SUPREME COURT OF QUEENSLAND

CITATION:	*R v Devlyn* [2014] QCA 96
PARTIES:	**R** **v** **DEVLYN, Paula Maree** (applicant)
FILE NOS:	CA No 270 of 2013 DC No 998 of 2013 DC No 1169 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	2 May 2014
DELIVERED AT:	Brisbane
HEARING DATE:	2 April 2014
JUDGES:	Holmes and Morrison JJA and Ann Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted of grievous bodily harm and serious assault against police officers in the execution of their duty – where the applicant was sentenced to four years imprisonment with parole eligibility set after 15 months imprisonment – whether the applicant's offending was as serious as that in *Braithwaite* – whether the sentence imposed was excessive *R v Braithwaite* [2004] QCA 82, applied *R v Henriott* [2004] QCA 346, considered *R v Nagy* [2004] 1 Qd R 63; [2003] QCA 175, considered *R v Neal* [2012] QCA 12, considered *R v Weare* [2002] QCA 183, considered *R v Williams & Attorney General of Queensland* [1997] QCA 476, considered
COUNSEL:	The applicant appeared on her own behalf D Meredith for the respondent

SOLICITORS: The applicant appeared on her own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of A Lyons J and the order she proposes.

[2] **MORRISON JA:** I have had the advantage of reading the reasons of A Lyons J and agree with her Honour and that the application for leave to appeal against sentence should be refused.

[3] **ANN LYONS J: The charges**

[4] On 24 September 2013 the applicant pleaded guilty to four indictable offences and three summary offences before Chief Judge Wolfe. All of the offences had occurred on 13 October 2012 during an altercation with police officers.

[5] Count 1 charged unlawfully doing grievous bodily harm to Sergeant Benjamin Suckling and Count 2 involved unlawfully assaulting him whilst acting in the execution of his duty. Count 3 was unlawfully assaulting Constable Craig Wilkinson whilst he was acting in the execution of his duty and Count 4 was unlawfully assaulting Sergeant Kristine Mitchell whilst acting in the execution of her duty. The summary offences included public nuisance and obstructing a police officer.

The sentences

[6] In relation to Count 1, the applicant was sentenced to four years imprisonment. In relation to Count 2 she was sentenced to two years imprisonment. On Count 3 she was imprisoned for a period 15 months. On Count 4 she was sentenced to a period of imprisonment of 18 months. In relation to all of the summary offences she was imprisoned for three months. All of the sentences were to be served concurrently. Her parole eligibility date was fixed at 24 December 2014, which means she is to serve 15 months in custody before she can apply for parole.

The appeal

[7] The applicant now appeals against those sentences on the basis that they were manifestly excessive. The maximum penalty which could have been imposed for the summary offences was six months. The maximum penalty for grievous bodily harm was 14 years and for the serious assaults it was seven years. The applicant was 24 years old at the time of the offences in October 2012 and 25 at sentence. She had three children, all of whom were in care.

The factual background to the offences

[8] The factual background to all of the offences was set out in an agreed schedule of facts.[1] At 8.45 pm on Saturday, 13 October 2012, police were called to an address at Wynnum to assist the Queensland Ambulance Service who had encountered difficulties with a large group of intoxicated people when they attended to administer medical assistance to an elderly man. As Sergeant Suckling and Constable Wilkinson arrived at the address they were abused by a number of the residents including the applicant. Sergeant Suckling suggested that the applicant

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[1] ARB 35 – 36.

leave before she caused a public nuisance. She continued yelling and her aggressive behaviour continued. After walking several metres away the applicant turned, looked at Sergeant Suckling, pointed one finger and said, "Fuck you cunt. You fucking cunts are fucked".[2] The Sergeant then walked over to the applicant, grabbed her by the arm and said, "That's enough. You're under arrest for public nuisance".[3] With the assistance of Constable Wilkinson they commenced to walk the applicant towards the police car. Those facts are the basis for the summary charge of public nuisance.

[9] Whilst the applicant was standing at the back of the car she started kicking and trying to shrug both police officers away whilst yelling and struggling. The officers attempted to get the applicant into the back seat of the car but she continued to struggle. She was warned to stop and she then put her feet onto the door-well to hang onto the car. She then pushed her body back into the police officers, who were trying to get her inside the car. She continued to yell, "Fuck you cunt".[4] This constitutes the second summary charge of obstructing a police officer.

