulfil the applicable

sentencing considerations. I would therefore grant the application, allow the appeal, set aside the sentence imposed in the District Court and instead sentence the applicant to imprisonment for nine months and fix the parole release date as today 7 October 2014.

[26] **GOTTERSON JA:** I agree with the orders proposed by Fraser JA and with the reasons given by his Honour.

[27] **MORRISON JA:** I have read the reasons of Fraser JA and agree with those reasons and the orders his Honour proposes.