SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hamstra* [2020] QCA 185
PARTIES:	**R** **v** **HAMSTRA, Paul** **(applicant)**
FILE NO/S:	CA No 142 of 2020 DC No 233 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport – Date of Sentence: 26 June 2020 (Muir DCJ)
DELIVERED ON:	Date of Orders: 26 August 2020 Date of Publication of Reasons: 4 September 2020
DELIVERED AT:	Brisbane
HEARING DATE:	26 August 2020
JUDGES:	Sofronoff P and Fraser and McMurdo JJA
ORDERS:	**Date of Orders: 26 August 2020** **1. Leave to appeal is granted.** **2. The appeal is allowed.** **3. On count 1, the sentence is varied to 62 days' imprisonment.** **4. On count 2, the sentence is varied so that it is suspended immediately.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant was originally charged with two counts of arson – where the applicant pleaded guilty to one charge of wilful damage, relating to damage to a playground, and another charge of wilfully and unlawfully setting fire to something situated so that a building is likely to catch fire from it under s 462 of the *Criminal Code* (Qld) – where the applicant was sentenced to imprisonment for three years to be suspended after six months – where the applicant's two co-offenders were charged with arson under s 461 of the *Code* – where the two co-offenders offered assistance under s 13A of the *Penalties and Sentences Act* 1992 (Qld) – where the two co-offenders were both sentenced to three years' imprisonment, wholly suspended with an operational period of four years – where it was submitted below by counsel that the applicant's sentence had to achieve

parity with the sentences imposed on his co-offenders – where the learned sentencing judge accepted this submission – whether the learned sentencing judge's sentencing discretion miscarried

Criminal Code (Qld), s 461, s 462

COUNSEL: M J Copley QC for the applicant
D Nardone for the respondent

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

[1] **SOFRONOFF P:** Late on the night of 20 April 2016 the applicant, and two friends, Rodgers and Coleman, drove to a park at Tallebudgera where they entered the playground area. The applicant collected some tinder and put it on a wooden footbridge which was part of the playground equipment, onto which he then poured an accelerant and lit it. He then poured accelerant onto the plastic slide which was attached to the structure and set fire to that also. The total fire damage thus caused by the applicant cost the local authority over $9,000.00.

[2] A few days later, on 25 April 2016, on the applicant's suggestion, he and three friends of his, Rodgers, Coleman and Plass, went to St Andrews Lutheran College at Tallebudgera. They had been students there and the applicant had left it in 2015. Rodgers found a traffic cone and put a soccer ball on top of it. The applicant had brought with him a bottle of accelerant and he poured some of the accelerant onto the soccer ball and set fire to it. One of the four then kicked the ball in the direction of a carpark where the ball landed and the flames went out.

[3] They all then went into one of the school buildings at the school where the applicant used fire to damage students' lockers. The applicant took a book from one of these lockers, poured the accelerant onto the book and set it alight. He put the flaming book back into the locker and shut the door. The fire went out.

[4] The four of them then found a hat. The applicant poured his accelerant onto the hat and set it alight. Once it was on fire, Rodgers kicked the hat into an open locker. One of them closed the locker and the four of them left. As they departed they could hear the fire alarm sounding. Although the applicant had no intention of burning down the building, that is what happened. The burning hat set fire to the building and destroyed it although fire crews worked for over 12 hours to save it. More than $6 million worth of damage was caused to the school building.

[5] The applicant and his co-offenders agreed not to discuss the fire except in the presence of each other. However, on the day after he set fire to the school, the applicant blabbed to his girlfriend, Emillie Sutherland, about what he had done. It was a long time before police were able to find the culprits. Police sought public assistance to find the people who had set fire to the school but with no results. In July 2017, the applicant told a friend of his, Christian Anderson, what he had done. In September 2017, police obtained a telephone intercept warrant for the applicant's phone. They also managed to obtain a statement from Anderson and learned of the applicant's admission. In November 2017, police interviewed the applicant. He denied any involvement in the offending. He admitted that he might have told

people he had started the fires but claimed that he was just joking. A Crime and Corruption Commission hearing was established. Ms Sutherland was given a notice to attend and she provided a statement implicating the applicant. She then called the applicant and told him what she had done. He said, "shit … you should've got a lawyer." Both Rodgers and Plass were charged with arson. On 7 December 2017, Rodgers provided a statement to police describing the offending. On 11 February 2019, Plass gave police another statement. The statements given by Rodgers and Plass were furnished pursuant to s 13A of the *Penalties and Sentences Act* 1992 (Qld).

