DISTRICT COURT OF QUEENSLAND

CITATION:	*Andersen v Commissioner of Police* [2020] QDC 23
PARTIES:	**KERRY ANDERSEN** (appellant) **v** **COMMISSIONER OF POLICE** (respondent)
FILE NO:	D204/19
DIVISION:	Appellate
PROCEEDING:	Appeal against sentence
ORIGINATING COURT:	Magistrates Court at Maroochydore (Magistrate Madsen)
DELIVERED ON:	6 March 2020
DELIVERED AT:	Maroochydore
HEARING DATE:	2 March 2020
JUDGE:	Cash QC DCJ
ORDERS:	**1. The appeal is allowed.** **2. The sentence imposed upon the appellant in the Magistrates Court at Maroochydore on 9 October 2019 is set aside.** **3. The appellant is sentenced to imprisonment for nine months, suspended after the appellant has served one month and 23 days, for an operational period of 18 months.**
CATCHWORDS:	MAGISTRATES – APPEAL AND REVIEW – QUEENSLAND – APPEAL – GROUNDS – where appellant pled guilty to one count of sexual assault and was sentenced to imprisonment for 12 months, suspended after serving three months – where the offending had a significant physical and mental impact on the complainant – where appellant suffered from various stressors, made an early plea, and has demonstrated remorse – where the Magistrate referred to offending as "persistent" and "sustained" – whether the Magistrate misapplied the facts – whether the sentence was excessive *Evidence Act* 1977 (Qld), s 132C *Justices Act* 1886 (Qld), s 222, s 223 *Braga v Commissioner of Police* [2018] QDC 48 *Commissioner of Taxation v Baffsky* (2001) 192 ALR 92 *House v The King* (1936) 55 CLR 488 *R v Bradford* [2007] QCA 293 *R v Bunton* [2019] QCA 214

R v Caulfield [2012] QCA 204
R v Goodman [2016] QCA 56
R v Harper [2002] QCA 107
R v Hooper; ex parte Cth DPP [2008] QCA 308
R v Lothian [2018] QCA 207
R v Mellor [2019] QCA 298
R v SDF [2018] QCA 316
Teelow v Commissioner of Police [2009] 2 Qd R 489

COUNSEL: A J Beard for the appellant
L K Soldi for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Office of the Director of Public Prosecutions for the respondent

Introduction

[1] The appellant is a man in his mid-fifties. He pled guilty to an offence of sexual assault and was sentenced to imprisonment for 12 months to be suspended after serving three months. The offence committed by the appellant occurred when he forcefully groped the genital area of a 27 year old woman at a bar at the Goondiwindi show. For the reasons that follow, I have concluded that the punishment imposed on the appellant was excessive. The sentence imposed by the Magistrate will be set aside and instead the appellant is sentenced to imprisonment for nine months, to be suspended after the one month and 23 days the appellant served, before being released on bail, for an operational period of 18 months.

History of the proceedings

[2] The offence occurred on 4 May 2019. On 8 August 2019 the appellant pled guilty in the Magistrates Court to one charge of sexual assault contrary to section 352 of the *Criminal Code* (Qld). Two months later, on 9 October 2019, he was sentenced to imprisonment for 12 months with an order that the sentence be suspended after the appellant served three months for an operational period of two years. On 5 November 2019 the appellant filed a notice of appeal. On 2 December 2019, after the appellant had been in jail for about eight weeks, he applied for and was granted release on bail pending the determination of his appeal.

Circumstances of the offence and its effect on the complainant

[3] The facts of the offence are detailed in an agreed statement of facts. The appellant and complainant did not know each other, though the appellant may have known members of the complainant's family. Around midnight one night during the Goondiwindi Show the appellant, complainant and others happened to be at the same bar. The appellant approached the complainant and tried to make conversation. The complainant told appellant she was at the bar with her husband attempted to ignore the appellant. What followed is described in the agreed statement of facts:[1]

> "At about 1:35am the [appellant] has approached the complainant and grabbed her hard on the arm causing it to hurt. He has then put his arm around her shoulder trying to convince her to talk to him.

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1 I have retained the past perfect tense of the original document.

