SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mallory* [2016] QCA 296
PARTIES:	**R** **v** **MALLORY, David William** (applicant)
FILE NO/S:	CA No 99 of 2016 DC No 137 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Beenleigh – Date of Sentence: 3 March 2016
DELIVERED ON:	16 November 2016
DELIVERED AT:	Brisbane
HEARING DATE:	22 June 2016
JUDGES:	Morrison and Philip McMurdo JJA and Peter Lyons J 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. Vary the sentences for counts 1 and 2 by imposing a term of imprisonment of 18 months and nine months respectively.** **4. Fix the applicant's parole release date as 16 November 2016.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to various offences including one count of robbery with personal violence – where the applicant was sentenced to three years' imprisonment – where the applicant was affected by medication and alcohol during the offence – where the applicant's conduct was bizarre and irrational – where there was some analogy with *R v Rogers* [1998] QCA 382, characterised as a stealing followed by an assault whilst escaping – where the offending involved a prolonged course of conduct – where the offending involved racial abuse – whether the sentence was manifestly excessive in all the circumstances

R v Boggs [2014] QCA 31, considered
R v Evans and Pearce [2011] 2 Qd R 571; [2011] QCA 135, considered
R v Flew [2008] QCA 290, cited
R v Kolodziej [2008] QCA 184, considered
R v Mules [2007] QCA 47, considered
R v Rogers [1998] QCA 382, considered
R v Torrens [2006] QCA 24, cited

COUNSEL: R A East for the applicant
S J Farnden for the respondent

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

[1] **MORRISON JA:** I have read the reasons of Peter Lyons J and agree with those reasons and the orders his Honour proposes.

[2] **PHILIP McMURDO JA:** I agree with Peter Lyons J.

[3] **PETER LYONS J:** On 3 March 2016, the applicant pleaded guilty to four counts on an indictment presented in the District Court, and was sentenced. On a count of robbery with personal violence, he was sentenced to a term of imprisonment of three years. On a count of entering premises with the intent to commit an indictable offence, he was sentenced to a term of imprisonment of 18 months. On two counts of assault, he was sentenced in each case to a term of imprisonment of six months. All sentences were to be served concurrently. A parole release date was fixed at 2 March 2017.

[4] The applicant has applied for leave to appeal against the sentence on the robbery count. The ground of the proposed appeal is that the sentence is manifestly excessive.

The offences

[5] At 5.45 pm on 16 February 2014, the defendant entered the SPAR Supermarket in Hillcrest. He was a regular customer at the supermarket, and had been there earlier in the day. He was known to the owners of the supermarket.

[6] When he returned in the evening, he smelt of alcohol and had red eyes. There is no suggestion that he attempted to conceal his identity. In addition to the owners, Mr Maharaj and his wife Ms Singh, there was at least one other customer in the store.

[7] The applicant placed a six pack of shampoo in the front of his pants. He went to the next aisle, and put a packet of kabana, a chicken roll and an Ice Break drink into his pockets. He then went to leave the store. Mr Maharaj intervened, at which point the applicant became aggressive, and started swearing. He said to Mr Maharaj, "Hit me", with a raised voice. Ms Singh moved between the two men, at which point the applicant spat in Mr Maharaj's face. He then punched Mr Maharaj twice, resulting in a bleeding lip. At this point, the drink, the kabana and the shampoo fell from his clothing.

[8] Ms Singh again attempted to intervene, and was pushed and hit in the scuffle. Another customer approached, telling the applicant to leave Ms Singh alone, and

trying to help her. The applicant continued to hit Ms Singh with an open hand, and pulled her hair. The other customer then pushed a trolley at the applicant, but the applicant turned to her and uttered obscenities and a racist comment. He then moved to the store entry, at which point Ms Singh asked him to "please leave". The applicant again pushed her. Other customers were present. The applicant then left with the chicken roll.

[9] The events recorded to this point constitute the factual basis for the robbery charge.

[10] About five minutes later, the applicant returned eating the chicken roll. He yelled at customers in the store that Mr Maharaj started the fight and that he was defending himself. He used a raised voice, his sentences were incomplete, and "didn't make a lot of sense". The applicant then left the store.

