DISTRICT COURT OF QUEENSLAND

CITATION:	*DYN v Queensland Police Service* [2020] QDC 47
PARTIES:	**DYN** (appellant) **v** **QUEENSLAND POLICE SERVICE** (respondent)
FILE NO/S:	Appeal No. 170 of 2019
DIVISION:	Appellate
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court, Cairns
DELIVERED ON:	27 March 2020
DELIVERED AT:	Cairns
HEARING DATE:	13 March 2020
JUDGE:	Morzone QC DCJ
ORDER:	**1. Appeal allowed.** **2. The sentence and orders of the Magistrates Court made in Cairns on 16 September 2019 are set aside, and substituted with the following sentence:** **a) For charge 1 - 12 months imprisonment;** **b) For charge 2 - 15 months imprisonment;** **c) The sentences for charges 1 and 2 will be served concurrently with each other, but cumulatively with the sentence imposed on 7 November 2018;** **d) Parole release date set at 27 March 2020.**
CATCHWORDS:	CRIMINAL LAW - appeal pursuant to s 222 *Justices Act 1886* - conviction – two count contravening a domestic violence order (aggravated offence) – reoffending on board ordered parole - parole eligibility date set – whether should

be parole release date and whether miscalculation of date of hearing of appeal – error of law – whether sentence manifestly excessive – resentence.

Legislation
Justices Act 1886 (Qld) s 222, s 223(1) & 227
Corrective Services Act 2006 (Qld) s 178, s 209
Penalties & Sentences Act 1992 (Qld) s 9(1), s 160B

Cases
AB v R (1999) 198 CLR 111
Addo v Jacovos [2016] QDC 271
Allesch v Maunz (2000) 203 CLR 172
Dwyer v Calco Timbers (2008) 234 CLR 124
Forrest v Commissioner of Police [2017] QCA 132
Fox v Percy (2003) 214 CLR 118
House v. The King (1936) 55 CLR 499, 504 and 505
Kentwell v R (2014) 252 CLR 60
McDonald v Queensland Police Service [2017] QCA 255
Mill v The Queen [1988] 166 CLR 59
RJD v Queensland Police Service [2018] QDC 147
Teelow v Commissioner of Police [2009] QCA 84
The Queen v Beattie, ex parte Attorney-General (Qld) [2014] QCA 206
Veen v The Queen (No. 2) (1988) 164 CLR 465
Warren v Coombes (1979) 142 CLR 531
White v Commissioner of Police [2014] QCA 121

COUNSEL: J Sheridan for the appellant
S Shaw for the respondent

SOLICITORS: Osborne Butler Lawyers for the appellant
Office of Director of Public Prosecutions for the respondent

[1] On 16 September 2019 the appellant pleaded guilty to two charges of contravening a domestic violence order (aggravated offence) and was sentenced to 18 months and 12 months imprisonment respectively, to be served concurrently with each other, but cumulative on a term of imprisonment that he was already serving. A parole release date was set for 16 September 2020, but that was varied to a parole eligibility date when the sentence was reopened on 18 October 2019.

[2] The aggrieved appellant now appeals the sentence.

[3] The issues on appeal are whether that the sentence imposed was manifestly excessive because the learned magistrate erred by:

1. Placing too much weight on the appellant's criminal history;

2. Failing to properly take into account the appellant's plea of guilty by not setting a parole eligibility date at a point sooner than one half and;

3. Miscalculating the setting of the parole eligibility date and;

4. Failing to take into account the principles of totality such that the sentence imposed was proportionate to his offending.

[4] The Crown concedes that the learned magistrate fell into error by finding that the defendant had "no prospects of rehabilitation" and by miscalculating the parole eligibility date intended to be at the half of the total period of imprisonment. Otherwise, the Crown contends that the sentence is open and proper.

Appeal Against Sentence

[5] The appellant appeals pursuant to s 222 of the *Justices Act* 1886 (Qld). The appeal is by way of rehearing, so "the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error,"[1] and thereby resulting in a manifestly excessive sentence.

[6] The rehearing requires this court to conduct a real review of the evidence before it (rather than a complete fresh hearing), and make up its own mind about the case.[2] Relevantly here, 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.[3]

[7] In *House v The King*[4] and *Kentwell v R*[5] the High Court distinguished 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.

Parole Date Error

[8] It is common ground that the learned magistrate, although clearly expressing the intention to set the parole eligibility date at one half of the total period of imprisonment, being 13 August 2020, apparently miscalculated to set the parole eligibility date as 16 September 2020.

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1 *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.

2 *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].

3 *House v. The King* (1936) 55 CLR 499, 504 and 505, *Kentwell v R* (2014) 252 CLR 60, [35], adopting *AB v R* (1999) 198 CLR 111, [130] per Hayne J (minority).