> The complainant has pushed him away and said, 'Fucking get away.'
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> At about 1.45 am the [appellant] was standing in front of the complainant making her feel uncomfortable, she has then gone and stood next to her husband.
>
> The complainant states that not even 30 seconds later she saw the [appellant] moving in behind her.
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> The complainant has felt something push through between her legs [from] behind, she looked down and saw the [appellant's] hand between her legs. The complainant has felt the [appellant's] fingers rubbing across her vagina, and then press into her vagina through her clothing.
>
> The complainant has felt immediate pain in her vagina and lower body. The complainant could also feel the [appellant's] erect penis against her backside.
>
> The [appellant] has leaned in towards her, putting his face next to hers. He has whispered into her ear, 'So where are we going baby,' he has heavily breathed into her ear and neck whilst his hand was still on her vagina.
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> The complainant has counted to three in her head and then jumped away, hiding behind her friends and telling [them] what had happened.
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> At no point did the complainant give the [appellant] any permission or encouragement to touch her.
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> The [appellant] was then detained by security guards until police arrived. Due to the [appellant's] level of intoxication he was unable to be questioned and was conveyed to his parent's house by police."

[4] The appellant, who it seems ordinarily resided on the Sunshine Coast, voluntarily attended Nambour police station on 21 July 2019 where he declined to be interviewed. He was charged and released on bail to appear in the Maroochydore Magistrates Court on 8 August 2019. It was during this first appearance that the appellant pled guilty.

[5] A victim impact statement was tendered at the sentence hearing. The complainant wrote of soreness to her genitals for a month after the assault as well as strain upon her relationship with her husband. Since the offence she had taken medication for depression and anxiety and found herself unable to deal with crowds. In short, the offence had a significant impact upon the complainant.

The appellant's circumstances

[6] The appellant was 54 years old when he committed the offence and 55 years old when he was sentenced. When he was in his early twenties he was convicted of drunk driving, assaulting police, hindering police and using obscene language. Until the present offence, the appellant not committed a criminal offence for more than 30 years. The appellant wrote a letter of apology to the complainant in which he expressed his remorse. In a separate letter tendered at the sentence hearing the appellant referred to his shame and humiliation at having committed the offence. The appellant wrote that he had no memory of committing the offence which he attributed to the alcohol he drank that night. He explained that he ran a motel business and supported his partner, her son and her 86 year old mother. The motel business was not doing well and the appellant was experiencing financial and

emotional stress. Since the offence the appellant sought treatment from a Doctor and had seen a counsellor in an attempt to addresses the stressors that contributed to his drinking on the night of the offence.

The sentence hearing and decision of the Magistrate

[7] The prosecutor submitted that the appellant's conduct was somewhat protracted, evidencing a sexual interest in the complainant and, ultimately, sexually assaulting her despite it being made clear over the course of some time that complainant wanted nothing to do with the appellant. The prosecutor noted that offence had a significant impact upon the complainant. It was submitted that, having regard to the relevant principles in section 9 of the *Penalties and Sentences Act* 1992 (Qld) and comparable cases, a sentence of six to 12 months' imprisonment suspended after two to four months would be an appropriate sentence.

[8] On the appellant's behalf it was said that imprisonment was the only appropriate sentence but that the sentence should be wholly suspended. The appellant's solicitor emphasised his early plea, remorse and the steps taken by the appellant to address the issues that contributed to his behaviour. In the context of discussing a comparable decision cited by the prosecutor, the appellant's solicitor challenged the suggestion that the offence itself was "protracted" or "sustained".

[9] The Magistrate considered the appellant's criminal history to be dated and irrelevant. His Honour considered the facts demonstrated a persistency by the appellant who committed the offence despite clear indication from the complainant that she wanted nothing to do with him. He noted the significant impact the offence had upon the complainant and the circumstances of the offence as warranting a deterrent sentence.

Relevant legal principles

[10] The appellant appeals pursuant to section 222 of the *Justices Act* 1886 (Qld). Pursuant to section 223 of that Act, the appeal is by way of rehearing on the evidence given in the proceedings before the Magistrate (and any further evidence that might be admitted with leave). I am required to conduct a real review of both the evidence before the Magistrate, and the Magistrate's reasons for imposing the sentence, to determine whether there has been error. As this is an appeal against the exercise of the sentencing discretion, it must be determined in accordance with the well-known principles in *House v The King* (1936) 55 CLR 499.[2] If I find that the sentence imposed was "unreasonable or plainly unjust", or if the Magistrate acted upon a wrong principle, took into account irrelevant matters, failed to take into account relevant matters, or mistook the facts, then I can exercise the sentencing discretion afresh.

