DISTRICT COURT OF QUEENSLAND

CITATION:	*Dawkins v Queensland Police Service* [2018] QDC 161
PARTIES:	**MICHAEL DAWKINS** (appellant) v **QUEENSLAND POLICE SERVICE** (respondent)
FILE NO/S:	100/2018
DIVISION:	Appellate
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court, Cairns
DELIVERED EX TEMPORE ON:	19 and 25 July 2018
DELIVERED AT:	Cairns
HEARING DATE:	19 and 25 July 2018
JUDGE:	Morzone QC DCJ
ORDER:	**1. Appeal allowed.** **2. The orders of the Magistrate's Court made on the 23 May 2018 ought be varied by substituting a sentence of 20 months' imprisonment in lieu of 18 months' imprisonment for count 1, serious assault police officer causing bodily harm, and varying the parole release date from 1 September 2018 to the 25 July 2018.** **3. The report of Centacare dated the 24 July 2018, together with copies of exhibits 5 and 6 be provided by the Registrar to the Parole and Probation Office.**
CATCHWORDS:	CRIMINAL LAW - appeal pursuant to s 222 *Justices Act 1886* – conviction on own plea of 12 offences - Serious assault police officer causing bodily harm; serious assault police officer by spitting; commit public nuisance; obstruct police officer; wilful damage; trespassing; wilful damage; breach of bail condition; common assault; common assault; commit public nuisance; stealing - appeal against sentence – mode of hearing of appeal – whether sentence manifestly excessive. **Cases** *House v The King* (1936) 55 CLR 499

Kentwell v The Queen (2014) 252 CLR 60
Muldrock v The Queen [2011] HCA 39
R v Benson [2014] QCA 188
R v Brown [2013] QCA 185
R v Goodger [2009] QCA 377
R v James [2012] QCA 256
R v Jurik [2003] QCA 132
R v King [2008] QCA 1
R v Kitson [2008] QCA 86
R v Charlie (unreported, Fantin DCJ, Cairns District Court, 8 March 2018)
R v Verdins [2007] 16 VR 269
R v Yarwood [2011] QCA 367
Townsend v Commissioner of Police [2017] QDC 45
Veen v The Queen (No. 2) (1988) 164 CLR 465

Legislation
Justices Act 1886 (Qld) ss 222, 223
Mental Health Act 2016 (Qld) s 91
Penalties and Sentences Act 1992 (Qld) s 9

COUNSEL: *J Sheridan* for the appellant

SOLICITORS: Aboriginal and Torres Strait Islander Legal Service for the Appellant

E Coley of the Office of the Director of Public Prosecutions for the respondent

[1] On the 23rd of May 2018, the appellant was convicted after pleading guilty to 12 offences in the Magistrates Court held in Cairns. He was sentenced for each offence with the effective head sentence being one of 18 months imprisonment carried by the most serious offence of serious assault – police officer causing bodily harm. The other offending was subject of lesser concurrent sentences. A declaration of pre-sentence custody of 152 days was made, being about five months. A parole release date was ordered for the 1 September 2018.

[2] The appellant appealed on the 8 June 2018 against the sentence on the grounds that it was infected by error and was manifestly excessive.

[3] In anticipation of the hearing of the appeal, the appellant applied for bail pending the appeal hearing and determination, but time permitted for the appeal to proceed within the current sittings and, with the parties' agreement, further submissions were made in the context of hearing the appeal proper.

Background

[4] The factual basis of the offending was contained in an agreed schedule of facts.[1] The sentencing material also included a pre-sentence custody certificate, criminal history, liaison service report, a psychiatric report and a letter under the hand of Samantha Mills, dated 1 May 2018.

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1 Exhibit 1.

[5] The relevant offending can be summarised as follows: charges 1 and 2 were committed on 15 June 2017. On that day, the police detained the 37-year-old appellant under an authority to take him to a mental health facility in response to a notified disturbance. He resisted the arrest violently, but was successfully transported to the hospital for examination. There, he thrashed out with his arms and legs, kicking out and trying to sit up from the bed and even threatened to kill the police officers in attendance. He apparently then spat at one officer with his spittle landing on the officer's clothing, on his leg and shirt (charge 2 - serious assault police officer spitting). A spit hood was applied. Later, when a doctor attended the appellant, he began to kick towards another officer who tried to restrain his legs, but, in doing so, the appellant kicked the officer in the right eye which caused an abrasion and swelling (charge 1 - serious assault police officer causing bodily harm).

[6] Charges 3 and 4 were committed on 3 December 2017 after police saw the appellant walking naked along the street. He was unresponsive and highly volatile and failed to comply with their directions. A relative of the appellant came to assist to cover him with a towel, but, without warning, he punched the female relative in the face (charge 3 - commit public nuisance). The appellant was arrested, but moved so that he and the officers fell to the ground before handcuffs were used (charge 4 – obstruct police officer).

[7] On 5 December 2017, the appellant was yelling and acting erratically. In the backyard of a property, he swung a metal chain with a padlock attached to it and used it to smash a car window on that property, giving rise to charge 5, wilful damage.

[8] He committed charge 6, trespassing, on 6 December 2017, when he jumped a fence of the next-door neighbouring property.

[9] The remaining charges 7 to 12 were committed on 7 December 2017, but at different places and circumstances.

[10] At 6.30 am that day, the appellant went into the same neighbouring property, picked up a shovel and struck and broke a house window (charge 7 – wilful damage). He was in breach of his bail residential condition because he resided at number 9, having been evicted from his bail address, being number 5, on the same street (charge 8 – breach of bail condition).

