SUPREME COURT OF QUEENSLAND

CITATION:	*R v Coutts* [2008] QCA 380
PARTIES:	**R** **v** **COUTTS, Chloe Ann** (applicant/appellant)
FILE NO/S:	CA No 204 of 2008 DC No 154 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	4 December 2008
DELIVERED AT:	Brisbane
HEARING DATE:	12 November 2008
JUDGES:	McMurdo P, Holmes JA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence granted.** **2. Appeal allowed.** **3. The sentence imposed at first instance is set aside and instead, upon Chloe Ann Coutts' legal representatives' compliance with s 95 *Penalties and Sentences Act* 1992 (Qld) and upon her agreement to the following order and to her compliance with it, it is ordered that Chloe Ann Coutts be sentenced to two years and three months probation, subject to the general requirements set out in s 93 *Penalties and Sentences Act*.** **4. A conviction is recorded.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – applicant pleaded guilty in July 2008 to an assault occasioning bodily harm committed in 2006 and sentenced to three months imprisonment followed by parole – applicant sentenced in April 2008 for another assault occasioning bodily harm to 18 months probation with community service and restitution – applicant sentenced in June 2008 for a public nuisance offence committed in May 2008 – this offence breached the probation order imposed in

April 2008 – sentencing judge applied totality principle in considering the appropriate sentence if applicant had been sentenced for both assaults in April 2008 – sentencing judge commented that non-custodial sentence was not open because of subsequent breach of probation order by the public nuisance offence – whether sentencing judge erred in applying the totality principle – Court of Appeal re-sentenced applicant to two years and three months probation with a conviction recorded

Penalties and Sentences Act 1992 (Qld), s 9(2)(a), s 9(4)

Clements (1993) 68 A Crim R 167; [1993] QCA 245, considered
Mill v The Queen (1988) 166 CLR 59; [1988] HCA 70, applied
R v Kite [1999] QCA 162, compared

COUNSEL: M A Green for the applicant/appellant
M J Copley for the respondent

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

[1] **McMURDO P:** The applicant, Chloe Ann Coutts, pleaded guilty in the Toowoomba District Court on 28 July 2008 to assault occasioning bodily harm on 16 September 2006. She was sentenced to three months imprisonment with a parole release date set at the end of that period. She applies for leave to appeal against her sentence contending that it was manifestly excessive. She also contends that the judge erred in failing to correctly apply the totality principle.

The sentencing proceeding

[2] Ms Coutts was 19 years old at the time of the offence and 21 at sentence. She had some relevant criminal history. During 2004 she appeared in the Toowoomba Magistrates Court on three occasions for street offences. On the last of those occasions, on 27 July 2004, she was also dealt with for both obstructing and assaulting a police officer. In respect of all these matters, she was fined. The assault on the police officer concerned a disturbance outside a Subway store in Margaret Street, Toowoomba. Police identified Ms Coutts as a troublemaker and after some resistance handcuffed her. As they placed her in the rear of the police vehicle, she kicked a male police officer in the thigh. In October 2004 she was convicted and fined for unauthorised dealing with shop goods. She was dealt with for two more street offences in 2005 and for yet further street offences on 1 April and 13 June 2008. Again, she was fined in respect of these matters. Of more consequence, on 1 April 2008 she was convicted and sentenced to 18 months probation and 100 hours community service, with restitution of $500, for an assault occasioning bodily harm committed on 8 November 2007. That offence was therefore committed subsequently to the present offence. The circumstances surrounding that subsequent offence were that Ms Coutts was recorded on security cameras "king-hitting" a male patron with her fist to the right side of his face at the

Irish Club Hotel in Toowoomba. The complainant fell to the floor and she fled. When police later spoke to her, she made full admissions.

[3] The circumstances of the present offence are as follows. The complainant and two female friends, Corrina and Johanna, were at the Monastery nightclub, Fortitude Valley. As they were leaving, Ms Coutts pushed the complainant and Johanna over onto a set of stairs. Johanna gave Ms Coutts "the finger" and then continued towards the exit. This infuriated Ms Coutts who then ran towards the complainant and her two friends. She grabbed the complainant's hair with both hands, pulling the complainant towards her and dragging her some metres along the floor on her knees. The complainant's friends and a nightclub security person intervened. Ms Coutts did not release the complainant until Ms Coutts' boyfriend slapped her. She fled but was later located by police. She declined to take part in a record of interview. The complainant suffered painful lumps on her head, some hair loss, an intermittent headache for a day and grazes and bruising to both knees.