The appellant's submissions

[11] Initially the appellant pressed three bases upon which it was said the sentencing discretion miscarried. First, that the Magistrate misapplied the facts of the case. Secondly, the Magistrate erred in law by not adverting to the effects of the *Child Protection (Offender Reporting and Offender Prohibition Order) Act* 2004 (Qld)

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2 *Teelow v Commissioner of Police* [2009] 2 Qd R 489.

('CPOR Act'). Thirdly, that the sentence was in any event excessive (that is, it was unreasonable or plainly unjust).

[12] At the commencement of the hearing, the appellant abandoned reliance upon the second asserted error. He was right to do so. In broad terms, a person becomes a "reportable offender" when sentenced for a "reportable offence".[3] A reportable offence includes an offence mentioned in schedule 1, item 9, of the CPOR Act, but (so far as relevant to these proceedings) only if that offence was committed in respect of a child.[4] Sexual assault, contrary to section 352 of the *Criminal Code* (Qld) is found in schedule 1, item 9 of the Act. The offence committed by the appellant would only be a reportable offence if it was committed in respect of a child. It was not, and as a result the provisions of the CPOR Act did not apply to the appellant.

[13] In the circumstances, it is unnecessary to consider the respondent's contention that, applying the decision of the Court of Appeal in *R v Mellor* [2019] QCA 298, the Magistrate would not in any event have been obliged to consider the effect of the CPOR Act.[5]

[14] The appellant's first complaint was directed to the submission that the Magistrate erred in his characterisation of the offending behaviour. In essence, it is a complaint that the Magistrate sentenced the appellant on the basis that he decided some time well before the offence to sexually assault the complainant, and that the assault itself was "sustained" or "protracted" when in truth it was over in seconds.

[15] The appellant's final complaint was that, even in the absence of specific error, the sentence imposed was impermissibly excessive when compared to other cases of a similar nature.

Consideration

[16] For the reasons that follow, I am persuaded that, compared to other relevant decisions, the Magistrate erred when imposing actual imprisonment. As such, it is strictly unnecessary to determine the suggestion that the Magistrate mischaracterised the appellant's offending. However, since the matter was argued by the parties it is appropriate to make some observations. When discussing a decision relied upon by the prosecutor as comparable, *Braga v Commissioner of Police* [2018] QDC 48, the Magistrate made a statement which is now at the heart of the appellant's complaint. After referring to the description of the offending in that case as being "unprovoked, persistent and sustained, showing determined effort to assault [the complainant] indecently", the Magistrate said of the appellant's conduct:

> "It was very persistent. It was sustained. As I have said, the interaction started at midnight and went until 1.45 am, and very much demonstrated a determined effort to assault the young lady indecently."

[17] Taken on its own, this passage suggests that the Magistrate was equating the conduct of the appellant to that of Braga and indicating that the appellant's offending took

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3 CPOR Act, section 5.

4 CPOR Act, section 9.

5 The decision and reasons of the Court of Appeal in *Mellor* were delivered on 17 December 2019, a couple of weeks after the appellant was granted bail and filed his outline of submissions.

place over a long period. Such a conclusion would not find support in the agreed facts which make clear the sexual assault itself took place over seconds, as opposed to the conduct of Braga who lifted and carried his victim into a toilet at a bar and held her as he tried to kiss her. But this passage must be read in the context of the Magistrate's earlier remarks that the appellant attempted to talk to the complainant a number of times during the night and ignored her plain indication that she was not interested.

[18] It must also be borne in mind that when considering *ex tempore* reasons delivered in busy courts "[i]t is not appropriate to parse and analyse judgments"[6] and "[i]mpreciseness of language … can have less significance that it might otherwise have".[7] Taking all that the Magistrate said in the context of the submissions he received, I do not consider that he misunderstood or mischaracterised the conduct of the appellant.