[11] Later on 7 December 2017, after being released from the watch-house and while waiting in front of the courthouse for his sentencing for earlier matters, the appellant kicked a man in the shoulder and arm as he was walking past the appellant (charge 9 – common assault). He then approached another woman who was seated outside the courthouse and kicked her to the chest and she fell backwards (charge 10 – common assault). He then continued on and walked to another person and slapped her in the back of the head (charge 11 – commit public nuisance). He then picked up that complainant's sunglasses and took them, constituting charge 12, stealing.

[12] The learned magistrate had the benefit of the court liaison service report as well as a psychiatric assessment as to his fitness in respect of charges 1 and 2. His Honour preferred that evidence as showing that the appellant was in the throes of a drug-induced psychosis at the time of his offending, especially in relation to those charges of the 15 June 2017. His Honour also rejected submissions as to further

offending resulting from anything other than self-induced intoxication. He concluded that the appellant had poor prospects of rehabilitation whilst being so affected. He took into account the appellant's age, circumstances of the offending and comparative cases, the appellant's pleas of guilty and the appellant's criminal history.

[13] His Honour described that history variously, but adopted the prosecutor's description of "appalling" criminal history. The appellant did have a nine-page criminal history which included three previous serious assaults on police, six assaults occasioning bodily harm, and five common assaults, and a grievous bodily harm. The learned magistrate rejected the appellant's indication of remorse.[2] During the course of his Honour's reasons, he referred to *Veen v The Queen (No. 2)*[3] as to the use of a defendant's antecedent criminal history and remarked that the principle was apt to the appellant, saying.[4]

[14] The learned magistrate sentenced the defendant to terms of imprisonment as follows:

1. Serious assault police officer causing bodily harm, 18 months imprisonment;
2. Serious assault police officer by spitting, 12 months imprisonment;
3. Commit public nuisance, three months imprisonment;
4. Obstruct police officer, one month imprisonment;
5. Wilful damage, three months imprisonment;
6. Trespassing, convicted and not further punished;
7. Wilful damage, three months imprisonment;
8. Breach of bail condition, convicted and not further punished;
9. Common assault, six months imprisonment;
10. Common assault, six months imprisonment;
11. Commit public nuisance, one month imprisonment; and
12. Stealing, one month imprisonment.

[15] His Honour ordered that the sentences be served concurrently and declared pre-sentence custody at 152 days, being about five months.

[16] In considering the parole release date, his Honour again honed in on the appellant's criminal history, including the appellant reoffending about two months after the expiration of an activated suspended sentence imposed on the 17th of February

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2 D1-2/43-3/1.
3 *Veen v The Queen (No. 2)* (1988) 164 CLR 465 at [14]
4 D1-4/19-25.

2015 for a serious assault of a police officer committed on the 6th of September 2014.

[17] After referring to the Court of Appeal decisions of *R v Kitson* [2008] QCA 86 and *R v James* [2012] QCA 256 in relation to the discretion to set a parole release date, his Honour set the parole release date at 1 September 2018 being eight months and ten days in actual custody.

Mode of Appeal

[18] The appellant's appeal is brought pursuant to s 222 of the *Justices Act* 1886 (Qld). Pursuant to s 223, such an appeal is by way of rehearing on the original evidence and any new evidence adduced by leave.

[19] 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 before the court the order that is the subject of the appeal is the result of some legal factual or discretionary error.[5] The rehearing requires this court to conduct a real review of the evidence before it rather than a complete fresh hearing and thereby make up its own mind about the case.[6]

[20] The court's function is to consider each of the grounds of appeal, having regard to the evidence, and determine for itself the facts of the case and the legal consequences that follow from such findings. In doing so, it ought pay due regard to the advantage that the magistrate had in relation to the submissions made below.[7]

[21] 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 a salient feature or there is otherwise a miscarriage of justice. A mere difference of opinion about the way in which the discretion should be exercised is not a sufficient justification for review. It must be shown that the discretion miscarried.

[22] The principles are set out in the oft-cited cases of *House v The King*[8] and *Kentwell v The Queen*[9] and cases which have cited and referred to those authorities. The 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 discernible 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.

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5 *Allesch v Maunz* (2000) 203 CLR 172, [22] – [23] followed in *Teelow v Commissioner of Police* [2009] QCA 84, [4]; *White v Commissioner of Police* [2014] QCA 121, [8], *McDonald v Queensland Police Service* [2017] QCA 255, [47]; contrast *Forrest v Commissioner of Police* [2017] QCA 132, 5.

6 *Fox v Percy* (2003) 214 CLR 118; *Warren v Coombes* (1979) 142 CLR 531; *Dwyer v Calco Timbers* (2008) 234 CLR 124; applied in *Forrest v Commissioner of Police* [2017] QCA 132, 5 and *McDonald v Queensland Police Service* [2017] QCA 255, [47].

7 *White v Commissioner of Police* [2014] QCA 12, [5]-[8]; *Forrest v Commissioner of Police* [2017] QCA 132, 5 & 6; *McDonald v Queensland Police Service* [2017] QCA 255, [47].

8 *House v The King* (1936) 55 CLR 499 at 504-505

9 *Kentwell v The Queen* (2014) 252 CLR 60 at [35]

Grounds of Appeal

[23] The appellant appeals against the sentence in reliance upon several grounds which can be categorised as follows:

1. The magistrate erred in not giving sufficient weight to the appellant's personal circumstances, including concluding that there was not a psychiatric condition at the time of the offending.

2. The magistrate erred in not giving sufficient weight to the consideration of rehabilitation of the appellant.

3. The magistrate erred by not giving sufficient weight to the pleas of guilty.

4. The magistrate erred by placing too much weight on the offender's criminal history.

5. The magistrate erred by ordering a parole release date greater than one-third of the total head sentence.

6. The magistrate erred by ordering a sentence which is manifestly excessive, including by failing to consider the principle of totality.

