SUPREME COURT OF QUEENSLAND

CITATION:	*R v Degn* [2021] QCA 33
PARTIES:	**R** **v** **DEGN, Brooke Amanda** (applicant)
FILE NO/S:	CA No 167 of 2020 DC No 7 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville – Date of Sentence: 23 July 2020 (Coker DCJ)
DELIVERED ON:	5 March 2021
DELIVERED AT:	Brisbane
HEARING DATE:	24 February 2021
JUDGES:	Holmes CJ and Morrison and Mullins JJA
ORDERS:	**1. Application for leave to appeal against sentence allowed.** **2. Appeal against sentence allowed.** **3. Vary the sentence by substituting a parole eligibility date of 13 February 2022.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant was sentenced to six years imprisonment for rape, with parole eligibility set after two years – where the applicant had served most of an earlier period of six years imprisonment at the date of sentence – where the applicant contends that the sentencing judge fixed the parole eligibility date by reference to the sentence he imposed, rather than the period of imprisonment, and therefore failed to apply s 160F of the *Penalties and Sentences Act* 1992 – whether the sentencing judge failed to take into account that the parole eligibility date would apply to the entire period of imprisonment – whether the sentencing discretion miscarried CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant argues that the

setting of a parole eligibility date eight years after the applicant first went into custody rendered the sentence manifestly excessive – whether the sentencing judge, in applying the totality principle, had the requisite regard to the minimum time required to be served in custody – whether the total effect of the period of imprisonment is manifestly excessive

Penalties and Sentence Act 1992 (Qld), s 160F

R v Bahcehan [2019] QCA 278, cited
R v Berns [2020] QCA 36, cited
R v WBK (2020) 4 QR 110; [2020] QCA 60, cited

COUNSEL: J McInnes for the applicant
D Nardone for the respondent

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

[1] **HOLMES CJ:** The applicant seeks leave to appeal a sentence of six years imprisonment for rape, with parole eligibility after she had served one-third of that sentence. At the same time, lesser sentences of imprisonment were imposed on her in respect of six counts of sexual assault in company, and two counts of common assault. A complicating factor was that at the date of sentence, 23 July 2020, the applicant had served most of an earlier period of imprisonment of six years in respect of previous offending. The grounds of the proposed appeal are that the sentence of six years imprisonment for rape with parole eligibility after two years was manifestly excessive and that the sentencing discretion miscarried because the sentencing judge failed to apply s 160F of the *Penalties and Sentences Act* 1992.

The applicant's past and present offending

[2] At the time of the offending which led to the sentence under consideration here, the applicant was a correctional centre inmate serving the earlier sentence imposed on her. She was aged between 37 and 38 years. She had a long criminal history dating back to 1999, principally for minor dishonesty and drug use offences and breaches of orders dealt with in the Magistrates Court over the period between 2005 and 2015; but in May 2016, after conviction by a jury, she was sentenced in the District Court on a very large number of offences, including armed robbery in company, supplying dangerous drugs, burglary and assaults occasioning bodily harm while armed and in company. On that occasion she was sentenced to four years and nine months imprisonment, with a parole eligibility date of 30 January 2018. The sentencing judge said that he was reducing both the head sentence and the parole eligibility date to reflect 15 months during which the applicant had been on remand in custody (since 30 January 2015), which could not be declared. The applicant's full time discharge date on that sentence was 12 February 2021.

[3] Although the applicant was eligible for parole at the end of January 2018, she had not succeeded in obtaining it before she was charged with the present offences, which were committed in late July and early August 2018. At that time she resided in a cell block with three other women who in various ways joined in her offending, which involved preying on a new, inexperienced inmate. Four of the sexual assaults

charged involved the applicant and another inmate on separate occasions removing the complainant's bath towel or her underwear and forcing her legs apart to expose her vagina. On one of those occasions, one of the applicant's co-accused grabbed the complainant around her legs, making her fall backwards and hit her head. She fell in and out of consciousness, and was left with a swelling to the back of her head, pain in her head and a bruised shoulder.

