# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Sabanovic; ex parte A-G (Qld)* [2009] QCA 324 |
| PARTIES: | **R**<br>**v**<br>**SABANOVIC, Asmir**<br>(respondent)<br>**EX PARTE ATTORNEY-GENERAL OF QUEENSLAND**<br>(appellant) |
| FILE NO/S: | CA No 197 of 2009<br>DC No 910 of 2009 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Sentence Appeal by A-G (Qld) |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 27 October 2009 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 9 October 2009 |
| JUDGES: | Keane, Holmes and Fraser JJA<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **Appeal dismissed** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEALS BY CROWN – where respondent convicted of one count of making a false statement on oath and one count of perjury and sentenced to one year and two years imprisonment respectively – where immediate parole release date fixed – where respondent had favourable personal circumstances and had recanted his perjury – whether the sentence fails to reflect adequately the gravity of the offences – whether the sentence fails to take general deterrence sufficiently into account – whether the perjury conviction calls for a custodial sentence<br><br>*Criminal Code* 1899 (Qld), s 123, s 193<br>*Justices Act* 1886 (Qld), s 110A(5)(c)(ii)<br><br>*R v Coombes* [2003] QCA 388, cited<br>*R v Houda* [1993] QCA 562, cited<br>*R v House* [1986] 2 Qd R 415, cited<br>*R v Lacey; ex parte A-G (Qld)* [2009] QCA 274, cited<br>*R v Nimmett* [2008] QCA 323, considered |

*R v Ozdemir; ex parte Attorney General* [1993] QCA 463, distinguished
*R v Pacey* (2005) 158 A Crim R 151; [2005] QCA 203, considered
*R v Sossi* (1985) 17 A Crim R 405, cited
*R v Triantafillopoulas; ex parte A-G (Qld)* [1999] QCA 336, considered

COUNSEL: A W Moynihan SC for the appellant
A J Glynn SC for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Gilshenan & Luton for the respondent

[1] **KEANE JA:** I have had the advantage of reading in draft the reasons for judgment prepared by Fraser JA. I agree with those reasons and with the order proposed by his Honour.

[2] **HOLMES JA:** I agree with the reasons of Fraser JA and the order he proposes.

[3] **FRASER JA:** On 24 July 2009 the respondent was convicted on his pleas of guilty to making a false statement on oath (count 1) and perjury (count 2). Convictions were recorded on both counts and the respondent was sentenced to concurrent terms of one year imprisonment for count 1 and two years imprisonment for count 2. The sentencing judge fixed an immediate parole release date. The Attorney-General has appealed against the sentences on the grounds that they fail to reflect adequately the gravity of the offences generally and in this case in particular, they fail to take general deterrence sufficiently into account, and the sentencing judge gave too much weight to factors going to mitigation.

**Factual background**

[4] The relevant facts were summarised in particulars of the offences tendered by the prosecutor at the sentence hearing.

[5] The respondent witnessed events in an inner city apartment bedroom on 8 July 2007. A group of young men were later charged with raping a young woman on that occasion. The respondent provided a statement to police on 9 October 2007 in which he acknowledged that his statement was true and, if it were admitted in evidence, he might be liable to prosecution for stating anything he knew to be false. The respondent nevertheless made various claims in the statement which he later admitted were false: he asserted that he saw two men in the bedroom; the young woman and the two men he saw were fully dressed; he did not see anyone engage in a sexual act with the girl; he was not aware of anyone who had engaged in any sexual act with the girl; and he had no further information to assist the police investigation. On 29 November 2007 the respondent gave evidence under oath at a judicial proceeding (a proceeding conducted by the Crime and Misconduct Commission (the "CMC")) which formed part of an investigation into the suspected rape of the young woman. In that evidence the respondent made false assertions that he did not see any of the other men in the bedroom expose their penises or commit any sexual acts on the young woman.

