DISTRICT COURT OF QUEENSLAND

CITATION:	*Saunders v Commissioner of Police* [2020] QDC 90
PARTIES:	**DANINE EVA SAUNDERS** (appellant) **v** **COMMISSIONER OF POLICE** (respondent)
FILE NO:	D2/20
DIVISION:	Appellate
PROCEEDING:	Appeal against sentence
ORIGINATING COURT:	Magistrates Court at Maroochydore (Acting Magistrate Hillan)
DELIVERED ON:	22 May 2020
DELIVERED AT:	Maroochydore
HEARING DATE:	22 May 2020
JUDGE:	Cash QC DCJ
ORDERS:	**1. The appeal is allowed.** **2. The orders of the Magistrates Court at Maroochydore on 10 December 2019 are set aside.** **3. The appellant is released under the supervision of an authorised corrective services officer for a period of 18 months. She must comply with the conditions set out in section 93 of the *Penalties and Sentences Act* 1992 (Qld) and report to an authorised corrective services officer at Maroochydore before 4.00 pm on Wednesday 27 May 2020. A conviction is not recorded.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant sentenced to six months' imprisonment immediately suspended for 12 months, and ordered to pay $1,500 compensation for one count of assault occasioning bodily harm – where complainant suffered physical and psychological injury – where appellant co-operated, had absence of prior offending, general good character and offending was partly due to her psychological makeup – whether sentence excessive *Justices Act* 1886 (Qld), s 222, s 225 *Penalties and Sentences Act* 1992 (Qld), s 9, s 12

House v The King (1936) 55 CLR 488
R v Coutts [2008] QCA 380
R v Hilton [2009] QCA 12
R v Hite (unreported, Toowoomba District Court, 11 February 2011)
R v Matauaina [2011] QCA 344
R v Monro [2002] QCA 483
R v Sanders [2007] QCA 165
Teelow v Commissioner of Police [2009] 2 Qd R 489

COUNSEL: DL Crews for the appellant

SR Drinovac for the respondent

SOLICITORS: Legal Aid Queensland for the appellant

The Commissioner of Police for the respondent

Introduction

[1] On 10 December 2019 the appellant appeared before an Acting Magistrate at Maroochydore. She pled guilty to a charge that, on 18 July 2019, she assaulted the complainant, Michelle Grayson, and did her bodily harm. The appellant was in her mid-twenties and had not previously offended. After hearing submissions the Acting Magistrate sentenced the appellant to imprisonment for six months, but immediately suspended the sentence for 12 months. He also ordered the appellant pay compensation in the amount of $1,500. On 7 January 2020 the appellant filed notice of her intention to appeal against the severity of the sentence.

[2] In my view the sentence imposed was excessive. The appeal will be allowed, the orders at first instance set aside and the appellant will be sentenced instead to probation for 18 months without a conviction being recorded. What follows are my reasons for reaching this conclusion.

Circumstances of the offence and its effect on the complainant

[3] The facts of the offence were detailed in an agreed statement of facts tendered at the sentence hearing. It was supplemented by two medical statements detailing the injuries to the complainant, some photographs and a victim impact statement. The appellant relied upon a number of character references and a letter from a psychologist who had counselled the appellant since September 2018. It is convenient to set out excerpts of the statement of facts:[1]

> "The victim stated she was in the front top level of her house on the veranda and heard some yelling and identified a group of males starting to punch and kick the victim's partner. The victim has run down to where her partner was and tried to pull a group of males away from her partner who was down on the ground. The victim has then been pushed by the defendant and the victim has flicked her hand in a motion to tell the defendant to go away. The defendant has walked to the victim and the punched the victim in the nose/mouth section resulting in the victim to black out and fall onto the ground on her back.
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> …

[1] The emphasis on the last sentence is mine. The grammar is that of the original document.

> The defendant stated that she acted in self-defence as she wanted to protect her partner and friends and his friends from [the complainant's partner]. The defendant sated she pushed the victim off the guys on the ground as she believes the victim was kicking and punching her friends. The defendant stated she pushed the victim off the group of guys, and the defendant stated the victim has then punched the defendant where the defendant has then used her right hand and punched the victim in the face. The defendant stated she was surprised the victim went to the ground.
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> **From the investigation police proceeded on the basis that the defendant utilised excessive force greater than that required for self-defence or defence of another.**"

[4] The medical statements and photographs indicated the complainant suffered bruising to the ligament attaching two of her upper teeth to her skull and swelling to her face and lips. In her victim impact statement the complaint spoke of her physical injuries, which took some time to heal, and also of her increased anxiety subsequent to the assault.