[11] The applicant returned again, some 10 minutes later. His return on this occasion constituted the offence of entering premises with intent to commit an indictable offence. He then approached Mr Maharaj while yelling, and pushed him with his right hand. Mr Maharaj fell on a display of video tapes, which in turn fell over. The applicant made racist and abusive comments. This assault on Mr Maharaj constituted count 3. On this occasion the applicant also pushed Ms Singh, though no consequences of this assault were recorded. There were other customers in the store, who came to the defence of the owners of the supermarket, and the applicant left the premises. He was later identified in photoboard interviews.

[12] The applicant surrendered himself to the police on 16 May 2014. He said that he was on Prozac and Serepax at the time, and did not remember the incident. He said that he recalled returning to the store to apologise, a fact not recounted by the owners of the supermarket.

Applicant's background

[13] The applicant was born on 22 June 1975, and was thus 38 years of age at the time of the offending. He has a two-page criminal history. It includes a number of drug offences, the most recent of which was committed on 6 August 2009. These offences were of a relatively low level, the most significant penalty being a fine of $750.

[14] On 4 March 2008, the applicant was sentenced for a number of offences committed on 26 March 2007. The most significant offences were two counts of entering premises and committing an indictable offence by breaking into the premises, for which he was sentenced to terms of imprisonment of 12 months. Lesser penalties were imposed for the other offences. He was released on parole at the time of the sentence. These sentences were imposed by the same Judge whose sentences are the subject of the present application.

[15] Otherwise, his criminal history is of little present relevance.

[16] The proceedings had been listed for trial before they resolved. The plea was described by the prosecutor on the sentence as a late plea of guilty[1].

[17] On the sentence, the applicant's Counsel said that the applicant had six children, including a 16 month old baby with a new partner. The applicant had been working, carrying out house maintenance on a fulltime basis. He appeared to have a good work

---

1 Appeal Record (*AR*) p 9.

record. The applicant's Counsel offered the applicant's apologies for his behaviour. He also submitted that the range for the sentence was between two and three years, "probably toward the top end of that range"[2].

[18] Although the applicant had been in custody, according to his Counsel for a period of "some months"[3], it was not suggested in the sentencing proceedings, or in this application, that that time could be taken into account by way of reduction of the sentence.

Sentence

[19] At the commencement of the sentence, the learned sentencing Judge asked the applicant if there was anything he wanted to say. The applicant responded, "… I'm just very remorseful and disgusted in my actions on that day and I do not intend to proceed with those lives that I had been leading back then, back in 2013, and, yeah, I'm just very remorseful to be here in front of you today."[4] The learned sentencing Judge subsequently referred to the applicant's apology, regarding it as important not only for the complainants, but because it involved an acknowledgement of responsibility. The applicant's statement was consistent with a letter from the applicant to the sentencing Judge expressing deep remorse and "deeps apologies" and stating that he had not had any alcohol since that day, and that his conduct was "total (sic) out of my character"[5].

[20] The learned sentencing Judge noted that he had previously sentenced the applicant, giving him an opportunity to avoid time in custody. He described the applicant's behaviour as "appalling, disgraceful and disgusting", particularly as the applicant had been going to the store for 10 years. His Honour said[6]

> "The behaviour is so strange that I accept what (the applicant's Counsel) says. The mixture of Prozac with rum seems to me to be about the only logical explanation for behaviour that is so – I was going to say weird – it probably is weird but certainly very strange behaviour on any view of it."

[21] The learned sentencing Judge ordered that a copy of the applicant's letter be sent to the complainants.

Submissions on application

[22] The applicant's Counsel on this application (he had not represented the applicant on the sentence) described the stealing component of the applicant's offending as being "in the form of shoplifting". He also referred to the applicant's conduct as "simply bizarre", and noted the finding of the learned sentencing Judge that the applicant was affected by a combination of Prozac medication and rum. While acknowledging the unnecessary nature of the applicant's violence, and degrading aspects of his conduct, he pointed out that the injury inflicted was minor, and the loss of property was minimal. He also submitted that this offending was inconsistent with the applicant's previous criminal history. He submitted the offending was in substance an offence of shoplifting followed by various assaults which were relatively minor. While

---

2 AR p 13.
3 AR p 12.
4 AR p 15.
5 AR p 51.
6 AR p 15.

a deterrent sentence including time in custody was warranted, the offending in the present case was towards the edge of the range of sentences appropriate for robbery. He referred to *R v Kolodziej*[7] (*Kolodziej*); and *R v Rogers*[8] (*Rogers*), and submitted the appropriate range for the sentence for robbery in the present case was 12 to 18 months, with a parole release date at the one-third mark. He also submitted the sentence on count 2 should be moderated accordingly.

