SUPREME COURT OF QUEENSLAND

CITATION:	*Queensland Police Service v Terare* [2014] QCA 260
PARTIES:	**QUEENSLAND POLICE SERVICE** (applicant) **v** **TERARE, Ellian Stewart** (respondent)
FILE NO/S:	CA No 15 of 2014 DC No 110 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	17 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	26 June 2014
JUDGES:	Margaret McMurdo P and Fraser and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the respondent was intoxicated – where the respondent was found by a police officer lying in the middle of the road – where the police officer attempted to assist the respondent – where the respondent walked to the front door of a house and proceeded to urinate on the front door – where the police officer tried to restrain the respondent – where the respondent swung around and pushed the police officer – where the respondent proceeded to aim his penis in her direction and urinate on her shoes and the bottom of her trousers – where the police officer tried to move backwards – where the respondent kept walking towards the police officer and continued to urinate on her shoes and trousers – where the respondent pleaded guilty to serious assault upon a police officer, public nuisance and obstructing a police officer – where the respondent was sentenced on the charge of serious assault to three months imprisonment wholly suspended with an operational period of 12 months – where the respondent was convicted and fined on the other charges – where s 340(1)(b) of the *Criminal Code* was amended in 2012 to increase the

maximum penalty for the offence of serious assault to 14 years imprisonment – where the respondent is 24 years old and has three young children – where the applicant appealed unsuccessfully to the District Court on the grounds that the sentence for serious assault was manifestly inadequate – where the applicant contends that the learned District Court judge gave no weight or insufficient weight to the fact that the serious assault was committed after the maximum penalty was statutorily increased – where the applicant contends that the learned District Court judge erred in finding there was doubt that the respondent's actions were deliberate – where the applicant contends that the learned District Court judge erred in finding that the sentence was not manifestly inadequate – whether the sentence was manifestly inadequate

Criminal Code 1899 (Qld), s 340, s 340(1)(b)
District Court of Queensland Act 1967 (Qld), s 118(3)
Evidence Act 1977 (Qld), s 132C
Justices Act 1886 (Qld), s 222, s 223
Penalties and Sentences Act 1992 (Qld), s 9(2)(b)
Police Powers and Responsibilities Act 2000 (Qld), s 790
Summary Offences Act 2005 (Qld), s 6(1)

Gabriel v Campbell, unreported, Court of Criminal Appeal, Qld, CA No 130 of 1990, 30 August 1990, cited
GAF v Queensland Police Service [2008] QCA 190, cited
Queensland Police Service v Koolatah, unreported, Durward SC DCJ, DC No 351 of 2012, 5 April 2013, cited
Queensland Police Service v Terare, unreported, Durward SC DCJ, DC No 110 of 2013, 20 December 2013, related
R v Barry [2007] QCA 48, cited
R v Brown [2013] QCA 185, cited
R v CBI [2013] QCA 186, cited
R v Clarke [2012] QCA 318, cited
R v Hamilton [2006] QCA 122, cited
R v Juric [2003] QCA 132, cited
R v Kinersen-Smith & Connor; ex parte Attorney-General (Qld) [2009] QCA 153, cited
R v King (2008) 179 A Crim R 600; [2008] QCA 1, cited
R v Laskus [1996] QCA 120, cited
R v McLean (2011) 212 A Crim R 199; [2011] QCA 218, cited
R v Murray [2014] QCA 250, cited
R v Reuben [2001] QCA 322, cited
R v Swayn; ex parte Attorney-General (Qld) [2009] QCA 81, cited
R v Tupou; ex parte Attorney-General (Qld) [2005] QCA 179, cited
Veen v The Queen [No 2] (1988) 164 CLR 465; [1988] HCA 14, cited

COUNSEL: P J Davis QC, with A C Freeman, for the applicant
J J Allen, with F D Richards, for the respondent

SOLICITORS: Office of the Solicitor for the Queensland Police Service for the applicant
Legal Aid Queensland for the respondent