The appellant's circumstances

[5] The appellant was 26 years old when she committed the offence and 27 years old when she was sentenced. As noted above, she had no previous convictions. The appellant had been seeing a psychologist for counselling since September 2018. The counselling was aimed at addressing symptoms of anxiety and post-traumatic stress disorder apparently originating in physical and sexual abuse suffered by the appellant as a child. The psychologist appeared to link the assault to the appellant's psychological state, suggesting that the appellant's "fight or flight" instinct was activated in the circumstances. Others wrote of the appellant's voluntary work in the Rural Fire Service. She was described as hard working and trustworthy and usually not violent. The material was such that the offence should rightly be regarded as out of character for the appellant.

The sentence hearing and decision of the Magistrate

[6] The prosecutor submitted that a sentence of between nine and 12 months' imprisonment was appropriate and also asked for compensation on behalf of the complainant. On the appellant's behalf it was emphasised that she saw the complainant intervene in a fight and threw a single punch when she felt threatened. The appellant relied upon the agreed position that the appellant was acting in defence but used more force than was necessary in the circumstances. It was submitted the appellant's culpability was further reduced by her personal situation, with her psychological makeup being such that she was more prone to an instinctive reaction than other people might be.

[7] The appellant was remorseful, had made admissions and pled guilty early. Her solicitor said:

> "Aside from this offence, she is a caring person … who contributes to the community by volunteering as a firefighter. She is a dog foster carer and is currently providing full-time care for her family. This is out of character, as evident in the fact that she hasn't been before court before and the factual basis of the plea."

[8] It was submitted that a community based order was appropriate and that a conviction should not be recorded as it would prevent her volunteering in the Rural Fire Service and may have other negative impacts upon the appellant.

[9] The Acting Magistrate summarised the facts and submissions of the parties. His Honour considered the offending serious because of the extent of injury caused and the impact upon the complainant. Comparison was made to a sentence imposed by a Judge in the District Court at Toowoomba in 2011 and on that basis made the orders for suspended imprisonment and compensation.

Relevant legal principles governing the appeal

[10] The appellant appeals pursuant to section 222 of the *Justices Act* 1886 (Qld). Because the appellant pled guilty, the sole ground of appeal permitted by the legislation is that the "punishment was excessive". Pursuant to section 223 of that Act, the appeal is by way of rehearing on the evidence given in the proceedings before the Acting 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.

Consideration

[11] In support of the complaint that the punishment was excessive the appellant submits the Acting Magistrate made a number of discrete errors. I find it unnecessary to consider these complainants because I am satisfied, having regard to comparable decisions and applying the relevant provisions of the *Penalties and Sentences Act* 1992 (Qld) ("PSA"), that the sentence was excessive.

[12] Because the appellant had been convicted of an offence that involved the use of violence (and that resulted in physical harm to another person), the principle that a sentence of imprisonment should only be imposed as a last resort did not apply. Instead the primary considerations for the sentencing court were those found in section 9(3) of the PSA:

> "(a) the risk of physical harm to any members of the community if a custodial sentence were not imposed;
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> (b) the need to protect any members of the community from that risk;
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> (c) the personal circumstances of any victim of the offence;
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> (d) the circumstances of the offence, including the death of or any injury to a member of the public or any loss or damage resulting from the offence;

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

(e) the nature or extent of the violence used, or intended to be used, in the commission of the offence;

(f) any disregard by the offender for the interests of public safety;

(g) the past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed;

(h) the antecedents, age and character of the offender;

(i) any remorse or lack of remorse of the offender;

(j) any medical, psychiatric, prison or other relevant report in relation to the offender;

(k) anything else about the safety of members of the community that the sentencing court considers relevant."

[13] A consideration of these matters serves to identify the present matter as one not requiring a sentence of imprisonment. There is little to no risk or physical harm to members of the community in the absence of a custodial sentence, and consequently no need to impose a sentence that protects against this risk. The violence used was a single punch thrown in response to a perceived need to act defensively. In circumstances where the appellant intervened defensively in a fight that was already occurring, she did not show disregard for the interests of public safety. Her age, antecedents, character and remorse all provided support for a sentence that was lenient, as did the appellant's psychological difficulties. The personal circumstances of the victim and the injury she suffered were relevant, but could not overwhelm the other considerations.