[6] Later on the same day, 29 November 2007, the respondent volunteered to the police that he had lied. He then gave further evidence under oath in which he substantially retracted his false evidence. He said that when he went into the bedroom with the young woman there were four other men present. The respondent knew and identified three of those men. The young woman, who was drunk, was lying on the bed with her breasts exposed. Some of the men had their penises exposed and they all asked the young woman for oral sex. The respondent said that he had his zipper down but he did not expose his penis. In subsequent statements to police the respondent made further disclosures. He said that he, like all the other men present, had his penis exposed. He said that the other men all asked the woman for oral sex, and that two of them successively got on top of the young woman and each of those men's exposed penis was between her legs.

[7] The respondent's motive in lying was to protect his friends and, it may be inferred, also to conceal his own discreditable conduct.

[8] Six men have been committed for trial for raping the young woman.

**The sentencing remarks**

[9] The sentencing judge did not accept the prosecutor's submission that the respondent should be required to serve between five and twelve months in actual custody or defence counsel's submission that actual custody of three to five months seemed unavoidable. The sentencing judge accepted that decisions of this Court uniformly stressed the seriousness of offences relating to false statements under oath and perjury in particular but thought that the present case was not a "suitable vehicle for general deterrence" in light of an unusual collection of facts. The sentencing judge, in careful and detailed sentencing remarks, identified the following matters as bearing upon the sentencing discretion.

[10] The respondent was only 20 years of age at the time of the incident, 21 years of age at the time of his offences, and 22 years of age when sentenced. He had no criminal history. He pleaded guilty after a full hand-up committal. He had left school with a low OP score but subsequently obtained a good pass in a vocational course, qualifying as a laboratory technician. In that way he earned entry into a university science degree, where he was doing well. One of his lecturers observed that the respondent had undergone a significant change in attitude between February 2006 and later in that year. The respondent had deliberately separated himself from distracting students, adopted a more mature and responsible attitude, improved his results markedly, and earned the respect of his fellow students and university lecturers.

[11] A psychiatrist who had treated the respondent since mid-2008 had diagnosed the respondent with a generalised anxiety disorder and panic disorder. The respondent had suffered from significant anxiety symptoms for many years and possibly suffered Attention Deficit Disorder and learning difficulties whilst at school. The respondent's symptoms were connected with his traumatic and difficult childhood. He suffered from his family having been caught in the ethnic cleansing in Bosnia, the respondent himself having witnessed atrocities whilst he was a child. He arrived in Australia when he was seven or eight years of age. He came of a decent family who had lost practically everything they owned in that war but nevertheless brought their children up in a loving and caring way. The psychotherapy treatment by the psychiatrist had been effective and the applicant had made significant strides in his university work, his part time job in security work, his sporting interests, and in

keeping better company than previously. The psychiatrist also expressed the unsurprising view that imprisonment would be very bad for the respondent's mental health and his educational, vocational and social development.

[12] A social worker who is a friend of the respondent's family reported that the respondent was highly distressed and remorseful about his offending. She expressed her opinions that the offences were out of character for the respondent and that, during the respondent's interactions with police and the CMC, he suffered from a reaction to his disturbing wartime experiences which resulted in his diminished trust in authority, especially police officers. The respondent also had the benefit of valuable family support and a favourable reference from his employer in the security industry.

[13] The sentencing judge noted that when the respondent made false statements to the police and in evidence in the CMC hearing he had been alone, and his change in evidence developed after he had seen a solicitor.

**The arguments in this Court**

[14] Mr Moynihan SC, who represented the appellant, emphasised that the respondent's perjury offence called for a custodial sentence. It was not a spur of the moment offence, as was demonstrated by the lies in his earlier statement the subject of count 1. The respondent's offence had the potential to deflect a police investigation into very serious alleged offences. Mr Moynihan argued that the sentencing judge erred in thinking that general deterrence was irrelevant; that the failure to require the respondent's actual incarceration was inadequate; and that the sentence failed to reflect the seriousness of the offence and the necessity for general deterrence and denunciation. He argued that the sentence was inconsistent with the Court's decisions in *R v Nimmett* [2008] QCA 323, *R v Pacey* (2005) 158 A Crim R 151; [2005] QCA 203, *R v Ozdemir; ex parte Attorney General* [1993] QCA 463 and *R v Triantafillopoulas; ex parte A-G (Qld)* [1999] QCA 336. He referred to statements in those authorities which emphasised the seriousness of perjury offences, as striking at the heart of the administration of justice, and the requirement to take into account the need for general deterrence. Mr Moynihan argued that lying to protect others from liability for alleged criminal behaviour was not less serious than the perjury considered in those decisions, which included lying for personal financial benefit and for the purpose of wrongfully implicating another in an offence.