[24] In the circumstances of this appeal, it seems to me that his Honour's reliance and reference to the criminal history permeates most of the matters the subject of the grounds of appeal and it's convenient that I have regard to that ground specifically insofar as it has been relied upon and further elaborate, if necessary.

The magistrate erred by placing too much weight on the offender's criminal history

[25] The learned magistrate variously remarked about the appellant's criminal history, some of which I have already referred to, but otherwise set out as follows:-

[26] Page 2 from line 31, his Honour described the appellant as having "*appalling criminal history in respect of violence*" and at about line 40 remarked *"...you present as a gentleman who has continually offended with offences of violence, particularly against police officers."*

[27] On page 3, his Honour again remarked about the appellant's criminal history, more particularly from line 7 as follows:

> *You have an appalling criminal history. It is [indistinct] criminal history. It is illuminating in respect of your character, sir. You are, on any view, a danger to the public at large consequent upon the demonstrated conduct in respect of offences of violence.*

[28] At line 35 on the same page, in comparing the offending to the cases, his Honour made remark that often comparatives are not "*on all fours in relation to either the circumstances of the offending or the defendant's antecedents and criminal history"*. When comparing the criminal histories in that context from about line 42, his Honour remarked:

> *And like your criminal history, sir, whilst you were sentenced on the basis of the criminality of your offending, the issue in respect of your antecedent*

> *criminal history is one that is required by the court to be taken into account.*

[29] In that regard, his Honour referred to *Veen v The Queen (No. 2),*[10] in particular, the passage at paragraph 14 as follows:

> "...the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences. The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind (references omitted)."

[30] After referring to that passage as to the use of a defendant's antecedent criminal history, his Honour remarked about the appellant's criminal history as follows:[11]

> *That is an apt statement principle for you, sir. You have maintained a continuing attitude of disobedience of the law over many years. Your moral culpability illuminated by your criminal history and, in fact, the dangerous propensity for violence illuminated by your criminal history, in my view, is a feature that is required to be weighed in relation to the appropriate sentences. In my view, the range of the offending is probably in the order of 18 months to two years, but it ought be moderated to reflect your pleas of guilty to one of 18 months.*

[31] It is unclear how his Honour used the antecedent criminal history to arrive at his range of 18 months to two years nor is it clear (despite the parties on appeal identifying two years) where in that range the learned Magistrate considered as his starting point before moderating that point to take account of the plea of guilty to arrive at 18 months.

[32] Having approached the sentence in that way, the appellant's criminal history was again the focus of his Honour's considering in setting the parole release date when he said:[12]

> *In terms of fixing a parole release date, which I am obliged to do, as I raised with Mr Goodwin and I invited submissions, you, sir, have an appalling history. You, in fact, had only recently ceased serving a period of imprisonment for an offence of violence on your criminal history.*

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[10] *Veen v The Queen (No. 2)* (1988) 164 CLR 465 at [14]

[11] D1-4/19-25.

[12] D1-4/39-44.

[33] The latter reference to the appellant only recently ceasing serving a period of imprisonment was a reference to the appellant's reoffending about two months after the expiration of an activated suspended sentence, which was imposed on 17 February 2015 for a serious assault of a police officer committed on 6 September 2014. Whilst the sentence was recent, the offending was much less so.

[34] After referring to *R v Kitson* [2008] QCA 876 and *R v James* [2012] QCA 256, in relation to the discretion to set a parole release date, his Honour remarked that those cases:[13]

> *"confirm that in terms of the appropriate discounts in terms of actual serving time, that is at large in terms of the exercise of a discretion, antecedent criminal history and other features can require a defendant to serve a greater period incarceration than one-third ... Justice Henry, in The Queen against James, said there is no entitlement to expect to serve one-third more (sic) is there any arithmetical formula."*

[35] His Honour then set the parole release date at 1 September 2018, being eight months and 10 days in actual custody or, in percentage terms, 46 per cent of the head sentence.

[36] It is trite law that the appellant's criminal history is a relevant matter for the proper exercise of the sentencing discretion. In particular, since the offence was one involving violence within the meaning of s 9(2A) of the *Penalties and Sentences Act* 1992 (Qld), the learned magistrate was required to have regard to the matters set out in s 9(3). In particular, subparagraph (g) of that subsection required the court to have regard to "the past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed". Further, s 9(10) provides:

> "In determining the appropriate sentence for an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if the court considers that it can reasonably be treated as such having regard to –
>
> (a) the nature of the previous conviction and its relevance to the current offence;
>
> (b) the time that has elapsed since the conviction.

[37] Subsection (11) provides:

> "Despite subsection (10), the sentence imposed must not be disproportionate to the gravity of the current offence."

[38] Clearly enough, the provisions reflect the common law as it stood and proclaimed in *Veen v The Queen (No. 2)* [14] set out above.

[39] The appellant's nine-page criminal history did include the offending identified by his Honour, being three previous serious assaults on police, six assaults occasioning bodily harm and five common assaults and a grievous bodily harm. The offending

[13] D1-5/1-4.

[14] *Veen v The Queen (No. 2)* (1988) 164 CLR 465 at [14]

commenced and includes a period involving the defendant's contact with the Children's Court when he was only 13 years old. It is not clear whether his Honour's attention was brought to any of those matters having regard to the revised approach of sentencing an adult and previous convictions as a child. The offences identified or apparently identified by his Honour as serious assaults on police officer seem to be the more-recent offending whilst the appellant was an adult.