4 (1936) 55 CLR 499, 504 and 505

5 *Kentwell v R* (2014) 252 CLR 60, [35], adopting *AB v R* (1999) 198 CLR 111, [130] per Hayne J (minority).

[9] However, more fundamentally it was realised during the hearing of the appeal that the learned magistrate was originally correct to set a parole release date, not a parole eligibility date.

[10] At the time of his sentence on 16 September 2019, the appellant was serving a sentence of 12 months imprisonment, imposed by the Cairns Magistrates Court on the 7 November 2018, for common assault and breaching the domestic violence order. He was eligible for parole on the 7 March 2019, and he was released on board ordered parole[6] on the 15 April 2019. On 9 July 2019 the appellant's parole was suspended due to his reoffending. By the time of his sentence, he had spent two months in custody, which was unable to be declared, and had about four months remaining to serve out the pre-existing sentence imposed on 7 November 2018.

[11] On 16 September 2019 the appellant was sentenced to concurrent terms of imprisonment being an effective 18 months imprisonment, which was ordered to be served cumulatively with the 12 term of imprisonment that he was already serving. The learned magistrate also set a parole release date of 16 September 2020.

[12] It seems that the parties laboured under the common misapprehension that the appellant reoffended while on court ordered parole, and on 18 October 2019 the learned magistrate acceded to an application to reopen the sentence and varied the sentence to change the parole release date to set a parole eligibility date.

[13] In fact, the appellant reoffended while released on board ordered parole. By operation of s 209 of the *Corrective Services Act* 2006 (Qld), the appellant's parole order was automatically cancelled by his further sentence of imprisonment on 16 September 2019. Court ordered parole is differentiated from board ordered parole under s 178 of the *Corrective Services Act* 2006 (Qld) which defines a parole order as being a parole order other than an exceptional circumstances parole order or a court ordered parole order.

[14] So since the appellant was then not subject of a court order parole order, s 160B(2) of the *Penalties & Sentences Act* 1992 (Qld) is not engaged, and the court was required to fix a parole release date in accordance with s 160B(3) of the Act.[7] Therefore, the learned magistrate had rightly set a parole release date in the first instance, only to be lead into error on the reopening.

[15] Having reached that conclusion, it is unnecessary to consider the other grounds. For the reasons which follow, in my respectful opinion the sentence having regard to the non-parole period and overall criminality was manifestly excessive as being too heavy and outside the permissible range. It is now incumbent on this court to re-exercise the sentencing discretion.

Re-sentence

[16] The only purpose for which a sentence may be imposed by virtue of s 9(1) of the *Penalties and Sentences Act* 1992 (Qld) is to punish an offender to an extent or in a way that is just in all of the circumstances, facilitate avenues of rehabilitation, deter the offender and others from committing a similar offence, make it clear that the community denounces the conduct in the offending and to protect the community. The relevant factors to which the court must

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6 Being a parole order granted by the parole board under s194 of the *Corrective Services Act* 2006 (Qld).

7 Cf. *Addo v Jacovos* [2016] QDC 271 at [56] – [58].

have regard are in the subsequent subsections of s 9 of the *Penalties and Sentences Act* 1992 (Qld). For this offending, it is relevant that imprisonment should only be imposed as a last resort and a sentence that allows the appellant to stay in the community is preferable.

[17] The appellant was 39 at the time of the offending and at sentence, he is almost 40.

[18] At the time of his offending he had been separated from the complainant for about seven months after they were together in an eight year relationship with one child.

[19] The protection order in place involved three conditions: firstly, to be of good behaviour; secondly, not to approach the complainant within 50 m; and thirdly, a prohibition on contacting the complainant.

[20] On 2 June 2019 and on 6 July 2019 the appellant contravened the domestic violence order by texting the complainant almost every day and on 8 June 2019, he rang her 81 times. The messages left were to the effect that he loved her.

[21] Then a month later on 4 July 2019, by escalating conduct he again contravened the domestic violence order. He knocked on the back window of the complainant's home at about 9pm. She told him to leave, but when she later opened to check he left, he rushed up the stairs calling her "a sick bitch." She shut the door, and he continued to bash the rear window as she ran upstairs to hide. The appellant fled when the police arrived, did not surrender himself and evaded capture during their patrols. After that, the defendant made a threatening telephone call to the complainant to the effect "*you were going to die; I'm going to kill you*."

[22] The gravity of this offending involves persistent menacing conduct in serious breach of the no contact and geographical limiting conditions in the protection order. Whist it did not involve physical violence, the appellant's conduct manifested in persistent daily calls in June, and one month later in July he engaged in physical intimidatory and aggressive behaviour by going to the home at night, rushing at the complainant, bashing the window and later making a death threat over the telephone despite police interest. The maximum penalty for the offending of contravening a domestic violence order (aggravated offence) is five years imprisonment.