[4] The prosecutor at sentence emphasised Ms Coutts' previous conviction for assaulting a police officer which, he contended, suggested a tendency towards violent behaviour when intoxicated and a need for anger management. He also emphasised the following matters. She had committed a subsequent similar offence. Had the present offence been dealt with at the same time as the subsequent offence, she would probably have been sentenced to lengthier periods of probation and community service.

[5] The prosecutor tendered a court report prepared by her probation and parole officer. It recorded that Ms Coutts had engaged with services provided by Alcohol and Tobacco Drug Service (ATODS), recognising the role alcohol played in her offending, and Relationships Australia (RA), recognising the need to deal with issues resulting from a previous relationship. The report was not encouraging in the following respects. She continued to regularly abuse alcohol and to engage in behaviours her probation order was designed to curtail. She had completed 37.25 hours of her 100 hour community service order but had failed to attend on four occasions. Soon after being placed on probation on 4 May 2008, she committed another public nuisance offence when she created a disturbance whilst drunk in a main Toowoomba street. She was later charged with being drunk or disorderly in licensed premises, arising from an incident on 20 July 2008. The author of the report understood that Ms Coutts was likely to be breached in relation to that offence should she be convicted.

[6] The prosecutor submitted that Ms Coutts had demonstrated that she was wholly unsuited to any further community based orders. He argued that a short period of custody was the appropriate sentence for the present offence because she had committed violent acts in a licensed venue and had subsequently disregarded community based orders. The prosecutor conceded, however, that the judge could order an immediate parole release date, effectively "a sword hanging over her head" in case she re-offended.

[7] Defence counsel made the following submissions. At the time of sentence, Ms Coutts had completed a little over half her community service order with 48 hours outstanding. She was a single parent of a one year old child. She occasionally undertook part-time work but her primary income was from a single parent pension. She had had a drug abuse problem from six years of ice and

amphetamine use resulting in psychosis. At the peak of her drug use she weighed only 45 kg. She was being treated for clinical depression by her general practitioner, Dr Pingu. When she was 13, she was sexually abused by a family friend. This seemed to trigger her subsequent rebelliousness and drug abuse. When she was 16, she received in-patient treatment for mental health issues for about six months. She had a self-harming problem and on a number of occasions self-harmed by cutting her arms. She had been in a two year sexual relationship with a champion boxer, Ricky Thornbury. Mr Thornbury was tried in the District Court at Ipswich on the charge of unlawfully wounding her by cutting her on the leg and hand. She required eight stitches to her leg and four to her hand. A mis-trial resulted, but a re-trial was ordered. In more recent times she has abused alcohol.

[8] Defence counsel tendered a letter from ATODS which recorded that she had attended there for counselling on 13 occasions between 11 July 2007 and 25 July 2008. He explained that, because of her background, the Department of Child Safety has taken an interest in the welfare of her child who was under a protective supervision order. The child lives with her and is visited by a Departmental officer every few months. Defence counsel contended that whilst her probation report was not favourable, it was not hopeless. When she committed the present offence, she was intoxicated with alcohol and drugs. She believed the complainant was "making eyes" at her partner and reacted irrationally and inexcusably. Fortunately, the complainant's injuries were not serious and she quickly made a full recovery. Ms Coutts' subsequent violent offending involved an attack on a much bigger adult man who had made sexual advances to her which she rejected; he called her a slut and she later retaliated. Defence counsel also emphasised Ms Coutts' plea of guilty and that the matter occurred some time ago. He urged the judge to give consideration to the totality principle by sentencing her to either a three month term of imprisonment fully suspended; a two year probation order; or to adopt the prosecutor's suggestion of a three month term of imprisonment with immediate release on parole.

[9] In sentencing Ms Coutts to three months imprisonment, the judge referred to the details of the offence, her unfortunate background, her "poor criminal history", her plea of guilty and to the following matters. Ms Coutts did not assist the police by confessing her role in the offence. Her counsel said that she suffered from clinical depression and psychiatric consequences from her amphetamine abuse, but no medical reports in this regard were tendered. She had subsequently been convicted and sentenced to 18 months probation for assault occasioning bodily harm. This required regard to the totality principle in sentencing for the present offence. The report from the probation and parole officer was not favourable.