[40] On 17 February 2015 he was most recently sentenced for a serious assault police officer by spitting committed on 6 September 2014. For that offending, he received a sentence of 15 months imprisonment suspended for three years after serving three months. It is that sentence which is the subject of the activation of the suspended sentence I referred to earlier when the court, on 18 April 2016, ordered that the balance of the suspended sentence be invoked, namely, 12 months imprisonment, with a parole release date set on the date of that sentencing, being 1 April 2016. Earlier offending of that kind was committed on 3 August 2013 which was dealt with by the Magistrates Court on 29 January 2014 when for the serious assault police the appellant was sentenced to six months imprisonment, seemingly a concurrent sentence for an offence committed a month earlier of assault occasioning bodily harm.

[41] There is a further serious assault in the appellant's criminal history which was dealt with on 25 March 2004. It's not clear whether his Honour was referring to that offending committed on 3 October 2003 or a lesser offence under the *Police Powers and Responsibility Act* 2000 (Qld) of assault police officer on that same date dealt with by the court on 26 March 2004. I am unable to identify any part of the transcript in the hearing below where his Honour was provided with the circumstances of the offending constituting serious assault police or, indeed, any other details of the other offending relied upon, namely, the previous offending of six assaults occasioning bodily harm, five common assaults and a grievous bodily harm.

[42] Whilst it may be fair to characterise the appellant's criminal history as "appalling" I think it unfair and inaccurate to describe the appellant as a person who has "*continually offended with offences of violence, particularly against police officers*," [15] or even otherwise having "*continued to commit serious offences of violence with no regard to others*" without detailed or any particularity of the offending.[16]

[43] In a similar vein, it is not clear how his Honour was able to form the view that the appellant was "*on any view, a danger to the public at large consequent upon the demonstrated conduct in respect of offences of violence*",[17] or likewise, in the absence of particularity of the offending, his Honour was able to characterise the appellant's "*moral culpability illuminated by your criminal history and, in fact, the dangerous propensity for violence illuminated by your criminal history,*"[18] or that the appellant had "*maintained a continuing attitude of disobedience of the law over many years*" in the context of providing the Court with some relevance to the

[15] D1-2/40.
[16] D1-2/46-3/1.
[17] D1-3/2-4.
[18] D1-4/21-23.

approach and the purpose of those remarks set out in relation to *Veen v R (No. 2)* on page 4 of the decision.[19]

[44] It seems to me that his Honour's references to the criminal history of the appellant and his characterisation of them, having regard to the nature of the offending before him and the dearth of particularity of past offence circumstances, his Honour allowed the criminal history to overwhelm his sentencing discretion. Having done so, his Honour has conflated that consideration with the setting of the "*range of the offending is probably in the order of 18 months to two years,*"[20] coupled with the moderation for pleas of guilty.

[45] And in relation to the pleas of guilty, it is clear that his Honour proceeded to provide credit, but, in doing so, not accepting that the plea or any other indication was one of remorse saying:

[46] The learned magistrate rejected the appellant's indication of remorse:[21]

> *In giving weight to your remorse bearing in mind as the prosecutor correctly identified from your history three previous serious assaults to the police, six assaults occasioning bodily harm, five common assaults and a grievous bodily harm. You, sir, are a person who is remorseful when confronted with the prospect of being sentenced to imprisonment, but otherwise have continued to commit serious offences of violence with no regard to others.*

[47] And in coming to that view in the remarks set out above, his Honour based his consideration on the appellant's "*continued to commit serious offences of violence with no regard to others*".[22]

[48] It is also unclear how his Honour has reached the range identified as 18 months to two years except to say that he has done so in the context of the "*range of the offending*". That seems to be indicative that his Honour has had regard to the whole of the offending before him as a consideration of the principles of totality in reaching a sentence involving more than one offence. Unfortunately, the reasons are not clear as to his approach except the moderation that he has applied for the plea of guilty absent remorse due to the criminal history evidencing continual offending.

[49] It is also evident that the criminal history has been the main consideration, if not the only consideration, to the setting of the parole release date beyond a notionally one-third mark contended by the appellant's representative below. It is now well settled that there is and ought not be a fetter of the sentencing judge's discretion in setting a parole release date at or about one-third. It could be more or less. However, his Honour has focused upon the prospect of a "*greater period incarceration than one-third*".[23] Seemingly, in reliance upon the appellant's criminal history.

[50] It seems to me that by approaching the sentence in the way his Honour did give undue and excessive weight to the appellant's criminal history which overwhelmed

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[19] D1-4/21-22.
[20] D1-4/24-25.
[21] D1-2/43-3/1.
[22] D1-2/47-3/1.
[23] D1-5/3-4.

and infected his consideration of the appropriate penalty, including consideration of matters of totality as well as the setting of the parole release date. For these reasons, in my respectful view, the learned Magistrate did err in the exercise of the discretion in sentencing the appellant and, therefore, the appeal ought be allowed. It then becomes the duty of this Court to resentence afresh if a different sentence ought be imposed notwithstanding the error.

[51] In this regard, it is also important that I consider the other grounds of appeal in relation to the weight and treatment of the appellant's personal circumstances, including whether he had a psychiatric condition relevant to the sentencing discretion.

[52] At the commencement of the sentence hearing, the learned magistrate engaged in a lengthy discussion with the appellant's solicitor about the tension in the evidence involving the differential diagnosis of either drug-induced psychosis or schizophrenia. However, it must be borne in mind that that aspect of the evidence drawn from the material forming exhibits 5 and 6, especially the psychiatric report, being exhibit 6, dated 22 February 2018, was confined to charges 1 and 2 and completed by the psychiatrist in the context of a request made pursuant to s 91 of the *Mental Health Act* 2016 (Qld).