[23] The prevalence of domestic violence is renowned, but of particular concern is the continuation of violence despite police or court intervention by protection orders.

[24] Due regard must be had to general and, particularly here, to personal deterrence.

[25] The appellant's previous convictions for recent, relevant and like offences, especially against the complainant, is an aggravating factor in the proper exercise of the sentencing discretion.[8] Of course the criminal history must not be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the offence.[9]

[26] The appellant's criminal history relevantly shows that the current offending is characteristic. He has a significant incidence of recidivism for like offending and a continuing attitude of disobedience of the law, undeterred by the protection order and various sentences including serving periods of imprisonment on 11 occasions. He has been convicted of breaching his

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8 *Penalties & Sentences Act* 1999 (Qld), s 9(10).

9 *Penalties & Sentences Act* 1999 (Qld), s 9(11); *Veen v The Queen (No. 2)* (1988) 164 CLR 465 at [14].

domestic violence order on 23 separate occasions and he has other offending against the complainant in breach of protection orders. This offending includes: assault occasioning bodily harm whilst armed or in company and wilful damage on 8 May 2014, assault occasioning bodily harm on 7 February 2015, and more recently, common assault on 20 September 2018. He has re-offended on parole on 7 separate occasions, including the current offending.

[27] It seems to me that in the circumstances of the current offending calls for condign punishment in the form of imprisonment. In doing so, I propose to impose concurrent sentences for the offending, but order they be served cumulatively with the appellant's existing sentence. This invokes considerations of totality.

[28] The ambit of the totality principle in circumstances an offender who is serving an existing sentence, requires the judge to take into account that existing sentence so that the total period to be spent in custody adequately and fairly represents the totality of criminality involved in all of the offences to which that total period is attributable.[10] However, this does not invariably require some reduction in the accumulation of otherwise appropriate sentences. When sentences are required to be served cumulatively, consideration of the aggregate of current sentences and the sentence to be imposed is a necessary precursor to the application of the totality principle to ensure there is an appropriate relativity between the whole of the criminality and the length of the sentences imposed.

[29] The appellant relies upon the comparative case of *RJD v Queensland Police Service* [2018] QDC 147. That case concerned an appeal against an effective head sentence of 18 months imprisonment that had been imposed for three counts of contravening a domestic violence order. That sentence was ordered to be served cumulatively upon a 15 month period of imprisonment as a consequence of reoffending 9 months into his parole. He had 6 prior like offences and had been given the full suite of sentencing orders on prior occasions including periods of imprisonment. The offending involved physical violence inflicted by the 25 year old appellant against the complainant by forcing her against the window, causing it to break, while children were present. Then later, on the same day, he returned to the complainant's house and yelled derogatory comments which culminated in his making a threat to kill the complainant. The police were called and upon their leaving he returned, yet again, demanding to know why the police were called and became verbally abusive. He had a significant criminal history of 10 pages including history of six previous like offences.

[30] The case can be distinguished as to the appellant's age, the nature and extent of offending absent of physical violence, reoffending in breach of orders only 2 weeks into his parole and 21 previous convictions for like offences. It seems to me that a sentence for the current offending ought to effectively fall in the high end of the range of 12 to 18 months imprisonment, but subject to some moderation having regard to the imposition of a cumulative sentence so as not to result in a crushing or disproportionate sentence. The appellant was returned to custody on 9 July 2019 (because of the current offences) and served 26 weeks or just over 6 months until 14 January 2020 to serve out the original sentence.

[31] I think sentences of imprisonment of 12 months and 15 months respectively for the current charges 1 and 2, will provide appropriate moderation according to the sentencing

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[10] *Mill v The Queen* [1988] 166 CLR 59 & *The Queen v Beattie, ex parte Attorney-General (Qld)* [2014] QCA 2006 at [19].

[32] The appellant seeks a parole date at one third, but the Crown maintain parole at one half of the period of imprisonment is warranted. There is not any fetter of the sentencing judge's discretion in setting a date at or about one-third; it could be more or less.

[33] The aggregate of the appellant's sentences is a period of just over 92 weeks imprisonment calculated from the date the appellant was returned to custody on 9 July 2019 to the end of the new sentences of 14 April 2021. It seems to me that it is appropriate in all the circumstances that appellant ought to serve about 40% of the aggregate of the pre-existing and new sentences before being released on parole.

[34] Accordingly, I will set a parole release date at 27 March 2020.

Order

[35] For these reasons, I order:

1. Appeal allowed.

2. The sentence and orders of the Magistrates Court made in Cairns on 16 September 2019 are set aside, and substituted with the following sentence:

   (a) For charge 1 - 12 months imprisonment;

   (b) For charge 2 - 15 months imprisonment;

   (c) The sentences for charges 1 and 2 will be served concurrently with each other, but cumulatively with the sentence imposed on 7 November 2018;

   (d) Parole release date set at 27 March 2020.