[6] Coleman then spoke to police and also admitted his involvement. He was also charged with arson but the prosecution against him was discontinued because he was terminally ill with bone and lung cancer. Plass was interviewed by police and admitted his guilt. Finally, the defendant was charged with arson, still denying his involvement, and was released on bail.

[7] The defendant required a committal and that committal hearing began on 6 March 2019. Ms Sutherland and her sister were cross-examined about the admissions that the applicant had made to them. Coleman, who was ill as has been said, something that the defendant knew, was also cross-examined.

[8] On 30 April 2019, Plass and Rodgers were sentenced by Muir DCJ. Their sentences will be referred to in due course. The applicant's committal hearing continued in May 2019 with a cross-examination of Plass and Rodgers.

[9] On 9 August 2019, after the applicant had been committed for trial on one count of arson and another of wilful damage, the Director of Public Prosecutions received a submission from the applicant offering to plead guilty to two counts of wilful damage. That submission was rejected but, on 25 September 2019, the Crown proposed that he plead guilty to one charge of wilful damage, relating to the damage to the playground, and another charge of wilfully and unlawfully setting fire to something situated so that a building is likely to catch fire from it – the offence created by s 462 of the *Criminal Code* (Qld). The maximum penalty for that offence is 14 years' imprisonment. That offer was made on 25 September 2019 and the applicant agreed to plead guilty to those charges towards the end of 2019. On 23 January 2020, the Crown accepted that proposal and, at sentencing, the prosecution acknowledged that the guilty pleas could be "considered a timely one once the *charges were correctly formulated*".

[10] The applicant had no relevant criminal history.

[11] Rodgers and Plass were both sentenced to three years' imprisonment, wholly suspended with an operational period of four years. The charge in each case was, of course, arson rather than the lesser offences charged against the applicant. The sentences expressly took into account the discount envisaged by s 13A of the *Penalties and Sentences Act*. Rodgers was 17 when he committed the offence. Plass was 18 years old. Muir DCJ said that, but for the provisions of s 13A, she would have sentenced each of them to a term of imprisonment of three years suspended after serving six months.

[12] In sentencing the applicant, Muir DCJ referred to the evidence of Mr Cook, the business manager of the school. He explained that the school was established a quarter of a century ago in a small farm house located on the current site. This

small school grew to its present size which engages with over 1,300 students. The destruction of an important building at the school affected Mr Cook very much. He has found himself "continuously exhausted and rarely find[ing] pleasure in the things [he] used to enjoy". The fire deeply affected his "physical and mental health, [his] work, and personal relationships". The destruction of the building also affected the teaching program of students across years seven to 12 and affected pupils emotionally. A massive amount of work was required in order to restore the school. There was an increase in workload and stress upon staff who have had to compensate for the loss of this important resource. Many personal possessions, including precious musical instruments, were destroyed. The discovery that the culprits were former students of the school left many staff members and students with a deep sense of betrayal.

[13] As has already been recounted, the financial, social and emotional cost to the school community were severe. The risk to life caused by the fire was also extreme notwithstanding that the school was unoccupied on the public holiday on which the offence was committed. There is no public holiday for fire officers who risked their lives to undo the result of the applicant's offending. The applicant's own subjective circumstances after he committed the most serious of the two offences, relating to the school, are an aggravation of sentence. Not only did he fail to cooperate with police but he acted positively to mislead them. But for the actions of others, the applicant's involvement would have remained unknown. Muir DCJ correctly took the view that the events at the school had their origin in an idea of the applicant's and it was he who thought to bring a flammable accelerant to help make fires. His actions in committing these offences were not "extremely foolish", as his counsel submitted at sentence. It was scornful of the interests of others and, to a degree, it was mean. His attempts to hide his own involvement in the face of his co-offenders' and his friends' truthful evidence, showed selfishness.