[53] It is tolerably clear that the psychiatrist formed the view that there was insufficient evidence of a psychiatric condition based upon the material that he was provided, as well as interviews with the appellant in relation to the two offences committed in June 2017, being charges 1 and 2. The psychiatrist identified the differential diagnosis of drug-induced psychosis or schizophrenia, and set out in his discussion the history ascertained from the source material dating from 2003, and expressed a view that the voluntary ingestion of alcohol and other substances explained the appellant's irrational behaviour.

[54] His Honour did take into account the appellant's age, previous consumption of alcohol and drugs, as evidenced by exhibits 5 and 6, and ultimately found that the appellant was not burdened by a psychiatric condition. In terms of whether the offending ought be considered in a different light pursuant to the principles adopted by the Court of Appeal in *R v Goodger*,[24] and *R v Yarwood*,[25] there affirming *R v Verdins*,[26] and also *Muldrock v The Queen*.[27] The appellant's representative properly accepted that the evidence could be relied upon as showing the appellant being voluntarily intoxicated. So much is mandated by s 9 (9A) of the *Penalties and Sentences Act* 1992 (Qld)

[55] It seems to me that the learned magistrate correctly identified the material placed before him as being insufficient evidence that the appellant was suffering from a psychiatric illness in terms of those cases, including the offending outside the courthouse on 7 December 2017. In relation to that offending, the court liaison service report at page 5 indicated that the appellant was seen by the court liaison service mental health for assessment when the appellant was taken into custody following the events outside the courthouse. The report provides that:

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[24] *R v Goodger* [2009] QCA 377
[25] *R v Yarwood* [2011] QCA 367
[26] *R v Verdins* [2007] 16 VR 269 at [32]
[27] *Muldrock v The Queen* [2011] HCA 39 at [50] to [58]

> *Court liaison officers found it difficult to assess him as he appeared drug affected, and stated he had been taking "cocaine".*

[56] The appellant's solicitor submitted that the appellant was "*diagnosed with schizophrenia at around the age of seven*,"[28] and was "*currently still subject to a treatment authority and is still taking medication for schizophrenia*"[29] and was in receipt of a disability pension.[30] The latter was referred to in the court liaison service report on page 3 where the author wrote:

> *It is difficult to ascertain a diagnosis of schizophrenia (for which he receives a Disability Support Pension) as his psychotic episodes are in the context of illicit substances.*

[57] However, his Honour does not address in the sentencing remarks these submissions made by the appellant's solicitor and other indicia of the appellant's mental health.

[58] It seems that the appellant's mental health was, and remains, a relevant matter to the exercise of the sentencing discretion, including the impact of the sentence on him as well as his prospects of rehabilitation. Having confined his consideration to the material contained in exhibits 5 and 6, despite their limited purpose, it seems to me that his Honour did not take into account the material consideration of the appellant's personal circumstances in the sense of his mental state. This is perhaps particularly relevant in the consideration as his Honour was required to do about the possible risk of reoffending pursuant to s 9(3) if a custodial sentence was not imposed.

[59] His Honour considered that aspect of the matter in the context of rehabilitation. On that topic, the appellant's Solicitor submitted that "*Rehabilitation, your Honour – he seeks to be released into the community and engage with support services, and indeed, from prison, has already commenced engagement.*"[31] The solicitor tendered a letter of a mental health resilience coach of Centacare regarding the appellant.[32] In that document, the writer proffers ongoing support to the appellant as well as linking him with other service providers to enhance his mental and social wellbeing to optimise his mental health recovery as well as reduce his risk of recidivism. The author of that document was present in the Court at the time of sentencing.

[60] Notwithstanding those matters, the learned magistrate did not remark about this evidence during the course of sentencing. Instead, he largely confined his consideration of the appellant's prospects of rehabilitation to his criminal history (as I have mentioned above) and the content of exhibit 6 (which was for a limited purpose) in the following way:[33]

> *"… There is also an assessment that seems to provide a pessimistic view of your prospects of rehabilitation, particularly in light of your significant history of continuing to consume drugs and alcohol in circumstances where you are aware that the intoxication causes you to offend. You have been noncompliant in the past with treatment regimes. The author of the last*

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[28] T1-18/43.

[29] T1-10/7; T1-19/6; T1-20/20.

[30] T1-18/46.

[31] T1-21/27-39.

[32] Exhibit 4

[33] D1-3/16-22,

> *report expresses little confidence that there is much other to be gained in the context of you being rehabilitated."*

[61] It is not clear on the material how it is the appellant had been diagnosed with schizophrenia at a young age and somehow has recovered, except perhaps the obvious, that is, the purpose of exhibits 5 and 6 were limited going to the offences subject of charges 1 and 2 and the appellant's capacity to provide instructs and plead. It seems to me that the submissions which were not rejected by his Honour or indeed challenged by the prosecutor ought to have alerted the Court to the need for some further investigation and consideration of that aspect of the case. The officer from Centacare was present in Court and may have been able to provide further information as to the supports so as to distinguish the support available to the appellant at the time of sentencing as opposed to previous occasions when the appellant had faced the Court and reoffended in the way set out in the criminal history.

[62] It is this aspect of the case which makes it difficult for the appellate Court to consider what is the appropriate range or, indeed, the extent to which the appellant ought remain in custody before being released on parole, and therefore makes the necessity of the re-exercise of the sentencing discretion uncertain and the exercise itself, in light of the errors identified above.

[63] The appellant's counsel submitted that a head sentence in the range of six to 12 months imprisonment ought be imposed and supports the submission by reference to the comparative cases of *R v Charlie*,[34] *R v Juric*,[35] *R v Benson*[36] and *Townsend v Commissioner of Police*.[37] And the respondent's advocate urges a range of 18 months to two years in reliance upon some of those comparative cases, as well as *R v Brown*.[38]

Further Submissions

[64] It seems to me that to embark upon a consideration of the appropriate sentence would be fraught in circumstances where the Court is, as the Court below, left with significant uncertainty about the appellant's mental health and state, as well as in that regard risk and prospects of rehabilitation.

