DISTRICT COURT OF QUEENSLAND

CITATION:	*Andrews v Queensland Police Service* [2018] QDC 89
PARTIES:	**BRADLEY JAMES ANDREWS** (appellant) **v** **QUEENSLAND POLICE SERVICE** (respondent)
FILE NO/S:	D220 of 2017
DIVISION:	Appellate
PROCEEDING:	Appeal – s 222 *Justices Act 1886* (Qld)
ORIGINATING COURT:	Southport Magistrates Court
DELIVERED ON:	15 February 2018 (delivered *ex tempore*)
DELIVERED AT:	Southport
HEARING DATE:	15 February 2018
JUDGE:	Muir DCJ
ORDERS:	**1. The appeal is allowed.** **2. The orders of Magistrate Kilner of 15 August 2017 are set aside.** **3. In relation to each of the offences, the appellant is convicted but not further punished.** **4. Convictions are recorded.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AGAINST SENTENCE – Where appellant convicted of two counts of serious assault of a public officer and one count of assault or obstruct police officer – where appellant sentenced to two months imprisonment to be suspended after 14 days, with an operational period of 12 months – whether Magistrate failed to fulfil obligations imposed by s 13(3) of the *Penalties and Sentences Act 1992* (Qld) – whether sentence was manifestly excessive.
LEGISLATION:	*Justices Act 1886* (Qld), ss 222, 225 *Penalties and Sentences Act 1992* (Qld), s 13
CASES:	*Chapman v Queensland Police Service* [2016] QDC 141, considered *Etienne v Commissioner of Police* [2018] QDC 6, considered *Fox v Percy* [2003] 214 CLR 118, considered *Graham v Commissioner of Police* [2015] QDC 103,

considered
Lowe v R [1984] 154 CLR 606, cited
Markarian v R [2005] 228 CLR 356, cited
McDonald v Queensland Police Service [2017] QCA 255
Rowe v Kemper [2009] 1 Qd R 247
R v Lawley [2007] QCA 243, followed
R v Lomass [1981] 5 A Crim R 230, cited
R v Mallon [1997] QCA 58, cited
R v McIntosh [1923] St R Qd 278, cited
R v MCL [2017] QCA 114, considered
R v Morse [1979] 23 SASR 98, cited
R v Safi [2015] QCA 13, considered
Teelow v Commissioner of Police [2009] 2 Qd R 489, considered
White v Commissioner of Police [2014] QCA 121, cited
Wong v R [2001] 207 CLR 584, cited

SOLICITORS: Carl Edwards Solicitor for the appellant
Queensland Police Service for the respondent

Introduction

[2] This is an appeal under s 222 of the *Justices Act 1886* (Qld) against the sentence imposed on the appellant by the learned Magistrate at the Southport Magistrates Court on 15 August 2017. On this day the appellant pleaded guilty to two counts of serious assault of a public officer performing function, and one count of obstructing/assaulting police. In relation to each of the offences, the Magistrate convicted and sentenced the appellant to two months imprisonment to be suspended after 14 days, with an operational period of 12 months. The appellant served five days in custody before being granted appeal bail.

[3] By his notice of appeal filed 15 August 2017, the appellant appealed on the single ground that the sentence imposed was manifestly excessive. The written submissions of the appellant also raised the issue that the early guilty plea was not recognised by the severity of the penalty imposed by the Magistrate. The appellant also submitted that the Magistrate placed too much weight on denunciation and general deterrence in his sentencing deliberation.

[4] The respondent's written submissions accept that the appellant's guilty pleas were not stated by the learned Magistrate in open Court to have been taken into account, and concede that there was a failure to comply with the obligations imposed by s 13(3) of the *Penalties and Sentences Act 1992* (Qld) ("the Act"). The respondent submits the Court is not justified in reviewing the sentencing in this case, as it is evident from the sentence that the guilty plea was in fact taken into account.