[1] **MARGARET McMURDO P:** The respondent, Ellian Terare, pleaded guilty in the Magistrates Court at Ayr on 28 March 2013 to serious assault upon a police officer under s 340(1)(b) *Criminal Code* 1899 (Qld); public nuisance under s 6(1) *Summary Offences Act* 2005 (Qld) and obstructing a police officer under s 790 *Police Powers and Responsibilities Act* 2000 (Qld). On 15 April 2013 he was sentenced on the serious assault to three months imprisonment suspended forthwith with an operational period of 12 months. On the remaining charges he was convicted and fined with the fine referred to SPER.[1] The applicant, the Queensland Police Service (QPS), appealed to the District Court under s 222 *Justices Act* 1886 (Qld) against the sentences contending that they were manifestly inadequate. The District Court dismissed the appeal.[2]

[2] The applicant has applied for leave to appeal under s 118(3) *District Court of Queensland Act* 1967 (Qld) on three grounds. The first is that the District Court judge gave no weight or insufficient weight to the fact that the serious assault was committed after the maximum penalty for that offence was statutorily increased. The second is that the District Court judge erred in finding that there was doubt that the respondent's actions were deliberate. The third is that the District Court judge erred in finding that the sentence was not manifestly inadequate.

[3] Ordinarily an application for leave to appeal under s 118(3) where there has been a hearing and a full appeal will be granted only to correct an error of law and where the interests of justice warrant appellate intervention. The applicant contends that leave to appeal should be granted for two reasons. The first is that the effect on sentences of an increase in maximum penalty involves a question of significant public interest. The second is that a substantial injustice has been occasioned to the applicant and the complainant through an error of law requiring appellate intervention.

The Magistrates Court proceedings

[4] The sentencing proceeding commenced in the Ayr Magistrates Court on 28 March 2013. The respondent, who was represented by the Aboriginal and Torres Strait Islander Legal Service, had no criminal history and was 24 at the time of his offending.

[5] The prosecutor placed the following facts of the offending before the magistrate. On 6 November 2012 at 1.30 am the respondent was lying in the middle of an intersection in Ayr. A female police officer who was working alone approached him. He was breathing and appeared uninjured but was unresponsive to her requests to sit up and speak. An ambulance officer examined him and advised he was intoxicated. Eventually the respondent sat up, got to his feet and began to walk away. The police and ambulance officers were concerned for his safety as he was swaying. They asked him for his name and address but he did not respond. He walked away weaving over the road and causing a traffic hazard. He was yelling but making no sense (public nuisance).

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1 State Penalties Enforcement Registry.

2 *Queensland Police Service v Terare*, unreported, Durward SC DCJ, DC No 110 of 2013, 20 December 2013.

[6] He stopped outside a house and said, "I live here." He walked up to the front door and rummaged in his shorts for what the police officer assumed was his house key. She shone her torch on him to give him some light. To her surprise, he pulled out his penis as if to urinate on the front door, in line of sight of neighbours who were watching the commotion. When she realised this was probably not his address and he was urinating on someone else's house, she told him to stop but he continued laughing and urinating. She stepped forward, grabbed his arm and attempted to pull him away from the door, repeatedly yelling, "stop". He suddenly swung around and shoved her backwards. While she attempted to regain her balance he aimed his penis in her direction and continued to urinate over her shoes and the bottom of her pants. He was laughing and dancing around. She tried to move backwards away from him but he kept coming towards her, still urinating on her shoes and pants even though she repeatedly told him to stop (serious assault).

[7] When she realised that he would not stop she stepped forward and grabbed him again. He pushed her down two steps onto the front lawn but she managed to keep hold of him. She told him he was under arrest for assaulting police and tried to handcuff him. He became angry and shoved her, breaking her hold. She tried to grab him again and he swung his fist in her direction. She ducked to avoid a punch to the face. He swung again. She got hold of his arm and stopped his fist from connecting. She secured his arm behind his back while he continued to struggle for a few seconds. She then walked him to the police vehicle. He tried to twist free, swinging with his free hand so that she was unable to handcuff him. He continued to try to hit her so that the ambulance officer had to assist (obstructing police).

[8] He was taken to the Ayr watch house where he continued to refuse to cooperate or provide his name. He eventually provided his details to police and claimed he did not know what had happened. He was released on his own undertaking as to bail.