[65] Consequently, I adjourned the appeal and any resentence to allow the parties to provide further submissions and any other material relevant to those aspects of the case, and subject to the parties' availability, to 25 July 2018. On that date, further submissions were received in respect of sentence together with additional material, for which leave was granted to the appellant to adduce in relation to the nature and extent of services proposed by Centacare FNQ in a report of 24 July 2018 together with confirmation of stable accommodation for the appellant upon his release into the community in due course.

[66] Of the comparative decisions, the most recent, involving the more serious type of offending of serious assault on police with an aggravating circumstance at a time

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[34] (unreported, Fantin DCJ, Cairns District Court, 8 March 2018)
[35] [2003] QCA 132
[36] [2014] QCA 188
[37] [2017] QDC 45
[38] [2013] QCA 185

when the maximum sentence was equivalent to that applicable here, namely, 14 years, are the matters of *Benson* and *Townsend*.

[67] In *Benson*, the Court of Appeal considered a sentence of 18 months imposed with an order for parole eligibility after serving six months, taking into account 158 days of pre-sentence custody which was declared by the sentencing Court. The appellant there was also facing summary offences, for which he was suitably sentenced. The circumstances of that case are set out in the decision, particularly paragraphs 8 and 9. The appellant there was displaying an aggressive demeanour. When police officers confronted him, one officer grabbed his shirt and arm in an attempt to restrain him whilst the appellant was standing on some steps a little higher than that officer. The appellant punched the officer in the left eye, causing immediate pain, and then wrapped both of his arms around the back of the officer's neck and pulled him towards him, the appellant. The officer felt the appellant choking him, making it difficult to breathe, and then he felt the appellant's finger hook deep into his eyeball, causing substantial pain. Another officer attempted to pull the appellant's arm away. The appellant then wrestled with the previous officer who had been restrained, and in the process, the officer fell to the ground with the appellant and felt immediate and substantial pain to his thigh as the appellant was biting his leg. Further effort was made by each of the officers to finally restrain the appellant. He was 42 at the time of the offending and had a current medical condition identified as: *"...intermittent explosive D/O poly substance abuse cluster B personality with antisocial and borderline features and a chronic active hepatitis C."* The Court was also informed that he had a diagnosis of bipolar depression and mental health issues for which he was being treated. The appellant had a very extensive criminal and traffic history, including offences of violence for which he received prison terms in Queensland, New South Wales and Tasmania. The decision below was corrected so as to take account of the automatic effect of a cumulative sentence, which, ultimately, did not change the sentence imposed except to make it cumulative upon an earlier sentence imposed by Magistrates Court, so it remained as one of 18 months in that altered context.

[68] It seems to me that the offending in that case was more physically serious than the appellant here. It was also more protracted and involved significant effort by three officers in public. There are also differences in the nature of those offences in the context of the appellant here also committing other lesser offences, which would require different considerations by way of totality. The more serious offending faced by the appellant here, of the serious assault police officer bodily harm, is, it seems to me, considered on its own, lesser offending than that in Benson.

[69] In *Townsend*, the Court of Appeal considered similar offending comprising four charges: obstruction of a police officer, serious assault on a police officer occasioning bodily harm, wilful damage and a further charge of serious assault on a police officer occasioning bodily harm. The second serious assault was premised upon the appellant's conduct as she struggled with police and grabbed an officer's right leg and moved her face forwards so as she could bite him on the shin through his trousers and causing him pain and discomfort. She was also kicking the officer's other shin, causing pain and discomfort and, later, swelling. For that offending, she was sentenced to six months of imprisonment. For the further offending, the appellant had continued to struggle when she scratched another officer's face and brought her face to bite that officer's left breast through her shirt, breaking the skin at that location and causing pain, discomfort, bruising and

inflammation. That victim had shown emotional suffering for some time as a result of that assault. For that offence, the appellant was sentenced to 18 months of imprisonment.

[70] That appellant was younger, with an insignificant or less serious criminal history. The Court considered that case varied, but the ultimate outcome resulted in a reduction by the appellate Court of the head sentence to take into account a substantial compensation order, and in that regard, the sentence of 18 months imprisonment for the further offence of serious assault was varied to 16 months.

[71] The other cases referred to by the parties are instructive, but caution is warranted, having regard to the increase of penalty since their incidence except for the latter decision, which I will come to.

[72] In *R v Juric*, the Court of Appeal considered an appeal from a sentence of 18 months imprisonment for a count of assault, striking a police officer in the face, and two and a-half years imprisonment on two further counts of spitting blood and saliva into the faces of the police officers. At that time, the maximum penalty was seven years and is now 14 years for that type of offending. The Court's consideration included matters of totality, having regard to a cumulative 10-month period of activated suspended sentence. The Court considered that a sentence in excess of 18 months for the assault offences was manifestly excessive. Accordingly, the appeal was allowed by varying the two and a-half years imprisonment to 18 months imprisonment.

[73] It seems to me the offending in that case was of a more serious kind than that here. Different circumstances as to totality prevail in the current appeal, and a different maximum penalty is applicable.