[5] Given that this issue was raised squarely and fairly on the material, I asked the solicitor for the appellant if he was seeking leave to amend the grounds of appeal. Not surprisingly, the appellant's solicitor made such an application, which was sensibly not opposed by the respondent. Accordingly, I gave leave to the appellant to amend the grounds of appeal to include that the Magistrate erred in law in that he failed to comply with the obligations imposed by s 13(3) of the Act, in that he failed

to state in open Court when imposing the sentence that he had taken into account the guilty plea.

Circumstances of Offending

[6] Turning now to the circumstances of the offence as outlined before the sentencing Magistrate. On 22 June 2017 at approximately 10pm, police were at the Gold Coast University Hospital in relation to other matters. The appellant was brought in by paramedics for a voluntary assessment, and was situated in the waiting room on a stretcher. Approximately 30 minutes later the appellant became agitated and started shouting, "I want a fucking cigarette." The appellant got off his stretcher and walked towards a ward area where there was a large sign displaying, "Authorised personnel only." He attempted to walk to the entrance.

[7] Two paramedics were standing at the entrance, and one paramedic was heard to say, "I am sorry, but you cannot go through that way." The appellant then shoved both paramedics with his shoulders to gain entry into the area. These facts form the basis of the two counts of serious assault public officer performing function. At this time police intervened, and hospital staff assisted to restrain the appellant. The appellant was escorted back to the stretcher where police told the appellant to stop acting like a child and to show some respect. At this time the appellant, while lying on the stretcher, forcefully pushed the police officer in the chest with one of his arms. These form the facts of the assault or obstruct police officer charge. The appellant was then restrained by police and security, and he was handcuffed and placed onto the stretcher.

Relevant Legal Principles

[8] Turning to the principles to be applied on appeal. The appeal is by way of re-hearing on the evidence given in the proceedings below. As Kent QC DCJ stated recently in *Etienne v Commissioner of Police* [2018] QDC 6:[1]

> The question on such an appeal may be framed in variations of language, however one helpful formulation is to consider whether, 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.[2] The appeal requires this Court to conduct a real review of the trial, and the Magistrate's reasons, and make its own determination of relevant facts in issue from the evidence, giving due deference and attaching a good deal of weight to the Magistrate's view.[3]

[9] The exercise of the Magistrate's discretion cannot be interfered with unless an error is apparent. As identified by Keane JA (as he then was) in *R v Lawley* [2007] QCA 243:[4]

> It is not a sufficient basis for this Court to intervene that this Court might have struck a different balance between the competing considerations which had to be weighed in the exercise of the discretion.

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[1] At [5].
[2] With reference to *Teelow v Commissioner of Police* [2009] 2 Qd R 489 at 493.
[3] See *Fox v Percy* [2003] 214 CLR 118 at 25*; Rowe v Kemper* [2009] 1 Qd R 247, at [3]; *White v Commissioner of Police* [2014] QCA 121, at [6]; *McDonald v Queensland Police Service* [2017] QCA 255 at 47.
[4] At [18], cited recently with approval in *R v MCL* [2017] QCA 114 at [17].

[10] This Court would be warranted in adjusting the sentence on the basis that it was manifestly excessive in the sense that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons.[5]

[11] In that respect, sentencing Judges are allowed as much flexibility in sentencing as is consonant with consistency and approach and as accords with the statutory regime that applies.[6]

[12] For a sentence to be excessive, it must be:

> …beyond the acceptable scope of judicial discretion or so outside the appropriate range as to demonstrate inconsistency and unfairness.[7]

Magistrates Court Proceedings

[13] Turning now to the proceedings below. Before the Court, it was submitted that the appellant was born on 17 June 1989. He was aged 27 at the time of the offence, and 28 at the time of sentence. He had a criminal history that contained one entry on 20 March 2017 in Queensland for an offence of enter premises and commit indictable offence, between 28 June 2016 and 1 July 2016. For that he was fined $700 and no conviction was recorded.