[14] On the other hand, as Muir DCJ also noticed, since he committed these offences the applicant has made efforts to rehabilitate himself. He has given many hours of work to rebuild a deck at the Nerang Community Association. He has engaged in a great deal of other work at that charitable organisation. He has been gainfully employed otherwise. Ms Lynn Ogden, who is an officer at the Association, furnished an affidavit in which she stated that the applicant expressed his regret for these offences. She herself has no doubt that he has expressed real remorse for what he has done. She is of the view that the applicant is "conscious of the seriously devastating effect" of his actions upon many people. Another character witness, Mr Stephen Davoren, a well-known solicitor on the Gold Coast, spoke very equally highly of the applicant's character and conduct since he committed these offences. Mr Davoren said that the applicant had grown "into a mature, responsible and hard-working young man". Mr Davoren was of the view that the "lessons he has learnt from the ordeal of his prosecution, have clearly played a pivotal role in helping him to become the sensible, focused and responsible young man I know him to be today". Similar character references of a very high order have been furnished by other witnesses. The following is typical:

> "I had the opportunity of getting to know Paul in a work context when he came to work for my construction company in Darwin, between 2015 and 2016. During that time, he proved himself to be an extremely reliable employee, always hard-working and trustworthy, and an all-round pleasant person to have around. He

> was very well-regarded by all staff on site, and was considered as a young man of honesty and high integrity. Despite being one of my youngest employees, he was usually the last person to leave the job site each day, as he always tried to help resolve issues encountered by others after he had completed his own work.
>
> Not only was Paul diligent on the job, but he showed considerable compassion and care for his workmates. Some months after Paul finished working with us, I found out that, during his time with us, one of the contractors who was working with Paul on site had been dealing with a child-custody matter at the time. Paul knew this, and he apparently checked in on this person on a regular basis, taking the time to ask how he was coping, ensuring he was emotionally okay, and spending a lot of time outside work hours to offer him support wherever it was needed. That did not surprise me, because that is the kind of person I know Paul to be, a thoughtful and compassionate person who often puts others before himself.
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> During his time working with my company Paul proved to be not only a fine employee, but a good decent person. He left our employ with an unblemished record, and indeed an excellent reputation, gaining the respect of all our supervisors, contractors, and staff.
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> I am fully aware of Paul's charges, and the seriousness of the offences he committed. I know from conversations that I have had with him since his offending that he is deeply ashamed and tremendously sorry for what he did, and he accepts full responsibility for his actions."

[15] However, the overwhelming factors in this case are three in number. First, there is the serious harm caused by the applicant's actions. These have been described.

[16] Second, notwithstanding the extremely serious consequences of the offences committed at the school, the harm caused by the applicant and his friends was not the result of his deliberate intention to cause that harm; it was due to his recklessness. There is a great deal of difference, legally and morally, between a person who wilfully burns down a school building and one who does so recklessly but unintentionally.

[17] On the facts which the prosecution accepted, the applicant did not intend to set fire to the building and he did not think that the building was going to catch fire. He did not set fire to the building. He set fire to a hat which one of his co-offenders then kicked the hat into an open locker. This lack of intent was the reason why the prosecution abandoned the charge of arson. Section 461 of the *Code* provides that a person who *wilfully and unlawfully* sets fire to a building is guilty of a crime and is liable to imprisonment for life. The applicant was charged with an offence against s 462 which provides that a person who wilfully and unlawfully sets fire to anything *situated so that* a building *is likely to catch fire* is guilty of a crime and is liable to imprisonment for 14 years. In the second of these offences, to be guilty, the offender does not have to know that the building will burn or even be aware of a likelihood that the building will be set alight; in the first offence that is the very nub of the offence and it is that much more serious offence to which the applicant's co-

offenders pleaded guilty. These differences in legal and moral culpability is the reason why the penalties for the two offences are so greatly different.