[9] The prosecutor contended this was a serious matter as the female complainant police officer was working alone trying to assist someone who was intoxicated in public. His behaviour was demeaning, disgusting and abhorrent. The *Criminal Code* was amended on 29 August 2012, shortly before this offending, to increase the penalty for serious assault of police from seven to 14 years. The explanatory memorandum to the Bill referred to the onerous duties of police officers and the need to deter this form of concerning conduct so that police officers were protected in carrying out their duties and to ensure the maintenance of civil authority. The deliberate application of urine to a police officer was more degrading than spitting at a police officer. Whilst the respondent initially exposed himself to urinate on a door, not the police officer, he persisted in urinating while walking towards her. The community should be protected from this type of behaviour. A deterrent penalty was required. In *King*[3] a two month period of actual imprisonment was imposed on an offender with no prior convictions for spitting on a police officer. The respondent should be sentenced to between nine and 12 months imprisonment and serve one third of that time in actual custody.

[10] The respondent's lawyer made the following submissions. The respondent had been in a de facto relationship for seven years and had three children aged from two to eight years old. Whilst his employment history was sporadic, he had recently commenced working at the local golf course through an employment program. He

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3 *R v King* (2008) 179 A Crim R 600.

was the sole financial provider for his family. He did not normally drink and until these offences had not had a drink for about two years. He ran into an old friend, became heavily intoxicated and cannot remember the subsequent events. His intoxication explained his actions but did not excuse them. There was no premeditation or calculation in his act of urination. His offending should be distinguished from those serious assault offences involving deliberate spitting or biting calculated to degrade police officers. Such offending normally warranted a term of imprisonment. The police officer's statement indicated that the urination was no higher than to the shoe or bottom of the trouser area. The respondent's lawyer referred to *R v Reuben*[4] to support his submission that, while serious assaults of police officers generally resulted in custodial sentences, courts were not bound to impose a custodial penalty in every case. This offending was at the lower end of seriousness for offences of this kind.

[11] The magistrate interposed, noting that on the accepted prosecution case the respondent had kept coming towards the complainant whilst urinating on her. This was not a quick, instantaneous spit in the face; he continued to deliberately urinate on her. The respondent's lawyer continued to submit that the urination was not a prolonged act and emphasised that the police officer interrupted the respondent after he had commenced urination. A spit to the face was more degrading than urinating in these circumstances on the shoes and lower trouser region. The magistrate observed that the respondent had several opportunities to stop urinating but continued to do so in the complainant's direction. The respondent's lawyer contended that, on the respondent's very limited recollection, the whole incident took between 10 to 15 seconds. This was not a case of calculated contempt for an authority figure. It would have happened irrespective of whether the complainant was a police officer. The offending was out of character and the respondent was embarrassed by it. He was a dedicated family man. He pleaded guilty at an early stage. He had excellent prospects of rehabilitation in light of the absence of any previous criminal or even traffic history.

[12] The magistrate stated that he considered a term of imprisonment was the appropriate penalty. The only question was whether it should be fully suspended. This behaviour was on the same level as spitting on a police officer. His Honour adjourned the matter to allow the parties to provide comparable cases.

[13] The sentence proceeding resumed in Townsville on 15 April 2013. The respondent's lawyer again emphasised that the complainant grabbed the respondent's arm and attempted to pull him, immediately prior to the respondent swinging around whilst heavily intoxicated. The magistrate observed that the respondent had pleaded guilty to aiming his penis in the complainant's direction after he swung around and continued to urinate.

[14] In sentencing the respondent the magistrate noted that he was 24 at the time of his offending, was in a relationship and had three children. He was of otherwise good character, of sober habits and had no criminal history. His behaviour was caused by severe intoxication which explained but did not excuse his conduct. He pleaded guilty at a relatively early time and was remorseful.