[10] The applicant then continued to struggle and as Sergeant Suckling went to grab her right arm she used her left arm to grab him in the groin, squeezing his testicles and penis. Sergeant Suckling let out a gasp of pain and grabbed the applicant's right elbow. She then used her thumb or finger to dig into the Sergeant's left testicle area and continued to squeeze, causing severe pain and discomfort, which caused him to fall to his knees. That assault constitutes Count 1 on the indictment of grievous bodily harm.

[11] The applicant continued to struggle until she was ultimately restrained and handcuffed. It was clear that the Sergeant was in significant pain as he was gagging, coughing and dry retching. At that point the Sergeant warned the others to be careful because she had grabbed his groin, to which she replied, "I didn't mean to".[5] At that point the applicant was warned that if she continued to disobey officers she would be charged with further offences. Other officers then intervened and Constables Levi, Mitchell and Wilkinson pulled the applicant off the ground and walked her to the police van. As the applicant appeared to have calmed down, Sergeant Suckling took the handcuffs off her and opened the van door. At that point the applicant yelled, "I can't go in there. I'm claustrophobic".[6] She continued to struggle and that constitutes another summary charge of obstructing a police officer.

[12] As Sergeant Suckling moved in to assist, the applicant broke free of Officers Mitchell and Levi. She then stepped towards Sergeant Suckling and kicked him with force to the inner part of his right thigh, 10 centimetres from the groin area. The kick was of such a force that it made the Sergeant's leg buckle and he stumbled. That action is the basis of the serious assault charge in Count 2. The Sergeant then struck the applicant on the left leg, which caused her to drop to the ground. She struggled violently with Officers Mitchell and Levi, who restrained her on the ground. Whilst on the ground she continued to struggle, kicking out and yelling, "I'll fucking kill you dogs".[7] She then kicked Constable Wilkinson in the groin. He

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2 ARB 35.
3 Ibid.
4 ARB 36.
5 Ibid.
6 Ibid.
7 Ibid.

immediately felt cramps to the lower stomach area. This constitutes Count 3 of serious assault. She then put her foot in the air and brought it down with great force on Sergeant Mitchell's right foot. She yelled, "Yeah come on you dog slut",[8] before using her right arm to grab and twist Sergeant Mitchell's breast. She yelled out in pain. Those actions are the basis of the serious assault charge in Count 4.

[13] The altercation continued and police were forced to lift the applicant into the police van because she would not stand up. As she was in the van, she continued to kick at the doors and yelled, "I know your name bitch. I'll find you live and next time I will fucking rip your tit off".[9]

The extent of the injuries

[14] Sergeant Suckling continued to feel pain in his groin area and ultimately saw his general practitioner. An ultrasound confirmed he needed to see a specialist urologist, Dr Hadley. Due to the unavailability of appointments he did not see him until 12 December 2012. Dr Hadley considers that Sergeant Suckling sustained an injury on 13 October 2012 which was consistent with his scrotum being squeezed tightly and pulled, whilst he was grappling with an individual. The doctor noted that on examination there was swelling which was consistent with a distraction force to the left testicle resulting in a hydrocele and odemia.[10] He was initially treated with antibiotics and anti-inflammatory medication to assist with the pain and swelling. He subsequently required an ultrasound guided aspiration of the fluid on the testes on 2 January 2013. The fluid, however, re-accumulated within two days and the pain returned.[11]

[15] Doctor Hadley indicated that due to the non-resolution of the injury after four months of conservative treatment, Sergeant Suckling required operative repair on 2 February 2013.[12] Under general anaesthetic the accumulation of fluid was removed and the space where the fluid had accumulated was over-sewn to attempt to prevent further fluid entering, and his testicle was secured in place so it could not twist. Dr Hadley stated that ten days after surgery the area was still swollen, requiring strong analgesics and that there was a residual haematoma which had not been completely reabsorbed.[13]

[16] In an addendum report dated 16 August 2013, Dr Hadley indicated that Sergeant Suckling re-presented again on 2 July 2013 with a very tender left hemi-scrotum at the upper pole and posteriorly, which he considered was epididymitis.[14] Doctor Hadley considered that the damage to the tissues in the scrotum would not have resolved without surgical intervention and that the post-operative course led to a protracted recovery with residual swelling and a haematoma. Doctor Hadley noted that he suffered physical pain due to the injury and the operative repair, as well as having a psychological and physical impact on his relationship with his wife due to the delay in the efforts to start a family.[15]

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[8] ARB 37.
[9] Ibid.
[10] ARB 51.
[11] Ibid.
[12] ARB 52.
[13] Ibid.
[14] ARB 54.
[15] Ibid.

