DISTRICT COURT OF QUEENSLAND

CITATION:	*EJB v Commissioner of Police* [2023] QDC 246
PARTIES:	**EJB** (Appellant) **v** **COMMISSIONER OF POLICE** (Respondent)
FILE NO:	2524/23
DIVISION:	Appellant
PROCEEDING:	Appeal pursuant to s. 222 *Justices Act 1886* (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	30 November 2023 (ex tempore)
DELIVERED AT:	Brisbane
HEARING DATE:	30 November 2023
JUDGE:	Farr SC DCJ
ORDER:	**1. Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was sentenced to three months imprisonment for one charge of contravening a domestic violence order, aggravated offence, to be served cumulatively upon a sentence of nine months imprisonment that had previously been imposed – where a parole eligibility date was fixed as at the date of the sentence and a conviction was recorded – where the appellant contends by notice of appeal that the subsequent sentence imposed by the Magistrate was manifestly excessive – whether the sentence falls outside the permissible range of sentences in light of all the relevant circumstances including those pertaining to the offender and the offence itself
LEGISLATION:	*Corrective Services Act 2006* (Qld), s. 180(2)(b) *Justices Act 1886* (Qld), s. 222
CASES:	*R v Craigie* [2014] QCA 1 *R v Omar* [2012] QCA 28 *R v Waszkiewicz* [2012] QCA 22
COUNSEL:	Self-represented appellant J Tickle for the respondent

SOLICITORS:	Self-represented appellant
	Commissioner of Police for the respondent

Introduction

[1] The appellant was convicted in the Magistrates Court at Brisbane on 10 August 2023 on his own plea of guilty of one charge of contravening a domestic violence order, aggravated offence. He was sentenced to three months imprisonment to be served cumulatively upon a sentence that had been imposed in the Beenleigh Magistrates Court on 5 April 2023 of nine months imprisonment. The learned Magistrate fixed the date upon which the appellant would be eligible for parole, as she was required to do, as at the date of sentence, that being 10 August 2023. A conviction for the offence was recorded.

[2] The sentence imposed in the Beenleigh Magistrates Court on 5 April this year involved one charge of stealing, two charges of wilful damage and one charge of entering a dwelling with intent by break. Those offences were all averred to be domestic violence offences. As I say, he was sentenced to a period of nine months imprisonment on that date, and a parole release date was set as at 4 May 2023.

[3] By notice of appeal dated 26 August this year, the appellant contends that the sentence imposed by the learned Magistrate on 10 August was manifestly excessive. This appeal is brought under section 222 of the *Justices Act 1886*. The law in relation to section 222 appeals is well established. It is an appeal by way of rehearing, which requires the appellant Court to decide the case for itself and the appellant Court must conduct a real review of the evidence and make up its own mind about the case. But the Court may only intervene if it concludes that the sentence falls outside the permissible range of sentences in light of all relevant circumstances including the circumstances pertaining to the offender and the offence itself.

[4] The appellant has also indicated in written material that he wished to contest the factual basis for which he was sentenced, indicating that the Magistrate acted on information to which he had not intended to plead guilty. However, upon reading the transcripts of the proceedings in the Magistrates Court it is abundantly clear that that is not what happened. The Magistrate, upon being provided with a schedule of facts, took some time to ensure that she understood the basis of the plea and the basis upon which sentence was to be imposed. In this case, it was effectively that the appellant, in breach of a domestic violence order, consumed alcohol with, or in

the presence of, the aggrieved on certain occasions and then had spoken in an aggressive way, at least on one occasion.

[5] Other material, other facts, were placed before the Court, alleging certain threats were made, but the parties specifically indicated that those matters were not to be taken into account and the Magistrate unambiguously indicated that they would not be, and she would only act on that which is agreed. There is no substance to the appellant's complaint in that regard and I need not deal with it further.

[6] The offending conduct had to be viewed in light of appropriate surrounding circumstances. The appellant has a very lengthy criminal history, spanning two States. It was described as being appalling. The offending conduct the subject of the offence that was dealt with on 10 August effectively occurred over three separate occasions by virtue of the same type of behaviour.