[15] The magistrate noted, however, that the maximum penalty for the offence of serious assault was 14 years imprisonment, a penalty which had been increased recently

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4 [2001] QCA 322.

from seven years. This was a relevant matter in sentencing under s 9(2)(b) *Penalties and Sentences Act* 1992 (Qld). The offending was disgusting, abhorrent and degrading. It was committed against a lone female police officer, who was trying to ensure his safety, whilst intoxicated. The magistrate recited the facts, finding that whilst the complainant was attempting to regain her balance the respondent aimed his penis in her direction and continued to urinate over her shoes and the bottom of her pants whilst laughing and dancing around. Urinating on a police officer in these circumstances was behaviour which should be severely punished as a personal and general deterrent. This was not a nuisance offence but an assault-based offence. The magistrate did "not accept that the act of urination on the police officer was neither calculated nor premeditated nor reckless malice… [nor] that it was not done in a disregard for civil authority or for the officer."[5] A term of imprisonment was warranted but given the mitigating factors, the imprisonment should be wholly suspended. The magistrate imposed three months imprisonment suspended forthwith with an operational period of 12 months and convicted and fined the respondent on the remaining charges.

The District Court appeal

[16] The QPS appealed to the District Court, contending that the sentence was manifestly inadequate.[6]

[17] The judge noted that the issues in the appeal were not only the adequacy of the sentence but also the construction of s 340 *Criminal Code* following the recent increase in the maximum penalty.[7] While this was a factor to be taken into account under s 9(2)(b) *Penalties and Sentences Act*, the maximum penalty was intended for cases within the worst category of cases for which it was prescribed: *Veen v The Queen [No 2]*.[8] The judge considered that deterrence could be achieved by the fact of rather than by the length of the term of imprisonment,[9] citing *R v King*.[10]

[18] After discussing a number of authorities, the judge expressed some doubt as to whether the respondent deliberately urinated on the complainant's trousers and shoes. The magistrate used the expression that the respondent "aimed [his] penis in her direction" which might suggest a degree of deliberate conduct. But the factual context was that the respondent was hopelessly drunk. He was moving about and laughing aimlessly as a drunken person might do. His Honour quoted from the magistrate's summary of the facts[11] and noted that, although the offence was serious, there were significant mitigating features. These were the respondent's youth, personal circumstances, otherwise good character, absence of criminal history, usually sober habits, severe intoxication at the time of the offending, relatively early guilty plea and remorse.[12] The act of urinating upon a police officer's shoes and trousers was degrading and deplorable but it was distinguishable from spitting on a police

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5 AB 36, sentencing remarks, Townsville Magistrates Court, Acting Magistrate Lehmann, 15 April 2013, 2-6.

6 *Queensland Police Service v Terare*, unreported, Durward SC DCJ, DC No 110 of 2013, 20 December 2013.

7 Above, [9].

8 (1988) 164 CLR 465.

9 *Queensland Police Service v Terare*, unreported, Durward SC DCJ, DC No 110 of 2013, 20 December 2013, [14]-[15].

10 *R v King* [2008] QCA 1.

11 *Queensland Police Service v Terare*, unreported, Durward SC DCJ, DC No 110 of 2013, 20 December 2013 [25].

12 Above, [26].

officer. A sentence of imprisonment was warranted especially as the officer was trying to assist the respondent by keeping him safe. The circumstances, however, did not mandate actual imprisonment.[13] There was no appealable error in the magistrate's exercise of his sentencing discretion. The sentence was not manifestly inadequate and the appeal should be dismissed with costs.

The applicant's contentions

[19] In oral submissions the applicant stated that the first proposed ground of appeal as to the effect of the increased maximum penalty was really part of the proposed third ground of appeal that the sentence was manifestly inadequate, so that both grounds could be considered together.