[17] Doctor Hadley indicated that without any treatment this would have been a permanent injury which would impact on the quality of his life and which would affect his normal activities, his ability to perform his duties as a police officer and potentially his sexual function and potency.[16] He noted that "the outer surface of the tunica vaginalis around the testicle had to be removed to repair the hydrocele". He noted that Sergeant Suckling has a permanent scar from the operation and will have changes around the left testicle as a result of the repair. Doctor Hadley considered that whilst the injuries did not endanger his life, they will have caused a permanent injury, with scrotal pain and swelling and physical restrictions.[17]

The sentencing hearing

[18] In imposing the sentence that she did, the learned sentencing judge outlined the factual background and reviewed a number of authorities that were referred to her by the learned Crown prosecutor. They included *R v Braithwaite*,[18] *R v Henriott*,[19] *R v Weare*[20] and *R v Neal*.[21] All of those sentences supported a sentence of between three-and-a-half to four years.

[19] Her Honour considered that the attack in this case was almost as serious as the factual situation in *Braithwaite* where a police officer suffered complex fractures to the face, the nasal bone and the upper jaw bones. Her Honour noted that whilst Braithwaite was required to have surgery twice to insert plates and screws, she considered that in this case, there was a "scale of pain, discomfort, embarrassment, disappointment, and difficulties with a marriage".[22] She considered that this was "at least nearly as serious, or almost as serious as the *Braithwaite* attack".[23] Her Honour ultimately considered the attack was worse because the applicant continued her attack on Sergeant Suckling and the other officers. The Chief Judge noted the applicant's criminal history and in particular that she has on a number of occasions "shown total disregard for the authority of the police force".[24]

The applicant's submission

[20] The applicant appeared on her own behalf. In her outline, she argues that the sentence which should have been imposed was three to three-and-a-half years. She argues, in essence, that her offending was not as serious as the offending in *Braithwaite*. The applicant indicated that she was very distraught and suffering depression and post-traumatic stress at the time of the incident. Her brother had also committed suicide in May. She also indicated she had been in an abusive relationship and had recently had her youngest son removed from her care due to the domestic violence she was experiencing. She stated that those feelings, mixed with her intoxication, meant she was not in a good state of mind when police attended at the residence.

[21] The applicant argues that because she was claustrophobic she became more agitated the closer she got to the police van because of her fear of being put in the van.

16 ARB 53.
17 Ibid.
18 [2004] QCA 82.
19 [2004] QCA 346.
20 [2002] QCA 183.
21 [2012] QCA 12.
22 ARB 31.
23 Ibid.
24 Ibid.

"I was thrashing my body around trying to get free so as not to be placed in the van. At the time I was not aware of my actions and was not intending to inflict any injuries to the officers".[25] The applicant argues that at the time of the offences she was considering suicide and was not medicated. She states that she is now medicated and feels very remorseful and ashamed of her behaviour. She argues that all of the decisions referred to by counsel were more serious in nature and that the criminal histories of those applicant's were more extensive.

Was the sentence imposed manifestly excessive?

[22] Having considered the cases referred to in argument it would seem that the cases referred to do support a head sentence of three to four years. In the present case there were indeed four separate and sustained assaults on three different police officers. I also note that police attempted to resolve the matter peacefully and warned the applicant on a number of occasions that her behaviour could result in her being arrested.

[23] In *R v Braithwaite*,[26] a sentence of six years had been imposed in relation to assault of police officers who had responded to a complaint that a car had been set on fire. As they arrested Braithwaite and another person, Braithwaite started to protest, arguing that it had nothing to do with him. It was clear to police that he was affected by drugs. As they arrived at a police car Braithwaite, without warning, punched the police officer with a clenched fist very heavily in the face, knocking him backwards and unconscious. The other attending constable was then attacked by Braithwaite and punched a number of times to the head and face. Whilst one officer experienced a sense of shame at what happened, the other constable was quite seriously injured and his relationship with his wife and child were also affected. Braithwaite had been convicted on many prior occasions for taking and damaging other people's property and unlawfully using motor vehicles. He had a prior conviction for arson, a conviction for a negligent act causing bodily harm, as well as convictions for stealing and for entering a dwelling-house with intent and for breaking and entering. The sentencing judge noted that no weapon was used, but that there was an extensive criminal history. There was, however, no history of deliberate violent offending and the judge accepted that Braithwaite was under the influence of drugs at the time he punched the constable. In that decision the judge took into consideration the fact that both police officers were acting in the execution of their duty when attacked and that any sentence imposed needed to reflect the overall criminality of Braithwaite's conduct and have the capacity to deter others from attacking police officers. The Court of Appeal held that the sentence of six years for the offence of grievous bodily harm was an appropriate one, as were the other concurrent sentences which were imposed.