[4] In another instance of sexual assault, the applicant and three others removed the complainant's pants, after which one held her while the others touched her on the buttock area around the genitals. There followed two common assaults which involved the applicant whipping the complainant's buttocks with a towel and then whipping her with her underpants. In a final incident, the applicant and a co-accused forced the complainant to the ground and pulled down her pants. While the applicant restrained the complainant, with her arm around her neck, the other inmate forced her legs apart and began to push the handle of a dustpan brush towards her vagina, giving rise to one count of sexual assault, and then digitally penetrated her, resulting in the count of rape. The co-accused then forced her fingers into the complainant's mouth; that was the final count of sexual assault.

The applicant's submissions on sentence

[5] The applicant's counsel described her background. She had left school early and worked in a variety of service industry jobs. In her twenties she ran what was described as an "adult" shop, a business which failed as a result of her drug use. She had been a methylamphetamine addict and had been in and out of jail since she was 30. While in custody, she had undertaken certificate courses in hospitality and kitchen operations and a barista course; she was currently undertaking a certificate course in hairdressing. She had also undertaken a drug and alcohol substance abuse course. Her behaviour in the prison had improved and she was now a supervising cook, a position of some responsibility. The applicant had two sons aged in their 20's with whom she had no contact and a 12 year old daughter with whom she did have contact; restricted, of course, because of her incarceration. Counsel urged the sentencing judge to take into account the fact that the applicant had been in custody since 30 January 2015, and it was likely that it was the present offending which had prevented her receiving parole on the previous sentence.

The sentencing remarks

[6] The sentencing judge accepted that the applicant had entered an early plea of guilty. He noted the applicant's past difficulties, including her limited education, and her demonstrated good behaviour and hard work in the period since the offending. His Honour considered that the plea indicated some degree of remorse and had the benefit of relieving the complainant of any necessity to give evidence. There was some hope of the applicant's rehabilitation, although she did not have the advantage of youth. Totality considerations led him to reject a Crown submission that a serious violent offence declaration ought to be made. In imposing sentence, his Honour said this:

> "…the most serious offending is count 10, the count of rape, and in relation to that count, I intend to impose a period of six years imprisonment and, recognising the circumstances, it is to be served cumulative with the current time being served and to, therefore, fix a parole eligibility date after what would be the normal one-third

> such that the parole eligibility date will be the 13th of February 2023."

In addition to the cumulative sentence of six years imprisonment on the rape count, the sentencing judge imposed lesser sentences in respect of the sexual assaults, assault occasioning bodily harm and common assaults, again cumulative on the previous sentence but concurrent with the rape sentence.

The argument on appeal

[7] The applicant contended that the sentencing judge had erred by fixing the parole eligibility date by reference to the sentence he imposed, rather than the period of imprisonment, which, it was said, was inconsistent with s 160F of the *Penalties and Sentences Act*. That section is as follows:

> "160F Significance of an offender's period of imprisonment
>
> (1) One of the objects of sections 160A to 160E is to ensure that at any 1 time there is only 1 parole release date or parole eligibility date in existence for an offender.
>
> (2) When fixing a date under this division as the date an offender is to be released on parole or is to be eligible for release on parole, the date fixed by the court must be a date relating to the offender's period of imprisonment as opposed to a particular term of imprisonment."

[8] In the alternative, it is said that the setting of a parole eligibility date eight years after the applicant first went into custody rendered the sentence manifestly excessive. The proper approach, counsel argued, was to retain the sentence of six years, cumulative upon the earlier sentence, but to set parole eligibility halfway through the total period of just over 12 years, with the effect of giving the applicant immediate parole eligibility.