[14] Of course, section 9(2A) of the PSA only excludes the operation of the principles in section 9(2)(a), that imprisonment should be considered a sentence of last resort and that a sentence that allows the offender to stay in the community is to be preferred. The balance of section 9(2) remained relevant and those considerations also favoured a more lenient sentence than that imposed.

[15] The decision of Judge McGill SC DCJ in *R v Hite* (unreported, Toowoomba District Court, 11 February 2011), to which the Acting Magistrate was referred, is not of a great deal of assistance. Hite had been involved in an altercation with the complainant in a hotel. The complainant was ejected as a result. When Hite later left the hotel he saw the complainant moving toward him. Acting defensively Hite punched the complainant once, knocking him to the ground. Hite was in his late twenties, was remorseful, of good character and in a stable relationship. Judge McGill considered Hite's offending to be out of character and imposed six month's imprisonment to be wholly suspended for 18 months. What Hite did was somewhat different to what the appellant did here. He had been involved in some kind of altercation with the complainant before the assault and, it might be inferred, both men were affected by alcohol. Hite also had a minor criminal history and did not refer to psychological matters to explain his use of violence.

[16] The respondent in this appeal referred to *R v Hilton* [2009] QCA 12 and *R v Monro* [2002] QCA 483 as supporting the sentence imposed. *Hilton* was relied upon for the proposition that imprisonment can be appropriate even for first offenders of good

character. Such a proposition is hardly controversial. However, it is helpful to consider the statement of Keane JA in its full context:

> "[22] Offences involving personal violence raise considerations of general and personal deterrence which may warrant a custodial sentence even for a first offence. The applicant's record of previous assaults suggests that the need for personal deterrence is a consideration of concern in this case. In the present case, the applicant's assault on the complainant was quite unprovoked; the complainant did not want to fight the applicant, but the applicant persisted in his pursuit of a grudge. While the courts are slow to send an offender to prison for a short time where the offender has not previously been sentenced to actual imprisonment, considerations of general and personal deterrence will, generally speaking, overcome that reluctance in the case of a mature offender. That this offence, involving as it did persistent personal violence by a mature adult, should be punished by a sentence involving actual custody is hardly surprising.
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> [23] The assault was not an act of youthful misjudgement: the applicant is a mature man, and his attack on the complainant was prosecuted with deliberation and determination. The complainant suffered serious injury. It is a matter of special concern that the applicant continued his attack upon the complainant by kicking him after he had been rendered unconscious. It cannot be said that the sentence was manifestly excessive on the material which was before the learned sentencing judge."

[17] When considered in this context, the statement relied upon by the prosecutor at first instance may be seen as less obviously relevant to the present appellant.

[18] *Monro* was convicted on his own plea of an offence of assault occasioning bodily harm. The circumstances of his offence were that Monro had been drinking at a bar, he acted in a manner that might be considered to be sexually harassing toward a young woman and then struck her with a glass when she remonstrated with him. The glass did not break against her face and the sentence proceeded on the basis that Monro did not use the glass as a weapon. Monro was a young law student who had worked in the Police Service. He was of good character. The sentence of four months' imprisonment wholly suspended for 18 months was not disturbed.

[19] Assessed objectively, Monro's conduct was worse than that of the present appellant. He behaved boorishly, and when confronted about his behaviour reacted with unprovoked violence. Even then, McMurdo P concluded that, "other non custodial options may also have been with the proper sentencing range…" The decision in Monro does not support a sentence of six months' imprisonment in the present case.

[20] The appellant relied upon the decisions of *R v Sanders* [2007] QCA 165 and *R v Coutts* [2008] QCA 380 as demonstrating the punishment was excessive. Sanders was very young – 17 years old – when he participated in an assault on another youth. He punched the complainant three times causing facial injuries and a slightly displaced orbital fracture. When the matter was investigated Sanders co-operated and made full admissions. The appeal concerned the decision of the sentencing judge to record a conviction. No complaint was made about the imposition of two years' probation and 40 hours' community sentence. Having identified specific error

in the approach of the sentencing Judge, the Court of Appeal considered the sentence afresh. Having regard to Sanders' youth, remorse, co-operation, absence of prior offending and progress toward rehabilitation, the court confirmed the orders for probation and community service but did not record a conviction.