[20] The applicant emphasised in its written submissions that assaulting a police officer acting in the execution of duty in circumstances where the offender applies to the police officer a bodily fluid now carries the maximum penalty of 14 years imprisonment.[14] This is the same maximum penalty for the offence of doing grievous bodily harm. Except in rare cases,[15] sentences for the offence of doing grievous bodily harm result in actual imprisonment. As the charge of serious assault of a police officer was dealt with summarily, the maximum sentence which the magistrate could impose was three years imprisonment.[16] The magistrate had to assess the seriousness of the offending and if he considered the appropriate sentence was more than three years imprisonment, he must refrain from dealing with the matter.[17]

[21] The applicant emphasised the following extract from the explanatory memorandum to the Bill which increased the maximum penalty in s 340:

> "Police perform an essential and unique role in maintaining civil authority. Their duties are frequently dangerous. Assaults upon police that involve the use of weapons, spitting, biting or otherwise causing bodily harm, represent serious displays of contempt for civil authority. Additionally, acts of spitting, biting or applying faeces or bodily fluids are particularly degrading and carry with them concern of transmission of disease. While it might be argued that an increase to the maximum penalty for certain serious assaults will affect the rights and liberties of some individuals, the increase can be justified given the need to: deter this form of concerning conduct; protect police officers carrying out their duties; and ensure the maintenance of civil authority."

[22] The legislature, the applicant contended, intended that offences of this kind were to be dealt with as severely as offences of doing grievous bodily harm. Whilst there were no comparable sentences where the serious assault of a police officer involved urination, the cases of *R v King*;[18] *R v Reuben*;[19] *Gabriel v Campbell*;[20] *R v McLean*;[21]

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13 Above, [27].
14 Criminal Code, s 340.
15 *R v Tupou; ex parte Attorney-General (Qld)* [2005] QCA 179; *R v Swayn; ex parte Attorney-General (Qld)* [2009] QCA 81; *R v Kinersen-Smith & Connor; ex parte Attorney-General(Qld)* [2009] QCA 153; *R v Clarke* [2012] QCA 318.
16 *Criminal Code*, s 552A and s 552H.
17 *Criminal Code*, s 552D and *GAF v QPS* [2008] QCA 190, [22]-[26].
18 (2008) 179 A Crim R 600.
19 [2001] QCA 322.
20 Unreported, Court of Criminal Appeal, Qld, CA No 130 of 1990, 30 August 1990.
21 [2011] QCA 218.

R v Laskus;[22] *R v Hamilton*;[23] *R v Barry*[24] and *R v Juric*,[25] all decided before the increase in penalty, supported a sentence involving actual custody.

[23] The substantial increase in the maximum penalty was significant, so that, the applicant contended, this could be expected to produce a general increase in the severity of sentencing, rendering the earlier cases of little utility as comparable sentencing decisions: *R v CBI*.[26]

[24] The applicant referred to only one sentence which post-dated the increased maximum penalty to s 340, an appeal to the District Court under s 222 *Justices Act*, *QPS v Koolatah*.[27] There the offender was sentenced to six months imprisonment with parole release after two months for spitting on a police officer.

[25] It was not open to the judge, the applicant contended, to conclude that the respondent's urinating on the complainant was anything other than an intended consequence of his actions. He deliberately urinated, aiming in the complainant's direction, and continued to urinate for a period of time. Leave to appeal should be granted because the legislature plainly intended to increase penalties for offences of this kind. The magistrate and the District Court judge ignored or paid insufficient regard to the legislative intent to protect vulnerable police officers performing important civic duties through deterrent sentences. Further, this Court has not yet considered the appropriate sentencing range for offences of this kind since the maximum penalty was increased. The application for leave to appeal should be granted, the appeal allowed, the sentence on the serious assault charge set aside and instead a sentence of six months imprisonment imposed.

[26] The applicant pursued its contention in its second proposed ground of appeal that the District Court judge erred in doubting the respondent's actions were deliberate. The appeal was by way of rehearing under s 223 *Justices Act* so that, where there was a factual basis, the judge was entitled to draw a different inference from the magistrate. But here there was no such factual basis and the judge could not draw that inference. Under s 132C(2) *Evidence Act* 1977 (Qld) the District Court judge could act on an allegation of fact that was admitted or not challenged. Under s 132C(3) if an allegation of fact was not admitted or challenged, the judge could act on it only if satisfied on the balance of probabilities that the allegation was true. Under s 132C(4), "the degree of satisfaction required varies according to the consequences, adverse to the person being sentenced, of finding the allegation to be true." The judge in his reasons[28] observed that "*there is some doubt* as to whether the [respondent] deliberately urinated on the officer's trousers and shoes" (emphasis added). That finding was irrelevant as it was not a finding on the balance of probabilities.

