# DISTRICT COURT OF QUEENSLAND

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| CITATION: | *RJD v Queensland Police Service* [2018] QDC 147 |
| PARTIES: | **RJD**<br>(appellant)<br><br>**v**<br><br>**QUEENSLAND POLICE SERVICE**<br>(respondent) |
| FILE NO/S: | APPEAL NO: 61/2018 |
| DIVISION: | Appellate |
| PROCEEDING: | Appeal |
| ORIGINATING COURT: | Magistrates Court, Cairns |
| DELIVERED EX TEMPORE ON: | 29 June 2018 |
| DELIVERED AT: | Cairns |
| HEARING DATE: | 29 June 2018 |
| JUDGE: | Morzone QC DCJ |
| ORDER: | **1. Appeal dismissed** |
| CATCHWORDS: | CRIMINAL LAW - appeal pursuant to s 222 *Justices Act 1886* - conviction on own plea of 3 offences – contravening a domestic violence order - appeal against sentence – mode of hearing of appeal – whether sentence manifestly excessive.<br><br>**Legislation**<br>*Domestic and Family Violence Protection Act* 2012 (Qld) s 177<br>*Justices Act 1886 (Qld)* ss 222, s 223(1) & 227<br>*Penalties and Sentences Act* 1992 (Qld) s 9<br><br>**Cases**<br>*House v King* [1936] 55 CLR 499<br>*Kentwell v R* [2014] 252 CLR 60 |

*LJS v Sweeney* [2017] QDC 18
*R v Goodger* [2009] QCA 377

COUNSEL: J Sheridan for the Appellant

SOLICITORS: Aboriginal and Torres Strait Islander Legal Service for the Appellant
P Nevard of the Office of Director of Public Prosecutions for the respondent

[1] On the 15th of March 2018 the appellant was convicted and sentenced on his own plea of guilty in the Magistrates Court of three counts of contravening a domestic violence order (aggravated offence) under s 177 (2) (a) of the *Domestic and Family Violence Protection Act* 2012 (Qld).

[2] The maximum penalty for those offences was five years imprisonment or 240 penalty units.

[3] He was sentenced to 18 months imprisonment for each offence, to be served concurrently and to be served cumulatively on a 15-month sentence he was then serving as a consequence of reoffending while on parole. A parole eligibility date was set at 11 August 2018.

[4] The appellant now appeals his sentence on the grounds that it is manifestly excessive.

[5] Both parties have provided comprehensive outlines of argument and have made further submissions on the hearing of the appeal, which I have had the opportunity to consider.

**Background**

[6] The appellant, a 25 year old man, first offended about 10 am on 11 February 2018 when he and the aggrieved were on a couch and a struggle commenced. The aggrieved fell onto a mattress, and the defendant then pushed her with sufficient force that she fell against and broke the lounge room window. When the aggrieved demanded the appellant apologise, he did so and then left the premises.

[7] During that offending, the children were in the home and apparently woke at some time either before or during the offending.

[8] At about 12.30 pm on the same day, the appellant returned to the house. He was in an aggressive mood and immediately began to yell and scream at the aggrieved, including shouting:

> *"You're a fat cunt and a slut."*

[9] As part of the further argument and abuse, he said to the aggrieved:

> *I could get a piece of glass from the window and kill you if I wanted to.*

[10] Thereby threatening her, before leaving again. After that time, police attended on the aggrieved, and when they had left the premises to search for the appellant, he returned home. It was about 1.50 pm when he returned, demanding to know why the police were at the house. He then became verbally abusive. All throughout the arguments, the appellant was demanding to go over to a Cash Converters store, and, on each occasion, he seemed enraged by her refusal to do so.

[11] The appellant has a significant criminal history of some 10 pages. These included previous property and motor vehicle offences, multiple breaches of bail, breaches of probation orders and community service orders. More relevant is his history of six previous like offences. On 11 January 2017, he was sentenced for one charge of contravention of a domestic violence order committed on 13 November 2016, common assault committed on 17 November 2016, and a further contravention of a domestic violence order committed on the 17 November 2016.