Discussion

[9] Section 160F(2) requires that any parole date be set so that it is operative for the entire period of imprisonment being served by the offender, as opposed to relating only to the term of imprisonment currently being imposed. As Morrison JA observed in *R v Bahcehan*,[1] the provision

> "…does not require that the parole eligibility date must be calculated as some proportion of the period of imprisonment";

and it does not, as Fraser JA pointed out in *R v WBK*,

> "…[prescribe] any sentencing methodology".[2]

[10] In the present case, having regard to the sentencing judge's reference to recognising the circumstance of the current time being served immediately prior to his fixing of a parole eligibility date, I would hesitate to conclude that his Honour was unaware that the parole eligibility date would apply to the entire period of imprisonment, or that that was not his intent. But there is a separate issue: whether his Honour

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1 [2019] QCA 278 at [75].
2 (2020) 4 QR 110 at [5].

appreciated that in applying the totality principle (as he clearly meant to) he needed to have regard, not only to the head sentence, but to the minimum time required to be served in custody.

[11] There are two aspects to the totality principle, or perhaps two ways of expressing the same aim: the first, the requirement that the resulting effective sentence is just and appropriate; and the second, the need to ensure that the effective sentence reached is not so "crushing" in its effect on the offender as to call for intervention.[3]

[12] In this case, the applicant had commenced serving imprisonment on 30 January 2015. That earlier term of imprisonment combined with the term presently imposed meant that she faced a period of 12 years imprisonment. She had not been successful in obtaining parole on the earlier sentence, although eligible from 30 January 2018, and it seems probable that once the complainant in the present set of offending made her complaint to prison officers (on 14 August 2018), the applicant had little prospect of obtaining parole. In that way, then, she seems to have begun to suffer the consequences of the offending well before she was sentenced in July 2020, and to that extent it can be said that her custody from August 2018 was at least in part attributable to the offending for which she was being sentenced.

[13] In the ordinary course, fixing a parole eligibility date to fall after a third of the sentence is served represents a lenient approach. However, that did not follow in the present case, because the result was that the applicant was not eligible for parole until 13 February 2023, more than eight years after her imprisonment commenced and two-thirds of the way through the 12 year period of imprisonment. To require two-thirds of the period of imprisonment to be served might in some cases be warranted, but there is nothing to suggest that this is such a case or that the sentencing judge appreciated that consequence when he set the parole eligibility date. It seems more probable that his Honour had acted on the premise which applies in most sentencing, that a sentence requiring one-third of the sentence to be served before eligibility would appropriately recognise the mitigating circumstances, without considering the wider implications arising from the length of time the applicant had already served.

Conclusions

[14] This was, in my view, an instance where the setting of the parole eligibility date two years from the expiration of the previous sentence did produce an unjust result and rendered the total effect of the period of imprisonment so crushing as to require intervention, so that the sentence is properly characterised as manifestly excessive.

[15] The applicant contended that the proper result was her immediate release, because as of 30 January 2021, she had served 50 per cent of the 12 year period of imprisonment. But the setting of a non-parole period where cumulative sentences are imposed is not an arithmetical process permitting of some precise result. As Bowskill J pointed out in *R v Berns*,[4] the totality principle does not require a sentencing judge to reduce the sentence by the precise amount of time already served. In this case, it does not follow that the parole eligibility date should be set having regard to the applicant's having served the 50 per cent which statute would otherwise prescribe. Her offending was extremely serious and warranted significant

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3 *Postiglione v The Queen* (1997) 189 CLR 295 at 304 and 308; *R v Baker* [2011] QCA 104 at [39]-[40].

4 [2020] QCA 36.

additional punishment. The sentence imposed by the sentencing judge commenced on 13 February 2021, and it is neither unjust nor crushing, in the context of the whole period of imprisonment, to require that the applicant actually serve a portion of that sentence in custody.

[16] For those reasons, I would allow the application for leave to appeal and the appeal against sentence, and vary the sentence by substituting a parole eligibility date of 13 February 2022 (a year after the commencement of the present sentence).

Orders

[17] The orders which should be made are as follows:

1. Allow the application for leave to appeal against sentence;
2. Allow the appeal against sentence;
3. Vary the sentence by substituting a parole eligibility date of 13 February 2022.

[18] **MORRISON JA:** I have read the reasons of Holmes CJ and agree with those reasons and the orders her Honour proposes.

[19] **MULLINS JA:** I agree with the Chief Justice.