[15] He contended that the fact that the applicant had succeeded in the face of adversity, had no criminal history, pleaded guilty, and was working hard at his tertiary studies were to his credit and properly taken into account in mitigation, but that the sentencing judge placed too much weight on those matters and insufficient weight on general deterrence and denunciation. He submitted that a proper sentence required variation of the parole release date so that the respondent served eight months in custody.

[16] Mr Glynn SC, who appeared for the respondent, accepted that the decisions cited for the appellant established that, generally speaking, a person convicted of perjury can expect a sentence which will include a period of actual custody. He submitted, however, that the authorities recognised that incarceration in prison is not inevitable. Mr Glynn submitted that the respondent's offending was less serious and his personal circumstances were more favourable than was the case for the offenders in the decisions cited for the appellant. He relied upon the mitigating features identified by the sentencing judge, and particularly that the respondent

recanted his perjury. Mr Glynn argued that actual custody was not required in the unusual circumstances of this case or, alternatively, that any such sentence should not exceed a period of four months and its commencement should be deferred until after the respondent had sat for his university exams later this year.

[17] In support of the latter submission the respondent relied upon an affidavit which he swore the day before the hearing of the appeal. The appellant did not object to this new evidence. The affidavit established that if the respondent were now sentenced to a term of imprisonment he would be unable to sit for his final exams for the second semester of the second year of his Bachelor of Biotechnology university degree, with the result that he would fall behind his current student cohort by one year. The respondent argued that this evidence supported the view that if actual custody was required it should be of limited duration and deferred until after the respondent had completed his end of semester exams.

**Discussion**

[18] As is reflected in the sentences imposed by the sentencing judge, the respondent's perjury offence under s 123 of the *Criminal Code* 1899 (Qld) (count 2) was markedly more serious than his offence under s 193 of the *Code* of making a false statement on oath (count 1). Count 2 attracted a maximum penalty of 14 years imprisonment, whereas count 1 attracted a maximum penalty of seven years imprisonment. The appellant did not contend that the conviction on count 1 itself called for a sentence of imprisonment which required actual custody, but rather that this offence bore upon the seriousness of the subsequent perjury offence.

[19] The issue debated before the sentencing judge was whether the respondent should be given a sentence which required him to serve some period in actual custody. In that context, I do not construe the sentencing judge's remarks as suggesting that general deterrence and denunciation were irrelevant considerations in fixing upon the just sentence. Rather, I understand that the sentencing judge intended to convey that the general requirement for deterrent sentences for perjury offences did not require the incarceration of the respondent in the unusual circumstances of this case.

[20] That raises the substantial issue in this appeal. The general importance of denunciation and general deterrence in sentencing for perjury is undoubted. In *Pacey*, after a review of the authorities Williams JA observed (at [29]) that actual imprisonment has almost invariably been imposed for perjury although in many instances the offender has no previous convictions and often there were other mitigating factors. The reason for severe sentences for this offence is that, as the President observed in *R v Coombes* [2003] QCA 388, perjury "strikes at the essence of the criminal justice system and the public's confidence in it". Those and many other authorities emphasise that because perjury strikes at the heart of the administration of justice it is a serious offence which will ordinarily call for a sentence of imprisonment: see, for example, *Ozdemir* at 5 and 7 and *Nimmett* at 6. It is the insidious potential for perjury to cause actual or apparent miscarriages of justice which forms the essential rationale for the severity with which that offence ordinarily must be treated.

[21] The respondent's perjury was serious. It was potentially very serious because the alleged offences being investigated by police were themselves grave offences and, as the appellant emphasised, the respondent's earlier misstatements to police demonstrated that the respondent's perjury was not a spur of the moment offence. If those were the only significant circumstances of the offences I would think that

imprisonment involving actual custody was required, despite the respondent's favourable personal circumstances.