[12] For those offences, he was sentenced with an order of probation for 18 months, together with community service of 100 hours to be completed within 12 months. Further, on the 22nd of May 2017, the appellant was again dealt with in the Magistrates Court for three contraventions of a domestic violence order (aggravated offence) pursuant to s 177(a) of the *Domestic and Family Violence Protection Act* 2012 (Qld), each of those committed on separate dates, 13December 2016, 4 December 2016, and 24 January 2017. He was sentenced to 15 months imprisonment, being an effective head sentence with concurrent six month periods of imprisonment being imposed.

[13] Having regard to a declaration of pre-sentence custody of 94 days, a parole release date was set for 17 July 2017. So at the time of the offending before the Magistrate – the sentence the subject of this appeal. The appellant was subject of both a probation order and a parole order for like offending. His reoffending occurred about seven months after he was released on parole on 17 July 2017. The appellant was returned to custody on 11 February 2018, and his parole was cancelled the following day, on 12 February 2018. By the time of sentence, he had only served one day in pre-sentence custody for the subject offences, but had an additional period of one month and three days in custody for earlier offending. The latter was not declarable.

[14] At sentence, the prosecutor contended for a sentence of 12 months imprisonment, while the defendant's representative contended for a sentence range of six to nine months imprisonment.

[15] When sentencing the defendant, the learned Magistrate remarked about the defendant's very early pleas, his criminal history and the nature of previous offending against the same aggrieved, reoffending on parole, the need for personal deterrence, having regard to a recidivist conduct, his relatively young age of 25 years, his unemployment status and his dated employment history, his continuing relationship with the aggrieved and the two children, and the absence of any documented medical psychiatric conditions.

[16] The learned Magistrate did not seem to be aware of the offending occurring during the period of probation. No submissions were made in that respect, and it did not form part of his sentencing remarks. His Honour did refer to the statutory sentencing guidelines and the prevalence and serious nature of the offending constituted by domestic violence and aggravated by the offending following earlier offending within a prescribed time.

[17] The learned Magistrate considered several comparative cases. In particular, he considered the decision of this court in *LJS v Sweeney*.[1] The learned Magistrate said of that decision:

> *"The offending conduct was similar: an assault with no resulting injuries, a push into a fence [sic] with no resulting injuries. The applicant had a slightly worse criminal history. He did not, however, offend – you have whilst you [sic] were on parole for like offending involving the same aggrieved. There, a sentence of two years was imposed. Of all the comparable decisions, that is the most useful."*

[18] Both during the course of argument and in the terms of the remarks, His Honour apparently moderated the sentence cognisant of the requirement to impose a cumulative sentence in the wake of the reoffending on parole, and, further, having considered in the course of setting a parole eligibility date, to the unbroken period of imprisonment served by the appellant by the time of sentence.

[19] In the result, the court sentenced the appellant to 18 months imprisonment to be served concurrently in respect of each of the offences, but cumulatively on the pre-existing 15-month sentence with a parole eligibility date set at one-third of the unbroken period of imprisonment, being 11 August 2018.

**Mode of Appeal**

[20] The appeal is brought pursuant to s 222 of the *Justices Act* 1886 (Qld).

[21] Pursuant to s 223, the appeal is by way of rehearing on the original evidence, and any new evidence adduced can only be done by leave. None is sought to be adduced here. For an appeal by way of rehearing, the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual, or discretionary error. Here, the appeal focuses on the latter, that discretionary error was entered into in the context of having regard to the relevant comparative cases in setting a manifestly excessive sentence.

[22] The rehearing requires this court to conduct a real review of the evidence rather than a completely fresh hearing to make up its own mind about the case.

**Grounds of Appeal**

[23] The appellant appeals against the sentence and relies on the grounds of appeal, in particular that the sentence was manifestly excessive.

[24] The appellant maintains the contention that the appropriate range of sentence is six to nine months but conceded it could extend to 12 months, with a parole eligibility date set at one-third of the unbroken period of imprisonment, having regard to the substituted sentence within the range contended.

[25] The appeal is opposed on the basis that the sentence is not manifestly excessive and ought not be disturbed.

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1 *LJS v Sweeney* [2017] QDC 18.

**Appeal Against Sentence**

[26] This court ought not interfere with a sentence unless it is manifestly excessive, it is vitiated by an error of principle, there has been a failure to appreciate some feature, or there is otherwise a miscarriage of justice. A mere difference of opinion about the way in which discretion should be exercised is not a sufficient justification for review. It must be shown that the discretion miscarried.