[7] The first of those occasions however, was the day after the appellant had been released on parole. He was on parole at the time of each of the events and the consequence of the commission of this offence was that he was taken back into custody and has, since that time, been continuing to serve the sentence which was imposed on 5 April this year. As I say, he has a lengthy criminal history that includes entries that are of relevance to the determination of sentence in a matter such as this, on a number of occasions.

[8] The fact that this offence occurred whilst on parole is a significant feature of aggravation which the Magistrate, quite properly, took into account. Other information placed before the learned Magistrate included, from the appellant's legal representative at the time, that he was remorseful for his conduct, that he had issues with drugs and alcohol, that he had acknowledged his own actions by the entry of the plea of guilty and therefore had cooperated with the administration of justice, that the aggrieved person was still supportive of him, that he has a history of drug abuse and that he has had the opportunity to reflect on his behaviour whilst he has been in custody. He had been in custody at that stage for 87 days, on remand for the offence the subject of this application, and also serving the term of imprisonment that was imposed earlier in the year.

[9] The appellant's principle complaint seems to arise from the fact that he has now been in custody for that period of time, since that sentence was imposed earlier this year, minus the short period of time that he was on parole, but has not yet commenced the three month term of imprisonment that was imposed by the learned Magistrate in relation to this matter and that he is not eligible to apply for parole due to the operation of subsection 180(2)(b) of the *Corrective Services Act 2006*. In the appellant's submission, the appropriate sentence would have been a term of imprisonment of three months or perhaps six months imprisonment but to be served concurrently.

[10] Turning to the issue of section 180(2)(b) of the *Corrective Services Act*. That section states that:

> *A prisoner cannot apply for a parole order if an appeal has been made to a Court against conviction or sentence to which the period of imprisonment relates, until the appeal is decided.*

[11] The appellant's complaint is that he will be unlikely to receive the benefit of release on parole because the time when he can make any such application would be such that he will have served the total period of imprisonment by the time a parole board considers it. However, it must be noted that that situation has arisen only by virtue of the appellant's own decision to appeal against the sentence.

[12] As was said in *R v Omar*,[1] and as affirmed in *R v Craigie*,[2] in circumstances where a prisoner made a deliberate choice to make an application for leave to appeal against sentence in the context of a legislative scheme which prevents him from then making an application for parole whilst an appeal against sentence is undecided:

> *In the circumstances, the operation of the legislation cannot be said to make the sentence manifestly excessive.*

[13] In *R v Waszkiewicz*,[3] Justice White referred to the prisoner's exercise of his right to seek leave to appeal and the consequential inability to apply for parole and stated that the Court:

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[1] [2012] QCA 28, [38].
[2] [2014] QCA 1.
[3] [2012] QCA 22.

> *Ought not to accede to the application merely because of those consequences, unless there is good reason for doing so.*

[14] No such good reason is present in this matter. Complaint is also made that the Magistrate erred in asserting that the 87 days that the appellant had spent on remand could not be declared, and as a bare assertion, that is correct. However, if the Magistrate had decided that this was an appropriate matter for the imposition of a cumulative sentence, then her statement was quite correct and it is quite apparent that the Magistrate had made such a decision.

[15] In fact, as I indicated during the course of submissions, given the nature of the offending and the timing of it on parole, the imposition of a cumulative sentence in this matter was almost inevitable. A concurrent sentence would have had no deterrent impact whatsoever, unless it was for a much longer period of time. The complaint that a cumulative sentence in the circumstances of this matter resulted in an excessive sentence because the appellant is unable to apply for parole is without foundation.

[16] His inability to apply for parole is, as I have said, solely a consequence of his decision to appeal against sentence. The imposition of a cumulative sentence was appropriate in the circumstances and it is clear upon looking at all of the material that the Magistrate took into account the 87 day period of time when determining that a three month period of time would be appropriate by way of head sentence.

[17] Her Honour then ameliorated that sentence by ordering that the appellant be immediately eligible for release on parole and it is only through his own actions that that has not been able to be actioned by the parole board. The learned Magistrate also noted that, ultimately, it would be a matter for the parole board to determine if and when parole would be acted upon, when she said:

> *So it is between you and the parole board, then, about when you convince them that you should be released from custody.*

Again, a correct statement of principle and fact.

[18] In all the circumstances, I find that there is no basis to overturn the decision of the magistrate below. The sentence is not excessive in the circumstances, and the appeal is dismissed.

Order:

1. Appeal dismissed.