[21] *Coutts* concerned a 19 year old woman who shoved over another young woman at a nightclub and, when the complainant responded with a rude finger gesture, took her by the hair and dragged her some metres along the floor. This caused grazing to the complainant's knees, some hair loss and a sore head. Ms Coutts had prior convictions for street offences. Her sentence hearing was complicated by the fact that after the nightclub assault, Coutts committed a further offence of assault occasioning bodily harm. This related to Coutts punching a man to the face at a hotel in Toowoomba. The later assault was dealt with before the former with the result that Coutts had been ordered to perform probation and community service by the time she came to be sentenced for the nightclub assault. McMurdo P, with whom Holmes JA and Fryberg J agreed, considered that the sentencing judge had erred in considering the "totality" principle. In re-sentencing for the nightclub assault, the court had regard to Coutts' efforts at rehabilitation, including the completion of 100 hours of community service. The court ordered that Coutts undertake probation for two years and three months and recorded a conviction.

[22] In this case, the appellant's culpability was not as great as that of the defendants in *Coutts* and *Monro*. In each of those cases the violence of the defendant was unprovoked. Here, the appellant acted in circumstances that permitted the use of force, but exceeded that which was reasonably necessary. As well, Coutts had a much less favourable background. In my view, a comparison with the cases mentioned above is sufficient to demonstrate that the sentence of suspended imprisonment imposed by the Acting Magistrate was excessive.

[23] But that was not the only order made; the appellant was also ordered to pay $1,500 in compensation with a direction that the matter be referred to the State Penalties Enforcement Registry where it might be dealt with under the *State Penalties Enforcement Act* 1999 (Qld). While an order for compensation may not strictly be a form of punishment, it has potential punitive consequences. As discussed in *R v Matauaina* [2011] QCA 344, in the event of non-payment the registrar can apply a series of escalating remedies intended to encourage payment. These remedies begin with the suspension of the debtor's driver's licence and extend to the seizure of property and even to the possibility of imprisonment.[3] This is a relevant matter to take into account in deciding the appropriateness of the overall sentence. As was said by Fraser JA in *Matauaina* at [35] (citations omitted):

> "In *R v Ferrari*, McPherson JA observed that an order under s 35, although part of the sentence or judgment, is not a form of punishment. Nevertheless, the potentially punitive consequences of such an order are certainly relevant in considering the appropriateness of the overall sentence. The appropriateness of the term of imprisonment imposed by the sentencing judge cannot be considered in isolation from the consequence that an offender might be sent to prison for non-payment of compensation."

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3 *Matauaina,* at [32].

[24] The additional burden, both actual and potential, imposed upon the appellant by the order for compensation provides further support for the conclusion that the punishment was excessive. It is appropriate to set aside the orders made and to sentence the appellant myself.[4] Taking into account the matters mentioned above, in particular the appellant's co-operation, absence of prior offending, general good character and the explanation for her conduct, both in terms of her psychological makeup and in acting defensively, the appropriate sentence is to release the appellant on probation. Such will make available to the appellant resources that will assist her in the future while also providing the means for her to be returned to court, and possibly re-sentenced, if she does not comply with the order.

[25] As a consequence it is necessary to consider whether a conviction should be recorded. The discretion whether or not to record a conviction is a wide one. Some criteria relevant to the decision are found in section 12 of the *Penalties and Sentences Act* 1992 (Qld). They are:

> "(a) the nature of the offence; and
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> (b) the offender's character and age; and
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> (c) the impact that recording a conviction will have on the offender's—
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> (i) economic or social wellbeing; or
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> (ii) chances of finding employment."

[26] At the sentence hearing the appellant's solicitor submitted, and it was not challenged by the Prosecutor, that the recording of a conviction would disqualify the appellant from volunteering with the Rural Fire Service. This volunteer work was something that gave the appellant a sense of purpose and being stood down pending sentence had a negative impact in her mental health. The appellant's character and age favoured her being given an opportunity to prove she can continue to contribute to society without the burden of a conviction being recorded. For these reasons it is appropriate to not record a conviction.

[27] During the course of argument in this appeal the appellant's counsel informed me that the purpose, effect and possible consequences of a probation order had been explained to her.[5] He also informed me that the appellant agreed to the order being made and that she will comply with the order.[6]

[28] The orders are:

1. The appeal is allowed;
2. The orders of the Magistrates Court at Maroochydore on 10 December 2019 are set aside;
3. The appellant is released under the supervision of an authorised corrective services officer for a period of 18 months. She must comply with the conditions set out in section 93 of the *Penalties and Sentences Act* 1992 (Qld)

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4 *Justices Act* 1886 (Qld), section 225.
5 *Penalties and Sentences Act* 1992 (Qld), section 95.
6 *Penalties and Sentences Act* 1992 (Qld), section 96.

and report to an authorised corrective services officer at Maroochydore before 4.00 pm on Wednesday 27 May 2020. A conviction is not recorded.