[24] In *R v Weare*,[27] a sentence of three-and-a-half years was imposed, where a victim had been struck from behind with a branch of a tree, causing serious damage to the victim's eye. In that case the defendant was 19 years of age and had no prior offences of violence, although he did have a criminal history. A head sentence of three-and-a-half years was not disturbed on appeal but the court considered it should be suspended after 12 months.

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25 Applicant's submissions dated 5 March 2014.

26 [2004] QCA 82.

27 [2002] QCA 183.

[25] In *R v Neal*,[28] a torch was used as a weapon and the criminal history included a conviction for violence. A sentence of four years suspended after 16 months was not disturbed.

[26] I note that at the sentencing hearing counsel for the applicant indicated that, having listened to the submissions and considered the appropriate comparative cases, his respectful submission was that the conduct was deserving of a sentence "of between three and a half and four years".[29] He further submitted that, taking into account the applicant's personal circumstances, her youth, her issues with drugs, that the term that should be imposed was three-and-a-half years with a parole recommendation at one-third. Similarly the prosecutor had argued that the cases tendered would indicate that the sentence of three-and-a-half to four years was supported by the cases.

Conclusion

[27] Whilst the applicant has indicated that she is remorseful for the injuries which she inflicted and was not intending to cause any harm to the officer, there is no doubt that the applicant deliberately inflicted a serious and painful injury by a willed act which was sustained for some time. Furthermore, the applicant participated in a series of attacks after she had been warned she would be arrested.

[28] I also note that the applicant has done well in custody and has acquired various certificates and references. All of that is admirable however her behaviour in prison has post dated the sentencing hearing and was not therefore a factor which could be taken into consideration.

[29] I also accept that the applicant is still a young woman at 25 years of age. She does have a relevant criminal history including a conviction in 2006 at the age of 18 for assaulting a police officer by kicking him and a conviction in 2008 for obstructing a police officer. She also has convictions for possession of utensils and for failing to appear. She had never, however, served a custodial sentence.

[30] It would seem to me that the learned Chief Judge had taken the applicant's personal circumstances into account as counsel at the sentencing hearing had outlined the applicant's unsettled family background including her drug addiction to 'crystal meth' as well as her use of cannabis and speed.

[31] In terms of whether a head sentence of four years was manifestly excessive it must be remembered that the applicant's own counsel, after a consideration of the comparable cases, had indicated that a four year sentence was indeed within range. An analysis of the authorities clearly supports a sentence of four years given that it was an inescapable fact that the applicant's behaviour was serious and sustained. Her actions were also clearly targeted at the complainants because they were police officers. In the 1997 decision of this Court in *R v William & Attorney General of Queensland*,[30] Dowsett J referred to an attack on police officers in the execution of their duty and stated:[31]

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28 [2012] QCA 12.
29 ARB 26.
30 [1997] QCA 476.
31 [1997] QCA 476 at 6 -7.

> "The maintenance of order in our society depends upon those who are charged with enforcing it being adequately protected to the greatest extent possible in the performance of their duties. Where police officer, innocently and with goodwill, are going about their duties, it is not fair to them that they should be exposed to assaults of this kind, nor is it in the best interest of the community, either the particular community in question or the broader community, that they should be so exposed.
>
> The potential effects upon the way in which they do their duty if exposed to such threats are obvious to anybody who thinks about it. If there is to be peace in the community and if those charged with maintaining it are to go about their duties in an acceptable way, then they must be protected in so doing."

[32] In *R v Nagy*,[32] this Court also referred to the fact that the discharge of a police officer's duty in maintaining law and order carries with it "appreciable risks of injury and even death" and accordingly those who harm such officers need to appreciate that this is a proper area for the need for deterrence and that violent actions directed against them will not be tolerated.[33]

[33] In my view the sentence imposed was appropriate in all of the circumstances and it can not be regarded as excessive let alone manifestly so.

[34] I would refuse the application for leave to appeal against sentence.

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[32] [2003] QCA 175.

[33] [2003] QCA 175 at [74].