[27] The High Court in *House v King* said:[2]

> It is not enough that the judges composing the appellate court consider that if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows erroneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed, and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if, upon the facts, it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in court at first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has, in fact, occurred.

[28] Further, the High Court in *Kentwell v R* held:[3]

> In the case of specific error, the appellate court's power to intervene is enlivened, and it becomes its duty to re-sentence, unless in the separate and independent exercise of its discretion, it concludes that no different sentence should be passed. By contrast, absent specific error, the appellate court may only intervene if it concludes that the sentence falls outside the permissible range of sentences for the offender and the offence.

[29] These decisions distinguish cases of specific error and manifest excess. Once an appellate court identifies a specific error, the sentence must be set aside, and the appellate court must exercise the sentencing discretion afresh, unless, in that separate and independent exercise, it concludes that no different sentence should be passed. By contrast, an error may not be discernable, but the sentence is manifestly excessive as being too heavy and lies outside the permissible range. Only then may the appellate court intervene and, in the exercise of its discretion, consider what sentence is to be imposed.

**Manifest Excess and Other Matters**

[30] During the course of argument on the appeal, it became apparent that the learned Magistrate was not referred to, nor apparently took into account that the reoffending also breached the probation order made in the Magistrates Court on the 11th of January 2017. On that date, the court ordered, in addition to 100 hours community service, that the defendant serve 18

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[2] *House v King* [1936] 55 CLR 499 at 504 to 505.
[3] *Kentwell v R* [2014] 252 CLR 60 at [35].

months' probation for two offences of contravention of domestic violence order and an offence of common assault.

[31] When considering a sentence, the court is obliged to sentence for the specific purposes prescribed by s 9 of the *Penalties and Sentences Act* 1992 (Qld) and, in carrying out those purposes, must have regard to the prescribed matters there set out, including s 9(2)(l), sentences already imposed on the offender that have not been served, and subparagraph (r), any other relevant circumstance, and

[32] Since the offending is of a violent nature, the court was also required to apply the principles set out in s 9(2A) and the related provision in subsection (3), including the relevant risk of physical harm and the need to protect members of the community from that risk, and subparagraph (g), the past record of the offender, including any attempt at rehabilitation and the number of previous offences of any type committed,

[33] Whilst the learned Magistrate had regard to the previous offending and apparently had regard to each of those factors, the absence of a reference to the offending also breaching the probation order and the fact that the offending subject of the order also related to the same aggrieved seems to me to speak of some error; however, that doesn't necessarily require this court to intervene to resentence as a result of some specific error. It should only do so if, in a separate and independent exercise, it concludes that no different sentence should be passed.

[34] This is really the focus of the parties on the appeal was placed. Indeed, the appeal focused significantly upon the decision of *LJS v Sweeney*, which was arrived upon by the Magistrate at first instance.

[35] That case concerned an appeal against sentence imposed at first instance where an effective head sentence of three years imprisonment was made for two offences of a contravening domestic violence order (aggravated offence), and the rest are concurrent sentences for six other relatively minor summary offences of receiving tainted property, three charges of fraud, possessing dangerous drugs, and assaulting or obstructing police. Given the nature of that offending, they were unlikely to attract any significant uplift in the application of the totality principle since the sentence was approached in a global way and each sentence to be served concurrently. That appeal was ultimately allowed, and the court substituted a sentence of two years imprisonment for each of the offences of contravention of a domestic violence order (aggravated offence), still to be served concurrently with the lesser sentences or the minor charges.

[36] The offending in *Sweeney* was more physically violent and different than the present case. LJS punched the aggrieved, causing her to fall over and, on another occasion, grabbed her by the back of her head and pushed her head into a fence and kicked her in the back. Here, however, the appellant was physically violent in respect of the first offence. The two subsequent offences on his return to residence was non-physical, domineering, verbally abusive, threatening, intimidating, and the latter included aspects of victimisation of the complainant's approach to police.