[19] This leaves the complaint that the sentence imposed was in any event excessive. The effect of the sentence was to require the appellant to spend three months in custody. The Magistrate was referred to little by way of helpful authority. *Braga v Commissioner of Police*, cited above, was rather different. While Braga did not attempt to touch the genitals of his victim, his conduct in carrying her to the toilet showed a concerning determination. The Magistrate was referred as well to *R v Harper* [2002] QCA 107 and *R v Goodman* [2016] QCA 56. Harper had committed four offences of sexual assault against two victims in the course of one evening, a separate offence on another day constituted by masturbating in the presence of a nine year old child and a final offence constituted by fondling his genitals while standing close to an 18 year old woman in a public bar. Little assistance can be found in the decision. Goodman was convicted after trial of one count of sexual assault, but did not press his application for leave to appeal against sentence. As a consequence, there is little information in the decision about Goodman's antecedents and no consideration of the appropriateness of the penalty imposed.

[20] I have been assisted by reference to authority not placed before the Magistrate. Of these *R v Bradford* [2007] QCA 293 is of the most assistance. On the day he was to face trial Bradford pled guilty to three offences of sexual assault. He was sentenced to imprisonment for 12 months to be suspended after he had served five months. Bradford sexually assaulted his 18 year old stepsister on three occasions. The first two offences occurred when they were travelling together in a car and Bradford put a hand inside his step-sister's shirt and touched her left breast. Then he put a hand between her legs and rubbed on her pants in the area of her vulva while making sexually suggestive remarks. The third offence occurred some months later. Bradford engaged in what was described as "sexual banter" with his step-sister before wrestling her to the bed and saying, "We could fuck here." Despite being rebuffed, Bradford followed his step-sister into the bathroom where he pressed an electric razor against her breast on the outside of her clothes.

[21] Bradford was 29 years old when he offended and 31 years old when sentenced. He has no prior convictions and did not commit any further offence while on bail for an extended period. He was said to have a good work history and the care of his four year son. Muir J considered comparable decisions and was of the view that the

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6 *Commissioner of Taxation v Baffsky* (2001) 192 ALR 92, 102.

7 *R v Hooper; ex parte Cth DPP* [2008] QCA 308, [23].

sentence imposed on Bradford was manifestly excessive. Muir J proposed resentencing Bradford by suspending the sentences immediately (the appeal was determined after Bradford has served about three months of the original sentence). McMurdo P and A Lyons J agreed in the orders proposed, with their Honours specifically noting that a sentence that was wholly suspended, or suspended after a short time, would have been appropriate at first instance.

[22] *R v SDF* [2018] QCA 316 is also of assistance. In that case the 63 year old defendant committed an offence of sexual assault upon his 18 year old granddaughter. SDF's conduct involved rubbing briefly on her underwear in the area of her genitals. His plea was not early; it was entered on the day fixed for trial but after the prosecution indicated it would not proceed with a second allegation of sexual assault. The sentence of imprisonment for 12 months to be suspended after four months was set aside. Instead SDF was sentenced to imprisonment for eight months to be suspended after the two months and four days already served by SDF before the determination of the appeal. In reaching this conclusion Fraser JA stated:[8]

> "[D]espite the applicant's serious breach of trust, the sentence of 12 months' imprisonment with a custodial period of four months imposed upon a plea of guilty is too severe for the unpremeditated, and momentary offence committed by this 63 year old man with no prior convictions who was found to be remorseful. Denunciation of the applicant's serious offence and deterrence of others justify a term of imprisonment but not one as long as 12 months…"

[23] Reference to *Bradford* and *SDF* is sufficient to demonstrate why the sentence of imprisonment for 12 months suspended after serving three months imposed upon the appellant, a contrite and remorseful man who pled guilty at a very early time and whose circumstances went some way to explain how he committed the offence, is excessive. That is so even taking into account the comparatively more persistent and invasive conduct of the appellant and his dated, minor prior convictions.

[24] In the circumstances I will allow the appeal, set aside the sentence imposed by the Magistrate and, instead, sentence the appellant to imprisonment for nine months to be suspended after the one month and 23 days the appellant has served before being released on bail, for an operational period of 18 months.

[25] The orders are:

1. The appeal is allowed;
2. The sentence imposed upon the appellant in the Magistrates Court at Maroochydore on 9 October 2019 is set aside;
3. The appellant is sentenced to imprisonment for nine months, suspended after the appellant has served one month and 23 days, for an operational period of 18 months.

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8 *R v SDF* [2018] QCA 316, [26].