[23] Counsel for the respondent accepted that there was no evidence that this was a planned robbery, but was factually more serious than planned robbery offences, because of the nature of the violence used. Nor was this a "technical robbery". The applicant's return to the store put his offending in a more serious light. The offending involved a prolonged course of conduct, and racial abuse. In view of the submission made by the applicant's Counsel on the sentence, by reference to *R v Flew*[9], it was submitted that the applicant now had to demonstrate that the circumstances were sufficiently exceptional to warrant relieving the applicant from responsibility for the conduct of his case at first instance.

[24] In addition to referring to the cases to which the learned sentencing Judge had been referred, and those relied upon by the applicant in the present proceedings, Counsel for the respondent referred to *R v Boggs*[10] (*Boggs*) and *R v Evans and Pearce*[11] (*Evans*).

Other sentences

[25] It was common ground that one of the other cases to which the learned sentencing Judge had been referred, *R v Torrens*[12], was of little utility as a comparable authority. Accordingly it will not be discussed in these reasons.

[26] The other case to which the learned sentencing Judge was referred was *R v Mules*[13]. While Counsel for the respondent submitted that this case could be distinguished, in her oral submissions she made reference to the sentencing of the co-offender, referred to in that case. Accordingly I shall focus on the sentence imposed on the co-offender.

[27] After a successful appeal, Ms Mules was sentenced to a term of imprisonment of three years, to be released on parole after nine months. She had pleaded guilty to one count of attempted armed robbery with personal violence, and one count of robbery with personal violence. The two offences were committed within minutes of each other. Her co-offender, Mr Elliott, had been sentenced to three years imprisonment, to be released on parole after serving seven months. He had spent five months in pre-sentence custody. Ms Mules' sentence was reduced because the learned sentencing Judge had not sufficiently taken into account a number of mitigating factors[14]. Thus, although some comment was made about some aspects of them, the appropriateness of the sentences imposed on Mr Elliott were not in issue in the appeal, and reference to those sentences is not of great assistance in the present application. However, it may be noted that he had a not insignificant criminal history, including being sentenced for fraud and property offences to three months imprisonment wholly suspended; 14 days' imprisonment for breach of a bail undertaking and for breaching

---

7 [2008] QCA 184.
8 [1998] QCA 382.
9 [2008] QCA 290.
10 [2014] QCA 31.
11 [2011] QCA 135.
12 [2006] QCA 24.
13 [2007] QCA 47.
14 *Mules* at [21].

the suspended sentence; and one month's imprisonment for assaulting a police officer. He was on probation at the time of the robbery offences. Although Ms Mules was the active participant in the two offences, reference was made to their relationship and Mr Elliott's greater maturity.

[28] The attempted robbery included an attempt to injure a complainant with a bottle, after a demand for money. The robbery included a threat to use a gun and a punch to the upper left cheek of a 17 year old person in charge of a video store. An amount of $500 was taken in the robbery. For the complainants in each case, the offences were described as "a traumatic life-event". The punch to the 17 year old video store attendant resulted in bruising and swelling to her face. In each case, the pleas of guilty were early.

[29] The nature of the offending, the fact that Mr Elliott was on probation at the time, and his criminal history all make it difficult to derive much assistance from the sentence imposed on Mr Elliott.

[30] Mr Rogers had pleaded guilty to a count of robbery. He entered a store at 6.45 pm, hunched over, with his shirt pulled up over the bridge of his nose, and wearing a cap. He then jumped the counter, frightening the store proprietor. He took $1,200 from a cash drawer. He then attempted to leave, but was intercepted by the other proprietor, which resulted in a brief scuffle. He was known to the proprietors of the store, his de facto wife being a regular customer. He was 32 years of age at the time of the offence. He had no prior criminal convictions and was affected by alcohol at the time of the offending. The store proprietor did not suffer any physical injury, but the Court concluded there would have been emotional upset for both proprietors.

[31] Mr Rogers had been sentenced to a term of three years imprisonment, for which was substituted a term of 12 months, suspended after three months in prison. Thomas JA considered that the offending could be characterised as a "stealing followed by a minor assault on a third party as the applicant was escaping from the premises".