[74] In *Brown*, the Court of Appeal there considered offending involving circumstances where the appellant was charged with two counts of serious assault, for which he was sentenced to nine months on one and 15 months on the other, together with three summary charges of assaulting police and committing a public nuisance and, further, possession of a knife in public. The offending there involved the police officers being distracted by another male, and as one officer turned to deal with him, the appellant punched the officer hard in the chest, which was the first of the assaults on which he was sentenced to nine months imprisonment. It was not alleged that an injury resulted. The appellant continued to lash out and was restrained by the other police officer when she began to hawk, accumulating saliva in her mouth, at which time she was told not to spit, but she did so and spat over the officer's face, mouth, hair and uniform, and that gave rise to the second count of serious assault, for which she was sentenced to 15 months of imprisonment. The appellant there was 50 years old at the time of sentence. She had a lengthy criminal history, but it, significantly, consisted of summary offences, all apparently liquor-related. The Court there looked at *Juric* and another case of *R v King*.[39] Ultimately, the appeal was allowed, with the sentences set aside, and a sentence of 203 days imprisonment in respect of each offence, with a declaration for that period, was imposed on the basis that the Court considered that seven months actual imprisonment was more than adequate by way of punishment.

[75] Again, caution ought be given, having regard to the maximum penalty at the time.

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[39] [2008] QCA 1

[76] More recently, in *R v Charlie*, the District Court considered a circumstance after police arrested the appellant after a disturbance, and when taken to the watch-house, the appellant verbally abused the officer and then walked up to the mesh door of the cell and spat on the officer through that mesh, with spittle landing on the officer's face and eyes. The appellant was 37 at the time of the offences and at sentence and had two previous serious assault offences which the Court took into account, one more aged than the other, but it was accepted that she had the capacity for rehabilitation and was sentenced to 11 months, with a parole release date set at two months of actual custody.

[77] When passing sentence, the court is charged with the exercise of their discretion as provided by the *Penalties and Sentences Act* 1992 (Qld) and the sentencing guidelines provided in s 9. More generally, the sentence may only be imposed for the purpose of punishing the offender to an extent or in a way that is just in all the circumstances; or to provide conditions in the order that the court considers will help the offender to be rehabilitated or deter the offender, or other persons, from committing the same or a similar offence; or to make it clear to the community, acting through the court, denounces the offender's conduct; or to protect the community or a combination of those matters.[40]

[78] In carrying out that task, the court must have regard to the matters set out in s 9(2), including the maximum penalties applicable in the case, relevantly here, 14 years of imprisonment for the more serious offending, the subject of dispute on appeal, the nature and seriousness of the offences which, here, are obvious on their own facts and in circumstances where police officers ought be able to carry out their duty without offending of this nature, or more or less serious nature, so as to obstruct the proper exercise of their function, and, worse, endanger their own wellbeing.

[79] Here, the appellant, for the more serious offending, was recognised by the officers to be in a compromised state, such that they formed the view of the need to transfer him by authority to the Mental Health Unit for assessment and care. The offending here occurs in the setting of the hospital, and in the course of restraint and attempted treatment. The circumstances of officers being called to that task and the result of injury, by bodily injury or spitting, are aggravating circumstances which ought be properly taken into account.

[80] The offending, quite apart from all the considerations in s 9(2), also attract the considerations and principles set out in subsection s9(2A), which negatives subsection (2)(a), that is, the principle that imprisonment should be imposed as a last resort and preferring an order enabling the appellant to stay in the community.

[81] Subsection 9(3) sets out the relevant considerations for the sentencing court in dealing with violent offenders, including those relevant here:

1. The risk of physical harm to any member of the community if a custodial sentence were not imposed;

2. The need to protect any members of the community from that risk;

3. The personal circumstances of any victim of the offence;

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[40] *Penalties and Sentences Act* 1992 (Qld) s 9 (1).

4. The circumstances of the offence, including any injury to a member or the public or any loss or damage resulting from the offending;

5. The nature or extent of violence used, or intended to be used, in the offending; any disregard by the offender for the interest of public safety;

6. The past record of the offender, including any attempted rehabilitation and the number of previous offences and type committed;

7. The offenders' antecedents, age and character;

8. Extent, if any, of remorse; and

9. Any medical, psychiatric, prison or other relevant report in relation to the offender and anything else about the safety of members of the community that the sentencing court considers relevant.

[82] I've already remarked about the extent to which the criminal history may be relevant to the circumstances of this case and how it apparently overwhelmed the sentencing magistrate's consideration of other features set out in s 9. It was necessary for the court, having undertaken the task of considering the comparative cases, to then weigh up the appropriate sentence having regard to the totality of the offending, which included the 10 further lesser offences of committing public nuisance, obstruct police officer, wilful damage, trespassing, breach of bail condition, common assault, commit public nuisance and stealing. For those matters, I have set out the sentences passed by the learned magistrate and there is no challenge to those sentences.

[83] It seems to me that, if the court were considering the offending constituted by counts 1 and 2, the appropriate range, as demonstrated by the cases and considerations set out in the sentencing guidelines and principles would have seen a sentence no higher than 18 months of imprisonment for the more serious conduct constituted by count 1.

[84] If that offending were taken in isolation of count 2, it seems to me the range would be in the order of 15 months. Looking at the aggregate of the sentences, having regard to the appellant's conduct in the whole of his offending, would have well exceeded an appropriate range, such as to be crushing and disproportionate. It seems to me the just and appropriate way to proceed with the sentence would be to reflect the totality of the criminal behaviour in the most serious of the offences, being count 1, serious assault police officer causing bodily harm. Having regard to the comparative cases by way of guidance, it seems to me that an uplift up to 20 months' imprisonment would be justified.

[85] Here, the appellant has, by the time of appeal, served 214 days, equating to approximately seven months in custody. He had, by the time of the sentence below, served 152 days, slightly over five months, which were declared. That is a relevant factor, it seems to me, to take into account in setting the parole release date, along with other relevant considerations, which, of course, include the matters I've referred to: the appellant's plea of guilty and cooperation with police and prosecution; his previous criminal history and the nature of his offending; the timing of it and the recidivist character that it demonstrates; the appellant's health and underlying condition leading up to his offending and the impact that presentence

custody would've had upon him; as well as any further custody by way of treatment, confinement; and the arduous nature of those things upon the prospect of rehabilitation.