[22] There are in this case, however, the important considerations that the respondent voluntarily repented of his offences, corrected his misstatements, and promptly recanted his perjury. This has a dual significance. First, the respondent's moral courage in voluntarily and promptly confessing his perjury and setting the record straight after he had earlier committed himself to lying to protect his friends and himself suggests that he has excellent prospects for a complete and speedy rehabilitation. The second consideration, which I think is even more important in the present context, is that the seriousness of each offence, and the perjury offence in particular, was diminished by the respondent's subsequently commendable conduct and the consequential absence of any suggestion that his offences in fact led to any miscarriage of justice or other substantially adverse consequence.

[23] In light of the rationale for imposing severe sentences for perjury which I have discussed, this second consideration is of particular significance in determining whether a custodial sentence is required for the legitimate purposes of denunciation and general deterrence. There is here no suggestion that the course of justice was in fact diverted or that the complainant in the rape investigation, or anyone else, was adversely affected in any significant way by the consequences of the respondent's offences. Further, whilst the respondent's misstatements and perjury might have tainted the evidence he could give, in the sense that they might expose him to cross-examination upon inconsistent statements, the appellant acknowledged that the evidence did not support the view that this would in fact impact upon the rape trial.

[24] These considerations make good the submission for the respondent that his perjury was a less serious example of the offence than in *Pacey*, *Triantafillopoulas* and *Ozdemir*, where more severe sentences were justified because the perjury contributed to miscarriages of justice.

[25] In *Pacey*, the Court refused an application for leave to appeal against a sentence of two years imprisonment, suspended after serving six months with an operational period of two years, which was imposed after a plea of guilty. That youthful offender gave perjured evidence at committal proceedings to the effect that he did not commit a serious robbery offence and it was committed by someone else. The innocent person was committed to trial and his liberty was significantly impaired during the 12 month period of his bail. As Williams JA observed, at paragraph [30], that case highlighted the consideration referred to in the authorities that perjury attacks the very heart of the justice system

[26] In *Triantafillopoulas*, the court allowed an Attorney-General's appeal against a sentence for perjury of 12 months imprisonment served by way of an intensive correction order and re-sentenced that offender to two years imprisonment with the recommendation that he be eligible for parole after nine months. The offender had made false statements in committal proceedings exonerating his co-offender from a serious home invasion offence. Derrington J observed that the seriousness with which perjury must be regarded because it was a "deleterious factor in the criminal justice system" was emphasised because the offender had used his original, true statement to police (that he had been persuaded to commit the offence by his co-offender) to obtain mitigation of his own sentence for the home invasion offence.

[27] In *Ozdemir*, the court allowed an appeal by the Attorney General against a wholly suspended sentence of two and a half years imprisonment for two counts of perjury

and substituted a sentence of two years imprisonment with a recommendation for eligibility for parole after nine months. That offender committed perjury in civil proceedings for his own personal gain. The perjury adversely impacted upon the course of justice in that the offender gave and did not retract false evidence at the trial of his civil claim. The potential effect of his evidence upon the award of damages was averted only when the perjury was discovered, when the offender withdrew his claim. That offender also had much less compelling personal circumstances than the respondent. He was not youthful (he was 49 years old), he pleaded not guilty, and he conducted the trial in a way which indicated absence of remorse.

[28] *Nimmett* bears the closest factual resemblance to this case but that offender had less favourable personal circumstances than the respondent. The Court there refused an application for leave to appeal against a sentence of 18 months with release on parole after four months. That offender, who was in her mid-thirties and had a minor criminal history, gave false evidence in a CMC inquiry exculpating her de facto husband from his suspected involvement in rape. She was convicted on her plea of guilty of four counts of perjury, which reflected four false statements in the inquiry. The appellant referred to a passage in my reasons, with which Holmes JA and McMeekin J agreed, in which I rejected the contention that the sentencing judge erred in imposing actual custody in light of that offender's voluntary confession of her perjury at a time when she was not the subject of a police investigation for perjury, requiring a non-custodial sentence. It must be borne in mind though that the Court did not decide that a non-custodial sentence was outside the range of sentences open to the sentencing judge. Rather, the Court decided that it was within the sentencing judge's discretion to require the applicant to serve four months in actual custody.