[10] The judge considered that relevant sentencing principles included the need for just punishment; conditions to help rehabilitation; deterrence to Ms Coutts and to others from committing wanton acts of violence; and making it clear that the community, acting through the court, denounced her conduct. The judge referred to *R v Kite*[1] where the Court of Appeal upheld a sentence of three months imprisonment and two years probation for a similar offence. Because this was an offence of violence, s 9(2)(a) *Penalties and Sentences Act* 1992 (Qld) did not apply; the court was instead required to take into account the matters set out in s 9(4). The judge considered that had the magistrate been sentencing Ms Coutts on 1 April 2008 for

---

1 [1999] QCA 162.

two vicious assaults instead of one, a period of actual imprisonment would not have been outside the expected range. His Honour added:

> "In terms of a period of suspension, it is noteworthy that [Ms Coutts'] subsequent entry on the 13th of June 2008 records a further conviction for an offence which is punishable by imprisonment."

The judge concluded that the serious nature of the offence and Ms Coutts' poor response to community based orders left no reasonable alternative to a term of imprisonment.

[11] Ms Coutts was admitted to bail pending appeal on 18 August 2008 on conditions which included abstinence from the consumption of alcohol and submission to random breath testing.

The submissions in this application

[12] Mr M A Green, who appears on behalf of Ms Coutts in this application, in contending that the primary judge misapplied the totality principle, emphasises the following matters. In applying the totality principle, the judge should not have had regard to Ms Coutts' public nuisance conviction on 13 June 2008. That error requires this Court to re-sentence Ms Coutts.

[13] In that event, regard should be had to her recent affidavit sworn 6 November 2008. She attests that she had an appointment with a psychologist at ATODS on 23 October and had others booked for 11 and 18 November 2008. She had completed the outstanding period of community service. The Department of Child Safety has required her to have regular urine tests, all of which have been clear. The Department is satisfied with the standard of her care for her child and will cease supervision and contact on 28 November 2008. She has now been drug-free for about 17 months and has not consumed alcohol for some months. Her period in custody before being granted bail was difficult: she missed her daughter "terribly". She has now obtained employment as a waitress in Toowoomba, working 15 hours per week while her family cares for her daughter. She also plays touch football in a local competition.

[14] Mr Green also contends the sentence was manifestly excessive, emphasising the following. There were many mitigating factors. Ms Coutts had a troubled background. She was sexually abused as a child and a victim of domestic violence as a young adult. Mr Green concedes that the probation report was not favourable but said her failings were consistent with the rehabilitation process taking some time, hardly surprising considering Ms Coutts' personal circumstances. The judge, Mr Green contends, over-emphasised the significance of her criminal history, which, although concerning, did not include "numerous offences of violence". He submits that, had the two episodes of assault occasioning bodily harm been dealt with together, the likely sentence was a period of probation of up to two and a half years with a community service order for, perhaps, more than 100 hours. The probation report did not indicate that Ms Coutts was not an appropriate candidate for further community based orders. He submitted that this was not an appropriate case in which to impose a period of actual imprisonment; if any period of imprisonment was imposed, it should have been wholly suspended.

[15] Mr M J Copley, on behalf of the respondent, contends that the primary judge did not err in his application of the totality principle. He submits that this Court should not conclude that the judge rejected the option of a non-custodial order because he took

into account information not available to the sentencing court on 1 April 2008, that a fully suspended sentence or a non-custodial community based order would inevitably be breached by the later conviction for public nuisance on 13 June 2008. Relying on *Kite*, Mr Copley argues that the judge rightly concluded that had the Magistrates Court been sentencing Ms Coutts on 1 April 2008 for two vicious assaults rather than one, a period of actual custody was within range. Mr Copley submits that the judge referred to all mitigating factors and was entitled to consider that her criminal history was "extensive" and included "numerous offences of violence". His Honour's comments, Mr Copley contends, do not suggest that he unfairly or unreasonably inflated Ms Coutts' history to the exclusion of other relevant considerations.

[16] Mr Copley was given leave to file an affidavit which contained the following recent information obtained from Ms Coutts' probation officer. She has abstained from drinking alcohol since on bail, has attended counselling and has not re-offended. The probation officer is not presently inclined to breach Ms Coutts for any subsequent offending.