[86] A critical feature of the appellant's offending, both the subject of appeal and his criminal history, is his intoxicated and drugged state, manifesting in behaviour which is dangerous to himself and to members of the public. At least in respect of the most serious offending, the subject of psychiatric assessment in the context of his fitness to plead and stand trial, a differential diagnosis of drug-induced psychosis or schizophrenia was proffered. This ought be considered having regard to the appellant's unchallenged diagnosis of schizophrenia at around the age of seven, coupled with this continuing treatment authority and medication for schizophrenia, for which he was and is in receipt of a disability pension since last year. These things are indicative of recognition of the underlying condition of schizophrenia, or at least an ongoing treatable mental condition that was, and remains, a relevant matter to the exercise of the sentencing discretion, including the impact of the sentence on him as well as his prospects of rehabilitation.

[87] The appellant was substantially raised by his mother, with little contact with his father. His mother passed when he was only 17 years old. He was the youngest in the family. He had five siblings. He, himself, has five children, aged between two and 17 years. He's currently 38 years old. He's been educated up to about grade 10. His work history is limited, including, in 1999, working for eight months in fibreglassing and otherwise undertaking fruit picking when available. But, as I've intimated, he has been qualified and is in receipt of a disability support pension since late 2017.

[88] There is no doubt that his criminal history is appalling. His past offending ought be considered in their proper context, both in time and the nature of the offences, and how they may relate, or be similar, to the current offending. I've already remarked about the salient features of the criminal history and, in taking those matters into account as an aggravating factor, as required by s 9(10) of the *Penalties and Sentences Act* 1992 (Qld), they ought not be permitted to overwhelm the sentencing discretion so as to be disproportionate to the gravity of the current offending.[41]

[89] Here, the learned magistrate placed significant weight upon the appellant's criminal history as a feature, coupled with the limited medical evidence to express significant pessimism of the appellant's risk of reoffending and prospects of rehabilitation. The evidence adduced on appeal shows that the appellant has the prospect of intensive personalised support and supervision by Centacare with referral to a specialised drug and alcohol misuse service with particular experience and focus on dual diagnoses involving drugs and other mental conditions.

[90] Whilst it is true that the appellant has had significant opportunities, and the medical material comprising exhibits 5 and 6 show the nature and extent of treatment and his reception to that treatment in the past, it seems to me that the proposal and preparedness by Centacare does show some additional support services to those already significant steps which had been taken in the appellant's past community corrections and mental health management as disclosed by that material, and that is, at least on appeal, there has been some demonstrated difference, it seems to me, in

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[41] *Penalties and Sentences Act* (1992) s 9 (11).

the appellant's future management in the event of release, not merely one confined to the efforts of the past by parole and probation and mental health services. Although those matters were brought to the attention of the learned magistrate, it seems little weight was placed upon them below and by the psychiatrist, whose report was not directed to that aspect of the case.

[91] Here, it seems to me that the appellant has spent a significant time in presentence custody with apparent compliance with the regime he has endured, including, from time to time and continuing mental health treatment. The details of his engagement with the mental health prison service is unclear, except that he now is willing to receive oral medication, apparently in a state having spent seven months in custody, for a condition inferentially other than a drug-induced condition. He seems to have reached stability in his mental health with the support of the prison services. In the circumstances of this case, it seems to me that the appropriate time in actual custody does not warrant any more than one-third of the head sentence here, notionally, I indicate, of 20 months of imprisonment. He has already served in excess of that period as at the time of this appeal and is subject to a further six weeks under the sentence imposed by the learned magistrate.

[92] It is not clear to me how the learned magistrate reached the result embodied in the orders comprising the head sentence of some form of reduction to 18 months from the recognised range of 18 months to two years, apparently to reflect the appellant's plea of guilty, but also cognisant of his criminal history, as is apparent from the reasons immediately preceding consideration of that aspect of the case. And, having reached that point, it remains unclear how his Honour reached the result embodied in the orders setting the parole release date, except for the undue focus, it seems to me, on the appellant's criminal history overbearing considerations of the unchallenged submissions of an underlying condition, indicia of such and rehabilitative steps distinguishing those of the past.

[93] Therefore, it seems to me that, in my respectful view, the orders made in the sentence were unreasonable and unjust in all of the circumstances, such that a different sentence ought be imposed in the re-exercise of this court's discretion, having found an error in his Honour's approach to the case.

Orders

[94] For these reasons, it seems to me and I order:

1. The appeal ought be allowed.
2. The orders of the Magistrate's Court made on the 23 May 2018 ought be varied by substituting a sentence of 20 months' imprisonment in lieu of 18 months' imprisonment for count 1, serious assault police officer causing bodily harm, and varying the parole release date from 1 September 2018 to the 25 July 2018.
3. The report of Centacare dated the 24 July 2018, together with copies of exhibits 5 and 6 be provided by the Registrar to the Parole and Probation Office.

[95] Having come to that decision, and given the appellant is present in court today, I must inform him of the conditions of his parole are those under s 200 of the *Corrective Services Act* 2006 (Qld), and, while under the supervision of the Chief Executive in the period of his parole, he must carry out each and any lawful

instruction, give a test sample if required, report and receive visits as directed, notify within 48 hours of any change of address of where he lives or works, and, most importantly, he must not commit any offences whilst on parole. He's informed that, if he commits an offence, then he will be sent to prison to serve the balance of the term of imprisonment, or part of it, that has just been imposed by this resentence, and I direct that the appellant report to Corrective Services' Parole and Probation Office at Cairns by 4 pm tomorrow, the 26th of July 2018.