[14] There was also a relevant entry in his New South Wales criminal history of 11 February 2009 for an assault occasioning bodily harm in company of others, for which the appellant had been imprisoned for 21 months, suspended on a bond under s 12 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), by which for 21 months he was to accept supervision and guidance and comply with all reasonable directions of probation and parole service. That conviction was when the appellant was 18.

[15] Before the Magistrate, it was submitted on behalf of the appellant, that a fine was appropriate. The following exchange took place between the Magistrate and the solicitor for the appellant:

> It is effectively a push. It is a push. It is unpremeditated and does not cause any injury –

[16] The Magistrate pointed out then that it was in a hospital where people go to expect to be treated in a calm, rational and conducive situation, and said:

> To put it bluntly, your client acted like a feral animal on that occasion because he wanted a cigarette… And it required the police to be called to restrain him – two ambulance officers, or paramedics, I think they are now called.

[17] During the course of this exchange the Magistrate asked why he should not be sending the appellant to jail. The submission in response was that a term of actual imprisonment ought not to be imposed, and that was because that would be excessive, given the lack of violence and the lack of premeditation.

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[5] See *Wong v R* [2001] 207 CLR 584 at 605.

[6] See *Markarian v R* [2005] 228 CLR 356 at 27.

[7] See the summary by Judge Durward SC in *Chapman v Queensland Police Service* [2016] QDC 141, with reference to *R v Morse* [1979] 23 SASR 98; *R v Lomass* [1981] 5 A Crim R 230; *R v McIntosh* [1923] St R Qd 278; *Lowe v R* [1984] 154 CLR 606.

[18] The Magistrate was not referred to any comparable decisions. The Magistrates reasons are as follows:

> Mr Andrews, you have heard the – you have heard the discussions I have had with your solicitor. Anyone who goes and commits one, let alone three offences, in a public hospital and disrupts the function of that hospital to appoint where the police have to be called and have you shackled to a Gerni, frankly, that sort of behaviour is just totally unacceptable. There is an issue here, not only of private deterrence, but public deterrence. People are expected to behave with decorum and with due regard to other people within a hospital.
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> The explanation given might be an explanation, and that is all it is. It is not an excuse. It is not a justification. When you go to hospital you are expected to behave in an orderly and a dignified way. You were given an opportunity. You chose not to follow the advice that was given to. Quite frankly, this behaviour is just totally unacceptable.
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> I accept that you have a limited history. I accept you have a wife and you have a number of young children, and these are mitigating factors that must be taken into account. But, in my view, this is a case where public deterrence must be front and foremost. We cannot allow people to continue to behave like feral animals in a hospital, and especially in regards to paramedics, who are there to try and treat and assist you, not obstruct you.
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> You were sentenced to two months imprisonment on each charge, to be served concurrently, and I will suspend it after 14 days, having regard to the mitigating factors that have been mentioned by Mr McMillan. I should indicate to you, had it been any more serious, you would be serving a lot longer than that. Please wait in the dock. The operational period will be 12 months. Thank you.

[19] This sentence was given in the context that it had been submitted by the appellant's solicitor that a fine was appropriate because the appellant had limited criminal history; was a married man with five-year-old twins, and a third child due in January 2018; was the sole bread winner and had full-time work as a qualified glazier, earning approximately $1200 a week; and that he would lose his employment and he and his family would suffer extreme hardship as a result if he was sentenced to a term of imprisonment.

The Appeal

[20] In my view, upon a review of the proceedings below, there are a number of errors of law, including that the Magistrate proceeded on an incorrect factual basis. There is an obvious factual error in that the police were not called, they were already at the hospital for other reasons. With respect, there are also, in my view, insufficient reasons set out by the Magistrate to understand why he formed the view that actual imprisonment was required in this case. But I will deal with the matters in the context that they are raised before me, that is, I will deal with the appeal grounds before me.