[37] LJS had a more serious criminal history relevant to the matters before the court and over a longer period. They included 14 previous contraventions of domestic violence orders over 10 years, with the most recent offending being five charges resulting in an 18-month imprisonment sentence imposed about two years before his sentence before the court. He

reoffended 16 months after his release on parole. By comparison, although the appellant here had six previous like offences, it is significant that he reoffended whilst serving probation and parole for like offending. He also had other previous property and motor vehicle offences and demonstrated a continued disregard for the authority of the court in previous offending constituted by breaching bail, probation orders, and community service orders. Clearly, specific deterrence was a significant factor before the learned Magistrate in this case.

[38] Unlike the appellant here, the court in *LJS v Sweeney* had an extensive medical history. These included post-traumatic stress disorder, antisocial personality traits, borderline intellectual impairment, substance abuse, and victim of child sexual and emotional abuse.

[39] The court had regard to extensive medical reports reporting of these matters in mitigation of the penalty, so much is clear by the court's reference to the relevant authority of *R v Goodger*, where the court cited longstanding authority in relation to the reduction of penalty when faced with relevant psychiatric evidence affecting and related to the offending.[4] This also perhaps explains why the learned appellate Judge sentenced at the bottom end of the identified range of two to two and a-half years. In that regard, His Honour Judge Smith in that case remarked:[5]

> "At first blush, I would have considered a three-year head sentence high but within the sentencing range, but, having considered the comparable decisions and noting the Crown's concession, it would appear that a head sentence of three years imprisonment was excessive despite the applicant's previous convictions. It seems to me that the parties concessions that a two to two and a-half year head sentence is within sentencing range in this matter is accurate, and, as such, I should exercise the sentencing discretion afresh."

[40] It seems to me that there are various competing factors which made it difficult to directly compare the case of *LJS v Sweeney* to the current circumstances. Although the nature of the violence in Sweeney was and can be described as more serious than the violence in this case, this case has the disturbing features of the defendant returning to the residence on two further occasions to continue a course of abuse, intimidation, and domineering behaviour. This also included a threat to kill and intimidation in relation to questioning the calling of police.

[41] The criminal histories are different, but the appellant here has shown contempt for court orders not only in the offending immediately before and the relevant sentence breached by this reoffending. He has a criminal history where he has breached previous orders, such as bail, probation, and community service. The defendant here did not have the benefit of any medical history which could have been relied upon, as it was in Sweeney, to mitigate the penalty. It seems to me that the various competing factors favour a sentence in the range of 18 months to two years before any consideration of amelioration of the length mitigation.

[42] Having regard to the sentencing principles, nature of the offending, the reoffending on probation and parole, the like offending against the same aggrieved, it was, I think, open for the Magistrate to look to the high end of the range. Having done so, the sentence ought be the result of proper moderation, having regard to the imposition of a cumulative sentence by gauging whether the overall period of imprisonment was just and appropriate for the whole of the criminality, including, of course, the period of continuing imprisonment so as not to result

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4 *R v Goodger* [2009] QCA 377 at [19] – [21].
5 *R v Goodger* [2009] QCA 377 at [26].

in a crushing or disproportionate sentence. Further consideration in this regard was warranted in setting the parole eligibility date at an appropriate stage, taking into account the total unbroken duration of imprisonment.

[43] In that way, the sentencing considerations could be balanced by aspects of specific deterrence, followed by further rehabilitative processes, serving out the sentence within the community under the auspices of parole. Further, such release would then be subject to appropriate assessment by corrections services to ensure, as best as possible, the risk factors are assessed and met on release.

[44] It seems to me that while the sentence of 18 months imprisonment imposed by the learned Magistrate is harsh and perhaps higher than another Magistrate or Judge may impose, I'm not persuaded that it falls outside the permissible range of sentences for the offender and the offences. It seems to me that the learned Magistrate did appropriately, then, set a parole eligibility date, having regard to the period of imprisonment, being the total unbroken duration of imprisonment, including the term then served before the sentence and the term he just imposed.

[45] Consequently, it seems to me that notwithstanding that the learned Magistrate may have failed to take into account the breach of probation order in a specific way, no different sentence should be passed in the circumstances, and, even so, that aspect of the sentencing consideration is likely to have reinforced an imposition of a sentence at the higher end of the range.

**Order**

[46] In the absence of any material error in the sentencing discretion, having regard to the appropriateness and conclusions that I've made about the sentence imposed, it seems to me that there is no proper ground for the court to vary the sentence.

[47] I therefore confirm the decision of the Magistrates Court and dismiss the appeal.