[32] Plainly the property aspect of the offending was far more significant in *Rogers*; though the assault was less significant than in the present case, and Mr Rogers had no prior criminal convictions. Moreover, Mr Rogers did not have the mitigating factor of the effect of prescription medication.

[33] In *Kolodziej*, the applicant had pleaded guilty to a count of robbery in company, and a count of wilfully and unlawfully damaging a taxi cab. The initial sentence for the robbery was two years' imprisonment; and for the wilful damage offence 12 months' imprisonment, both periods wholly suspended, with an order to pay compensation. There had been a persistent course of threatening and intimidating conduct towards the taxi driver, but the acts were not premeditated. There was no violence inflicted on the complainant, although the damage to the cab involved violence. The conduct was not directed generally to stealing the cab driver's takings, but to the recovery of an amount of $30 paid by one of the offenders. The applicant had made extensive admissions, provided a written apology to the driver and the owner of the taxi, requested the presentation of an *ex officio* indictment, and offered to pay compensation. The applicant was 24 years of age, with a responsible position, and previous minor offending which included a number of counts of wilful damage. The Court recognised that "taxi drivers are in a particularly vulnerable position"[15] but considered the starting point for the robbery of a taxi driver to be a term of imprisonment of two years. The mitigating factors warranted a reduction of the term to 18 months, fully suspended.

---

15 *Kolodziej* at [38].

[34] Both Mr Evans and his co-offender, Mr Pearce, were young offenders, Mr Evans having no previous convictions and Mr Pearce having committed two minor and irrelevant previous offences. They both demonstrated a willingness to co-operate with the administration of justice, Evans making full admissions, and Pearce claiming that he was unable to remember details of the offence (both were heavily intoxicated). There was a full hand up committal, and early pleas. Both expressed remorse.

[35] The offending in *Evans* occurred at midnight, in Surfers Paradise. Mr Evans and Mr Pearce wished to go to a nightclub, but Mr Evans was not appropriately dressed. Accordingly, they (and two others travelling with them) decided to rob someone of his jeans and shoes. They came upon a 33 year old Turkish student who had arrived in Australia four days earlier. They alighted from their vehicle with one of the other persons, and engaged in some conversation with the Turkish student. One of the three then pushed him in the back, causing him to fall and hit his head on the footpath. One of them restrained him on the ground using a choke hold, and the other two kicked and punched him in the chest and face. They then removed his jeans and shoes. The complainant was very scared by the attack, fearing sexual abuse. The offenders stole his jeans with a mobile phone, keys, personal cards and a wallet containing his Turkish ID, licence and $150. The complainant suffered bruising to the forehead, chest, face, nose, right side of the head, left side of the neck, shoulders, and knees, and a swollen lip. He also stated that he experienced blood in his urine, a ringing in his ears, and occasional dizziness. He developed post-traumatic stress disorder. He had paid to attend a language school, but could not go to the class.

[36] Some aspects of this offending are of serious concern. It happened at night, and involved three persons ganging up on a person who was alone. The stealing aspect itself was likely to be frightening. There was significant gratuitous violence, with significant consequences for the complainant. Notwithstanding the mitigating factors, the sentence of two years' imprisonment with parole release fixed after nine months was held not to be manifestly excessive. The learned President said that it "gave proper but not excessive weight to the requirement of general deterrence"[16].

[37] The circumstances of the offending in *Evans*, including the extent of the violence used, its consequences, and the property involved, all demonstrate that this offending was far more significant than the offending of the present applicant. Notwithstanding the mitigating features in *Evans*, it is not possible to say that the two sentences reflect the consistent application of appropriate sentencing principles; or that the difference in sentences reflect the differences in relevant circumstances.

[38] Mr Boggs was convicted after a trial of an attempted robbery carried out with three other persons one of whom carried a replica pistol. The offending occurred at midnight in suburban Townsville. The offenders went to a service station, intending to rob it. Mr Boggs approached the service station, with his face covered, positioning himself so that he could not been seen from inside the service station, but could assist in the robbery. The offender with the replica pistol attempted to open the door of the service station, unsuccessfully. Only one staff member was present at the service station at the time and saw one of the offenders attempt to enter the service station. He suffered significant mental anguish and financial strain as a result of the offence.