[29] I said in *Nimmett* that the offender's voluntary recantation of her perjury was an important factor and that it was in the public interest that witnesses who had given false evidence at compulsive hearings retract that evidence and credit should be given for that. Similarly, Holmes JA accepted the proposition that, generally speaking, a case in which perjured evidence was given in a coercive hearing by an accused who was a witness in that context, not a suspect, and who subsequently co-operated might, depending on the facts, justifiably attract a sentence not involving actual custody. The public interest consideration discussed in that case reflects the same concern with the avoidance of actual and apparent miscarriages of justice which underlies the general seriousness of perjury offences.

[30] The circumstances of this case point to a less severe sentence than was imposed in *Nimmett*. Despite the undoubted seriousness of the respondent's offences, in light of his voluntary, prompt recantation of his perjury and the correction of his misstatements and in the absence of any actual miscarriage of justice or other substantial adverse effect resulting from the respondent's offences, the requirements of denunciation and a deterrent sentence are here sufficiently met by the sentence of two years imprisonment which the sentencing judge imposed. The order for immediate release on parole appropriately reflected the significant mitigating effect of those circumstances of the offences and the respondent's personal circumstances. Accordingly, I would dismiss the appeal.

[31] There are some other matters I should mention. The first is that I have thought it unnecessary to consider the admissibility of the new evidence in the respondent's affidavit, which I thought had little significance in the resolution of the critical issue

in this appeal. I have also thought it unnecessary to consider the applicability in this appeal of the statement in *R v Lacey; ex parte A-G (Qld)* [2009] QCA 274 by the Chief Justice and Keane, Muir and Chesterman JJA at [153], upon which the respondent relied, that "the long-standing judicial aversion to putting the subject in jeopardy of criminal punishment for a second time is a consideration relevant to the exercise of the discretion conferred on this Court by s 669A(1)." I do however record my rejection of the respondent's submission that this appeal, which raised a real issue for the Court's consideration, was brought merely so that the Attorney might have a "second bite at the cherry": see *Lacey* at [148].

[32] There was one other issue discussed at the hearing of the appeal which should be mentioned. One element of the offence under s 193, both in its current form and in the form it was in before the section was amended by s 36 of Act 55 of 2008 which commenced on 1 December 2008, is that the statement was made on oath, or made under some "sanction" that may by law be substituted for an oath, or verified by solemn declaration or affirmation. The respondent's signed statement to police of 9 October 2007 was not made on oath and it was not verified by solemn declaration or affirmation. The respondent's plea of guilty was apparently premised on the view that the respondent made the statement under some "sanction" that may by law be substituted for an oath.

[33] The respondent signed the statement under the following acknowledgment:

> "Justices Act 1886
>
> I acknowledge by virtue of section 110A(5)(c)(ii) of the Justices Act 1886 that:
>
> (1) This written statement by me dated 09/10/2007 and contained in the pages numbered 1 to 3 is true to the best of my knowledge and belief; and
>
> (2) I make this statement knowing that, if it were admitted as evidence, I may be liable to prosecution for stating in it anything that I know is false."

[34] It may be that this acknowledgment is or adverts to the necessary "sanction" within the meaning of the term as it is used in s 193.[1] That question was not in issue in the sentence proceedings or in the appeal, but the form of the acknowledgment is troubling. It might mislead a witness into thinking that, unless and until the document is subsequently admitted in evidence, there is no exposure to prosecution of a witness who makes deliberately false statements in it. It is not necessary for the resolution of this appeal to say anything further about the point which, if it has any relevance in the appeal, favours the respondent, but I note that the appellant's senior counsel acknowledged that it is desirable that there be some investigation of the question whether there should be any amendment of the form of the acknowledgment or the underlying statutory provisions.

**Proposed order**

[35] I would dismiss the appeal.

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[1] Differing views have been expressed about the meaning of "sanction" in similar contexts: see, for example, *R v Sossi* (1985) 17 A Crim R 405 at 409, *R v House* [1986] 2 Qd R 415 at 419, and *R v Houda* [1993] QCA 562 at 4 – 5.