[18] Muir DCJ appreciated, of course, that the applicant had been charged with a less serious offence than his co-offenders. However, in my respectful opinion her Honour did not give effect to the significant difference in culpability between the crime of arson, to which the applicant's co-offenders pleaded guilty, and the offence under s 462, to which the applicant pleaded guilty. As a result, the sentence proceeded upon the footing that, although the applicant did not intend to set fire to the building, the applicant accepted that there was some risk that the building might catch fire and that he recklessly disregarded that risk. The applicant formally admitted that that was so, but he had made that admission in the context of his further statement, which the Crown accepted was true, that he did not think that the building would catch fire. In my respectful opinion, for this reason, the sentencing discretion miscarried.

[19] The applicant's criminal responsibility, under s 462, and his moral responsibility are not comparable with a person who is guilty of an offence under s 461. This meant that the achievement of any parity in sentencing between these co-offenders would be difficult to the point of impossibility.[1] At the sentence hearing the prosecutor submitted that the applicant was the "principal offender" and, as such, "the only appropriate sentence is one of immediate imprisonment".[2] The applicant was not the "principal offender". The other two offenders were guilty of arson. The applicant was not. He was the only offender under s 462, a lesser offence as I have said. Both counsel below proceeded, wrongly, on the footing that the applicant's sentence had to achieve parity with the sentences imposed on his co-offenders. The learned sentencing judge accepted the Crown's incorrect submission that the applicant was the "principal offender" as well as the ringleader and sentenced him on that basis. In my respectful opinion, that was an error and it led to a sentence greater than the sentence imposed for the much more serious offences to which the other two offenders pleaded guilty.

[20] Third, the applicant was 18 years old at the time he committed these offences and will turn 23 years old in October of this year. He was not a child when he committed these offences but he was very young and he is still young.

[21] His offending was serious and it was not mere "foolishness" as his counsel submitted to her Honour. Yet there are the character references which conflict with the inference to be drawn as to his character from the facts of the offending and post-offence conduct. How, then, can these inferences be reconciled with the sterling and uplifting character references that were put in evidence, and which have not been challenged? They can be reconciled by reference to the effect of his maturation, by his having aged and also by dint of his deep experience of having been guilty of these offences, having been found out, having felt shame and having, for four years, faced imminent imprisonment. The present character of the applicant, as evidenced by the unchallenged evidence, raises three important questions: Does general deterrence require the applicant to be imprisoned? Does the need to satisfy the community's justifiable sense of outrage require for its

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1 *Cf. Green v The Queen* (2011) 244 CLR 462 at [30] *per* French CJ, Crennan and Kiefel JJ.

2 Paragraph [12] of the written submissions on behalf of the Crown.

vindication the actual incarceration of a young man? Does the need for personal deterrence require that the applicant serve a period of actual imprisonment?

[22] The answer to all these questions is "No".

[23] The respondent did not suggest that personal deterrence was a factor here.

[24] The objective facts of the offending were serious. However, in the case of a youthful first offender who has demonstrated that, in terms of personal deterrence, imprisonment would serve no purpose, I can find no principle of sentencing which requires the applicant to serve any time in prison. Further, before a short sentence of a few months is imposed, particularly on a youthful first offender, serious consideration has to be given to what useful purpose will be served by such a punishment. When a judge is considering such a course, it is essential to consider how an order of that kind can stand with the principle that imprisonment is a punishment of last resort. There are cases in which a short sentence is required; it is critical, however, to identify with precision the purpose to be served by the imposition of the sentence of imprisonment that was imposed, one of imprisonment for three years. However, having regard to the applicant's previous and subsequent character, as well as the delay of years before he was sentenced, that sentence should be suspended forthwith.

[25] For these reasons I joined in the orders made by the Court after the hearing of the application:

1. Leave to appeal is granted.
2. The appeal is allowed.
3. On count 1, the sentence is varied to 62 days' imprisonment.
4. On count 2, the sentence is varied so that it is suspended immediately.

[26] **FRASER JA:** I agree with the reasons for judgment of Sofronoff P.

[27] **McMURDO JA:** I agree with Sofronoff P.