[39] Mr Boggs was 31 at the time of the offence. He had a three-page criminal history including numerous assault, dishonesty and drug offences, the sentences including

---

16 *Evans* at [1].

short periods of wholly suspended imprisonment. He was in a de facto relationship, had three children, and was caring for his 64 year old mother. He had a solid work history. He had struggled for many years with substance abuse, and was intoxicated on the evening of the offence. It was said that he had "no real mitigating features other than his unfortunate background and the fact that his mother and family would be disadvantaged by his imprisonment"[17]. The sentence of 30 months' imprisonment suspended after 15 months, was upheld.

[40] Although in *Boggs* the robbery did not proceed, nevertheless the fact that it occurred at night and was directed to a service station where any attendant was likely to be isolated and vulnerable, that it was committed in company, and that the offending involved a replica pistol, all indicate its serious nature. Although no violence was used, the offending had a "dreadful effect" on the complainant[18]. At the time of the sentence, Mr Boggs had shown no remorse[19]. Again, it cannot be said that the difference in circumstances explains the difference between the sentence imposed on Mr Boggs, and that imposed on the applicant.

Disposition

[41] In a sense, it may be said that there is some loose analogy between the offending in the present case, and that in *Rogers*. The initial taking of the property in the present case did not involve the use or threat of violence. That occurred only when the store proprietor approached the applicant as he was leaving; and then after some verbal abuse by the applicant. The amount of money taken by Mr Rogers was far more significant than the property taken by the applicant; and Mr Rogers had made some attempt to prevent the store proprietors from identifying him. Nevertheless, the absence of prior convictions and the fact that there no person was injured are matters of considerable importance when comparing the sentence imposed on Mr Rogers to that imposed on the applicant.

[42] Although Mr Kolodziej had a less significant criminal history, and he did not assault the complainant, nevertheless he raised a clenched fist to the taxi driver, and used violence against the cab itself. There is some similarity with the applicant's offending, in the persistent course of conduct (described as threatening and intimidating); and the relatively small amount of property involved. Moreover the offence was committed in company. The vulnerability of the taxi driver was a not unimportant consideration; but in the circumstances of the applicant's offending, vulnerability does not seem to be a matter of significance. Again, it cannot be said that the differences in sentences are explicable by the differences in the circumstances.

[43] When decisions of this Court on cases which have some degree of comparability with the applicant's offending are considered, it is apparent that the sentence was manifestly excessive.

[44] There is an additional feature of the present case. Reference has already been made to the way in which the learned sentencing Judge described the conduct of the applicant at the time of his offending. Indeed, it could be characterised as irrational. It would appear that he intended to walk out of the shop with goods which he had taken, while the proprietors and other customers were present, and notwithstanding that he had been a customer of the store for 10 years. He made no attempt to hide his

---

17 *Boggs* at [19].
18 *Boggs* at [15].
19 *Boggs* at [15].

identity. He returned on two occasions. His manner of speech was not that of a person in control of his faculties. His conduct was accepted by the learned sentencing Judge to be the result of the combined effect of a prescription medication, and alcohol. This is accordingly not a case where the offending was simply the product of voluntary intoxication by alcohol or drugs.

[45] In any event, those circumstances indicate the very unusual nature of this offending. This is not a case where there has been a marked deterioration of the offender's conduct over a period of time, so that the need for personal deterrence would warrant a harsher penalty than might otherwise be imposed. On the contrary, the number of years which had passed since the earlier offences committed by the applicant, and the fact that he has no recent offences associated with illicit drugs, point to efforts at rehabilitation which have had some success.

[46] The offending warranted a sentence of a term of imprisonment, and some features, including the repeated resort to violence and abuse, made it appropriate that the applicant spend some time in custody. In my view, an appropriate term of imprisonment for the robbery offence would be 18 months. It would then be appropriate to modify the sentence for the offence of entering premises with intent by reducing it to nine months. It was not suggested that the other two sentences should be modified. The time to be spent in custody should also be reduced. I would fix the parole release date as the date of publication of these reasons.

Conclusion

[47] I would make the following orders:-

1. Grant the application for leave to appeal against sentence.
2. Allow the appeal.
3. Vary the sentences for counts 1 and 2 by imposing a term of imprisonment of 18 months and nine months respectively.
4. Fix the applicant's parole release date as 16 November 2016.