[21] Dealing first with the alleged error that the Magistrate erred in not stating in public that he had taken the guilty plea into account. Relevantly, s 13 of the Act provides:

> **13 Guilty plea to be taken into account**
> (1) …
> (2) …

> (3) When imposing the sentence, the court must state in open court that it took account of the guilty plea in determining the sentence imposed.
> (4) A court that does not, under subsection (2), reduce the sentence imposed on an offender who pleaded guilty must state in open court –
> (a) that fact; and
> (b) its reasons for not reducing the sentence.
> (5) A sentence is not invalid merely because of the failure of the court to make the statement mentioned in subsection (4), but its failure to do so may be considered by an appeal court if an appeal against sentence is made.

[22] Section 13(3) does not interact with another subparagraph, as subparagraphs 13(4) and (5) do. However, the issue has been considered in a number of decisions, including *R v Safi* [2015] QCA 13. In that case the Court considered circumstances where it was accepted that the sentencing Judge had not stated in open Court that the applicant's pleas of guilty were taken into account in imposing the sentence, and relevantly stated:

> I accept that the obligation imposed by section 13(3) is important. Where leniency is afforded on account of a plea of guilty, a statement to that effect serves the particularly important purpose of informing offenders of that fact. The publicity given to such statements encourages guilty offenders to plead guilty, thereby saving victims and witnesses of offences the trauma, disruption, and expense, which may be involved in giving, and it saves the state the expense of prosecuting offences. Where it is evident that the guilty plea was in fact taken into account, however, those considerations will not necessarily justify the Court in reviewing a sentence merely because the sentencing Judge did not clearly state that the plea was taken into account.
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> The applicant relied upon the Court's observation in *R v Mallon* [1997] QCA 58 that one result of failure of a sentencing Court to make the required statement in open Court will be to place the imposed sentence in jeopardy. That observation does not suggest that a non-compliance inevitably must result in the sentence being reviewed in all cases. That such non-compliance may not always require a review of the sentence is also consistent with the Court's immediately following observation that a non-compliance will cause the Appeal Court to examine the sentence closely since it will not clearly appear that the Court has in fact taken the plea into account.
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> In this case, I would conclude that the non-compliance does not justify review of the sentence because, despite the non-compliance, it is quite clear that the sentencing Judge did take the guilty plea into account in formulating the sentence. My conclusion that the sentencing Judge took the guilty plea into account in formulating the sentence is supported by the sentencing Judge's observation that the applicant had pleaded guilty, the circumstance that all of the comparable sentences to which the sentencing Judge was referred, and which the sentencing Judge cited, were imposed upon pleas of guilty, the circumstance that the sentence imposed by the sentencing Judge was within the range of sentences suggested by those decisions, and the inherent unlikelihood that this basic principle was overlooked.[8]

[23] Turning, then, to the present case. In my view, there is plainly an error in the Magistrate not stating publically that he had taken the guilty plea into account. For the respondent, it is submitted that I would consider that he has done so in

[8] At [16].

formulating the sentence, because he has suspended the sentence at less than the one-third mark. The Magistrate's reasons are brief, and it is difficult to ascertain how he reached the view that an actual term of imprisonment was necessary. It is also impossible, in my view, to understand or to see how he has taken the very early guilty plea into account in formulating the sentence.

[24] In any event, even if the Magistrate had stated in open Court that he had taken the guilty plea into account, I would have allowed the appeal on the basis that the sentence was unreasonable or plainly unjust. The respondent accepts that it was at the higher end, but in my view, it was outside the permissible range of sentences for this type of conduct.