Discussion and conclusion

[17] *Kite* is distinguishable from the present case, although there are similarities. Kite was sentenced to three months imprisonment and two years probation for an offence of assault occasioning bodily harm. She was 19 years old and had extensive prior convictions as a juvenile for offences including assault occasioning bodily harm, for which she was placed on 100 hours community service, and an assortment of property offences, for which she had been sentenced to probation and six months detention. One month after completing her supervision in the community, she committed the offence the subject of her application. She then committed subsequent drug offences whilst on bail. Kite's offending involved an attack on a 15 year old girl while Kite's female companion attacked a 16 year old girl at 1.00 am after the complainants left an under 18s dance party. Kite apparently thought the complainant gave her and her companion "a dirty look". Kite's assault involved blows to the complainant's head but fortunately, as in the present case, caused only minor injury. Kite had a seven month old child whom she was supporting on a sole parent pension. She had been drinking heavily but since the offence had moderated her drinking and returned to school to further her education. This Court noted that the sentencing judge considered offences of this kind prevalent in Surfers Paradise so that people were reluctant to venture out at night. The Court emphasised Kite's prior conviction for assault occasioning bodily harm, which was also committed upon a young female complainant. The Court ultimately determined that whilst a sentence involving an intensive correction order or a fully suspended sentence would have been within range, the sentence imposed was not manifestly excessive. The significant difference between *Kite* and the present case is that Kite had a recent prior conviction for assault occasioning bodily harm and convictions for property offences which were so serious that, although a juvenile, convictions were recorded and she was sentenced to detention. By contrast, Ms Coutts' prior criminal history was minor.

[18] In his application of the totality principle, the learned sentencing judge seems to have placed considerable emphasis on *Kite*. His Honour also seems to have reasoned that, had Ms Coutts been sentenced by the magistrate on 1 April 2008 for both episodes of assault occasioning bodily harm, a period of actual imprisonment

would have been within range. His Honour then observed with hindsight that, had that imprisonment, or part of it, been suspended, it was now known that she committed a subsequent offence on 13 June 2008 which was punishable by imprisonment. In making that observation, his Honour seems to have decided in applying the totality principle that, because of her conviction on 13 June 2008, a suspended term of imprisonment (or a community based order) was not open. This reasoning was flawed. The totality principle discussed in *Mill v The Queen*,[2] as explained in *Clements*,[3] required the judge to place himself in the position of the magistrate sentencing Ms Coutts on 1 April 2008 for the present offence together with the offence of assault occasioning bodily harm committed on 8 November 2007. Neither *Kite* nor the conviction for public nuisance on 13 June 2008 meant that a non-custodial sentence was not open in the application of the totality principle to Ms Coutts' case. His Honour wrongly fettered his sentencing discretion in considering that they did. This error warrants the granting of the application for leave to appeal, the allowing of the appeal and requires this Court to re-exercise the sentencing discretion.

[19] In re-sentencing Ms Coutts, it is appropriate to take into account the matters referred to in her recent affidavit and the further information supplied by Mr Copley. She has now made very significant efforts at rehabilitation and her prospects in this respect are far more promising than when this matter was before the learned sentencing judge. Ms Coutts has a very disturbed background. She has been a victim of sexual abuse and domestic violence and has substance abuse and anger management problems. All this strongly suggests she needs the long term assistance, guidance and control offered by a lengthy probation order. She has now completed 100 hours community service in respect of her sentence for the subsequent assault occasioning bodily harm offence. She has also spent a period of about three weeks in prison in respect of this offence and has successfully met her onerous bail conditions since 18 August 2008. In these circumstances, the appropriate sentence is to record a conviction and to sentence her to two years and three months probation on the usual terms and conditions. Mr Green has indicated on Ms Coutts' behalf that she would consent to such an order.

Orders

1. Application for leave to appeal against sentence granted.
2. Appeal allowed.
3. The sentence imposed at first instance is set aside and instead, upon Chloe Ann Coutts' legal representatives' compliance with s 95 *Penalties and Sentences Act* 1992 (Qld) and upon her agreement to the following order and to her compliance with it, it is ordered that Chloe Ann Coutts be sentenced to two years and three months probation, subject to the general requirements set out in s 93 *Penalties and Sentences Act*.
4. A conviction is recorded.

[20] **HOLMES JA:** I agree with the reasons of McMurdo P and the orders she proposes.

[21] **FRYBERG J:** I agree with the orders proposed by the President and with her Honour's reasons for them.

---

2 (1988) 166 CLR 59; [1988] HCA 70 at 66.

3 (1993) 68 A Crim R 167; [1993] QCA 245 at 174 (Pincus JA).