[27] The complainant's statement which was before both the magistrate and the District Court judge was tendered without objection in this application.[29] The prosecutor submitted to the magistrate that the respondent "started to deliberately urinate on the

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22 [1996] QCA 120.
23 [2006] QCA 122.
24 [2007] QCA 48.
25 [2003] QCA 132.
26 [2013] QCA 186, [19].
27 *QPS v Koolatah*, unreported, Durward SC DCJ, Appeal D 351 of 2012, 5 April 2013.
28 *Queensland Police Service v Terare*, unreported, Durward SC DCJ, DC No 110 of 2013, 20 December 2013, [25].
29 Ex 1.

officer".[30] This submission was consistent with the complainant's statement that the respondent

> "suddenly swung around and shoved me backwards, and whilst I was attempting to regain my balance, he has aimed his penis in my direction and continued to urinate, all over my shoes and the bottom of my pants.
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> 29. While doing this [the respondent] was laughing and dancing around, as I tried to move backwards away from him he has kept coming towards me, still urinating on my shoes and pants."

[28] For these reasons, the applicant contended that the judge erred in expressing doubt as to whether the respondent deliberately urinated on the police officer.

[29] Returning to the contention of manifest inadequacy, the applicant emphasised that this was a relatively serious example of the offence as it was committed against a lone female officer acting to ensure the intoxicated respondent's safety in public. Urinating on a police officer and laughing about it was behaviour which should be severely punished both as a personal and a general deterrent. This was not a nuisance offence, it was an assault-based offence. The officer did nothing to contribute to the offending. The respondent urinated on her in a way that was calculated, premeditated or with reckless malice and in disregard for civil authority and for the officer. Such conduct should ordinarily result in actual imprisonment: *R v King*.[31] An increase in the maximum penalty will generally produce an increase in the severity of sentences although this principle is not to be applied in any mathematical or mechanical way. A review of comparable sentences imposed before the penalty was increased supported the conclusion that a period of actual imprisonment should have been imposed. In oral submissions, the applicant referred to *King*, *Laskus*, *R v Brown*[32] and *Koolatah* to demonstrate that the sentence was manifestly inadequate.

Conclusion as to whether the judge erred in doubting the respondent's actions were deliberate

[30] The sole ground of appeal for the District Court judge's consideration was whether the magistrate's sentence was manifestly inadequate. The applicant contended that the judge's statement in his reasons that "there is some doubt as to whether the [respondent] deliberately urinated on the officer's trousers and shoes" was not open on the evidence and did not comply with the standard of proof needed for fact finding in sentencing under s 132C *Evidence Act*.

[31] It was not in dispute before the District Court judge that the respondent deliberately urinated on the complainant although the respondent's lawyer clearly raised the issue before the magistrate. When the magistrate clearly expressed an unsympathetic view, the respondent's lawyer did not pursue this. The District Court judge's observation "that the respondent was hopelessly drunk as he was moving about and laughing aimlessly as a drunken person might do"[33] was unquestionably correct on the evidence before the magistrate. The respondent had been lying comatose in the

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30 AB 11, line 32, T1-3.

31 (2008) 179 A Crim R 600, [6].

32 [2013] QCA 185.

33 *Queensland Police Service v Terare*, unreported, Durward SC DCJ, DC No 110 of 2013, 20 December 2013, [25].

middle of an intersection at 1.30 am. When the police officer finally managed to rouse him he was incoherent and apparently incapable of finding his way home or even identifying his own home. It is not uncommon for grossly intoxicated people to lose bladder control, partially or completely. The respondent commenced urinating against the house and only urinated in the direction of the complainant when she physically grabbed and pulled at him in an attempt to stop him. It may be that he was unable to stop urinating when requested. This would not have been inconsistent with his laughing, dancing and moving towards the police officer. And there was no evidence that the respondent in his drunken state had registered that he was urinating on a police officer. Given his intoxicated state, it may be that the respondent's claim to have no memory of the incident was true.