[25] The respondent, on appeal, has helpfully provided me with a number of decisions. I am grateful for that. In *R v MLC* [2017] QCA 114, the applicant was residing at a drug rehabilitation facility. At the time of the offending she was heavily intoxicated and acting violently. Police came to assist. The applicant kicked a male officer to the upper thigh, which formed the subject of the facts to count 1. She also bit a female officer on the thumb, causing a superficial laceration and bleeding. That was count 2. She was sentenced on her own pleas. Her background, absence of criminal history, timely plea, genuine remorse, mental state at the time, reports tendered to the Court, rehabilitation efforts, education, otherwise good character, desire to work, and her custody of the six-year-old daughter were taken into account. In relation to count 1, she was sentenced to 18 months probation. In relation to count 2, she was sentenced to nine months imprisonment, wholly suspended for an operation period of 18 months. She applied for leave to appeal against the sentence on the basis the recording of the conviction was manifestly excessive in the circumstances. Leave was refused.

[26] In *MLC* the count for which the applicant received the term of imprisonment – although not actual imprisonment – carried a maximum penalty of 14 years imprisonment, because there was a circumstance of aggravation that she had bitten the police officer. This decision contains a useful discussion of this type of offending. In particular, the Court said:

> Consistently with that very severe maximum penalty [and that is with reference to the maximum penalty of 14 years for the second count] each case involves an exercise of the sentencing discretion in light of all the relevant evidence in the case, and there is no rule that offenders who assault police officers acting in the course of their duties in a way that attracts that penalty must be sentenced to imprisonment, in the ordinary course of offenders who spit upon police officers or break the skin by premeditated biting can expect to be sentenced to a term of imprisonment involving a period of actual imprisonment.

[27] The decision of *MLC* supports the imposition of an actual term of imprisonment where there is biting or breaking of the skin or spitting. The present case does not involve such circumstances. They involved the appellant pushing.

[28] In *Graham v Commissioner of Police* [2015] QDC 103, a term of four months imprisonment to be suspended for three years after serving two months was not overturned on appeal. That case, in my view, is not comparable at all to the present. The injuries were far more serious. Mr Graham had a far worse criminal history. And whilst it was a guilty plea, it was taken in the absence of Mr Graham, and it was not considered to be a case where there was any remorse.

[29] The injuries in *Graham* were that the appellant had been uncooperative with ambulance staff and had used her right arm and swung it towards the victim and hit him on the right side of the face causing his glasses to come off his face. The other victim on that case sustained injuries as a result of the appellant's conduct, which included bruising and swelling to his face, and he required two days off work.

[30] None of the authorities that I have been provided, nor the relevant principles referred to in them, suggest that a term of actual imprisonment was within the exercise of the sensible sentencing discretion in this case.

Re-sentence

[31] In the circumstances, then, the appeal is allowed and the sentences below are set aside. I turn now to re-sentence. The maximum penalty for the serious assault offences is seven years imprisonment, and for the obstruct police, six months imprisonment. I take into account the appellant's early guilty plea, and accept this was also an indication of his remorse. I take into account that the appellant's criminal history was largely irrelevant, and to the extent it was, it was very dated.

[32] I consider the circumstances of this offence at the low end of offending for offences of this type. This was not a case of spitting or biting. The facts involve pushes or shoves. The appellant was intoxicated at the time, and did not have much recollection of the events. I do not consider that this excuses his behaviour at all. This still remains a serious and prevalent offence, and I accept that general and personal denunciation and deterrence are important.

[33] Ordinarily, I would have imposed, in the circumstances, a hefty fine and recorded a conviction, but in this case, the appellant has served three days and seven hours in custody. On appeal, pursuant to s 225(1) of the *Justices Act 1886* (Qld), I may set aside or vary the appeal order or make any order that I consider just. In the circumstances of this case, I consider that the appellant has been sufficiently punished.

Orders

[34] I therefore order as follows:

1. The appeal is allowed.
2. The orders of Magistrate Kilner of 15 August 2017 are set aside.
3. In relation to each of the offences, the appellant is convicted but not further punished.
4. Convictions are recorded.