[32] On the evidence before the magistrate, the judge was entirely justified in expressing some doubt as to whether the respondent deliberately urinated on the complainant, even though his Honour and the sentencing magistrate accepted the complainant's statement that the respondent aimed his penis in her direction and moved towards her laughing and dancing. The appeal was by way of rehearing.[34] In making that observation in an appeal against sentence under s 222 *Justices Act* where the issue of deliberateness was not specifically raised in the appeal, his Honour was not making a finding of fact about an issue which was not admitted or was challenged under s 132C *Evidence Act* so that s 132C did not apply.

[33] This proposed ground of appeal is without substance.

Conclusion as to whether the magistrate's sentence was manifestly inadequate

[34] The District Court judge, like the magistrate, appreciated the serious circumstances of the offending and the reasons why the maximum penalty had been increased by the legislature from seven to 14 years. The conduct of police officers like this complainant was of the kind that instils public confidence in the QPS. She uncomplainingly attempted to assist a grossly drunken citizen in a public place to protect him and others. For her trouble, she was subjected to highly unpleasant and offensive treatment. To her great credit, she reacted in a measured, lawful way despite the respondent's extremely inflammatory behaviour. His Honour thoroughly reviewed the cases upon which the parties relied as comparable. Like the sentencing magistrate, his Honour apprehended that there were significant mitigating features and concluded that these supported the full suspension of the sentence so that it was not manifestly inadequate.

[35] The legislature in increasing the maximum penalty clearly intended that sentencing courts should impose significantly heavier penalties in respect of serious assaults committed on police officers acting in the execution of their duty where, as here, the offender applies a bodily fluid to the police officer. As this Court identified in *R v CBI*,[35] this increase in maximum penalty can be expected to produce a general increase in severity of sentences, rendering earlier cases of limited utility as comparable sentencing decisions. But that does not mean that a sentence of actual imprisonment is inevitable in every case,[36] even where, as here, the maximum penalty has been increased from seven to 14 years imprisonment.

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34 *Justices Act*, s 223.

35 [2013] QCA 186, Fraser JA, [19]; Gotterson JA and Mullins J agreeing; *R v Murray* [2014] QCA 250, Fraser JA [16], Gotterson and Morrison JJA agreeing.

36 *R v King* (2008) 179 A Crim R 600, Holmes JA, [16].

[36] I cannot accept the applicant's contention that the sentences imposed for offences of this kind should be comparable to those imposed for the offence of grievous bodily harm. The extent of the injuries suffered by a complainant in offences of physical violence is relevant in determining the appropriate sentence.[37]

[37] It is fortunate for both the complainant and the respondent that the complainant was not apparently physically injured beyond the obvious revulsion she must have experienced as a result of the respondent's anti-social conduct. This case was not as serious as those where offenders claimed to suffer from serious contagious diseases and threw blood, saliva or other bodily fluids on police officers. There was no suggestion the respondent was suffering from any contagious disease, that the complainant had reason to think he was, that his urinating on her shoes and lower pants could spread life-threatening illness, or that the complainant had reason to think it could. It is also fortunate for both the complainant and the respondent that there was no evidence that the complainant suffered psychological injury or trauma as a result of the assault, although that possibility certainly cannot be discounted in cases of this kind.

[38] Unquestionably, deterrence, both specific and general, was an important sentencing consideration. But to record a conviction and impose a period of imprisonment, albeit fully suspended, was a salutary penalty for someone like the respondent. He was relatively youthful and of otherwise good character, without as much as a previous traffic infringement. He was in employment and in a steady relationship. He was supporting his young, dependent family. He was usually a non-drinker who foolishly allowed himself to become grossly intoxicated and this was the cause of his abhorrent behaviour. He pleaded guilty at an early time and was remorseful. The penalty imposed, together with the real fear that he could have been sentenced to actual imprisonment and the knowledge that any lapse over the ensuing 12 months would likely result in imprisonment, was sufficiently severe to be a salutary deterrent to him and to others like him.

[39] The sentences in the cases to which this Court has been referred as comparable demonstrate that, even before the maximum penalty was doubled, without significant mitigating circumstances, the respondent may well have been sentenced to actual imprisonment. The one comparable sentence following the increased maximum penalty to which this Court was referred, *Koolatah*,[38] is also consistent with the imposition of a custodial sentence for an offence of this kind where the offender is a mature man without the mitigating circumstances applicable in this case.

[40] This Court noted in *R v Brown*[39] that a review of the sentences in cases for offences against s 340 prior to the increase in penalty indicated that a period of actual custody in spitting and biting cases where there had been a plea of guilty varied between fully suspended imprisonment and sentences requiring offenders to serve actual imprisonment of three months. The fact that cases of spitting and biting were more serious than this case was counterbalanced by the increased maximum penalty. While increased sentences can be expected with the increased maximum penalty, the sentence imposed will turn on the facts of each particular case. Actual imprisonment is by no means mandatory.

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37 See *Penalties and Sentences Act*, s 9(2)(b), (d) and s 9(3)(c), (d).

38 *QPS v Koolatah*, unreported, Durward SC DCJ, DC No 351 of 2012, 5 April 2013.

39 [2013] QCA 185, Holmes JA, [29], Fraser JA and North J agreeing.

[41] This conclusion is consistent with the recent and relevant decision of this Court in *R v Murray*.[40] Murray pleaded guilty to assaulting a police officer under s 340 with the circumstance of aggravation that she spat on him. She and others were yelling and swearing in the front yard of a house at Warwick at 2.00 am. She was intoxicated, highly agitated and verbally abused the police who warned her about her behaviour. When they detained her on a different matter, she attempted to pull away, but they handcuffed and put her in the police car. She hit the car windows with her handcuffs. At the watch house she verbally abused the police. When the complainant police officer tried to manoeuvre her into a seat, she spat saliva into his face, hitting his eyes and mouth. The complainant had two negative HIV tests and required a further test. His fear of contracting a disease put him under considerable stress. Murray was 19 years old with a one year old child. She had a prior criminal history for public nuisance offences. The offence against s 340 occurred at her de facto mother-in-law's house after the applicant became upset and intoxicated during a domestic dispute. She did not have any diseases. She wrote a letter of apology to the complainant acknowledging that her behaviour was disgusting and inexcusable and asking forgiveness. She pleaded guilty at the first opportunity.

[42] The District Court sentencing judge noted that the penalty was increased from seven to 14 years imprisonment and sentenced her to 15 months imprisonment with release on parole after five months. She applied to this Court for leave to appeal against sentence. In allowing the appeal, this Court reviewed a number of sentences imposed prior to the increase in penalty, namely, *Laskus*, *R v Barry*,[41] *King* and *R v McLean*.[42] This Court concluded that Murray's sentence was so far out of kilter with the sentences in those cases, even giving the fullest possible allowance for the increase in the maximum penalty, that the sentencing judge had erred in the imposition of both the head sentence and the parole release date. At the time of the appeal hearing, Murray had spent nearly three months in custody, a period more than sufficient to deter her and others. The Court allowed the appeal and substituted a sentence of nine months imprisonment with parole release fixed on the date of the delivery of the Court's reasons.

[43] Murray did not have this applicant's unblemished prior history or as many mitigating features and her offending was objectively worse. This Court said nothing in *Murray* to suggest that every sentence for an offence against s 340 since the increase in penalty must be one of actual imprisonment. The applicant has not demonstrated that the District Court judge erred in concluding that in light of the many mitigating circumstances in this unfortunate case, the fully suspended sentence imposed was manifestly inadequate. The magistrate's sentence was appropriate.

Summary

[44] As the applicant has failed to demonstrate any error of law on the part of the District Court judge, the application for leave to appeal must be refused. The respondent did not seek his costs.

ORDER:

The application for leave to appeal is refused.

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40 [2014] QCA 250.
41 [2007] QCA 48.
42 (2011) 212 A Crim R 199.

[45] **FRASER JA:** I agree with the reasons for judgment of the President and the order proposed by her Honour.

[46] **GOTTERSON JA:** I agree with the order proposed by the President and with the reasons given by her Honour.