SUPREME COURT OF QUEENSLAND

CITATION:	*R v Summers* [2015] QCA 278
PARTIES:	**R** **v** **SUMMERS, Kyle Joshua** (applicant)
FILE NO/S:	CA No 40 of 2015 DC No 465 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport – Unreported, 9 March 2015
DELIVERED ON:	18 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2015
JUDGES:	Gotterson and Morrison and Philippides JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal against sentence is granted.** **2. The appeal is allowed.** **3. The order made on 9 March 2015, setting the parole release date at 6 July 2015, is set aside, and in lieu thereof the parole release date is set at 31 March 2015.** **4. The sentences otherwise imposed on 9 March 2015 are confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant pleaded guilty to four counts, namely attempted robbery (assault with intent to steal, using actual violence); possession of a dangerous drug (cocaine); possession of a dangerous drug (cannabis); receiving tainted property (a mobile phone) – where the applicant was sentenced to 12 months imprisonment with a parole release date after four months for the count of attempted robbery and three months for the remaining counts, to be served concurrently – where the applicant was intoxicated and talking on his mobile phone – where the applicant fell into a gutter as he passed the complainant – where the applicant spoke aggressively towards the complainant – where the applicant asked the

complainant if he wanted "a cut" – where the applicant attempted to intimidate the complainant into giving the applicant his phone – where the applicant pushed the complainant – where the applicant asked the complainant where he was from – where upon discovering where the complainant was from, the applicant ceased being aggressive on the premise the complainant was "from [his] hood" – where the complainant left the scene – where police were conducting foot patrols and the complainant told them what happened – where the police approached the applicant and discovered in the applicant's backpack $1,500 in cash, a large clip seal bag with two smaller clip seal bags inside, containing 0.965 grams and 0.903 grams respectively of a white substance in which cocaine was detected, and the larger clip seal bag containing approximately 1 gram of cannabis – where the applicant was patted down by police and a mobile phone was discovered in the applicant's pants – where the applicant was arrested – whether the sentence was manifestly excessive

R v Francis [1996] QCA 217, cited
R v Kolodziej [2008] QCA 184, cited
R v Norton [2007] QCA 320, cited
R v Taylor & Napatali; Ex parte Attorney-General (Qld) (1999) 106 A Crim R 578; [1999] QCA 323, cited

COUNSEL:	A Vasta QC for the applicant C N Marco for the respondent
SOLICITORS:	McMillan Criminal Law for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Morrison JA and with the reasons given by his Honour.

[2] **MORRISON JA:** On 9 March 2015 Mr Summers pleaded guilty to four counts arising out of events on 9 November 2013, when he was 20 years and eight months old. Put shortly, he was agitated or intoxicated when he threatened, several times, to "hurt" or "cut" the complainant, made four demands for his phone, and pushed the complainant in the chest, causing him to stumble backwards. On hearing where the complainant was from, he suddenly desisted.

[3] The offences were:

- Count 1 - attempted robbery (assault with intent to steal, using actual violence);
- Count 2 - possession of a dangerous drug (cocaine);
- Count 3 - possession of a dangerous drug (cannabis); and
- Count 4 - receiving tainted property (a mobile phone).

[4] On the count of attempted robbery he was sentenced to 12 months' imprisonment, with a parole release date set after four months, on 6 July 2015. On the other counts he was sentenced to three months, to be served concurrently with the sentence on count 1. Three days' pre-sentence custody was declared as time served.

[5] Mr Summers challenges the sentence as being manifestly excessive. The ground advanced is that in the circumstances a period of actual imprisonment was not warranted. It was contended that he should be released on immediate parole, or, at worst, be subject to a community based order.

The offences

[6] An agreed schedule of facts was tendered before the learned sentencing judge.

[7] At approximately 5.30 pm on 9 November 2013 the complainant, his brother and a friend were walking north on the road on the Esplanade, Surfers Paradise. As they walked the complainant saw Mr Summers, who appeared agitated, and intoxicated, talking on his mobile phone.

[8] Mr Summers fell or tripped into the gutter, and then looked directly at the complainant. He asked the complainant "*oi cunt do you want* a *cut*". The complainant replied to the effect of "*no thanks mate we're fine*".

[9] Mr Summers then said "*alright then cunt give me your fucking phone*". The complainant responded to the effect of "*Nah seriously just fuck off*". Mr Summers replied "*alright give me your fucking phone right now*", attempting to shove and push the complainant. Again the complainant said "*no*".

[10] Mr Summers told the complainant "*give me your phone cunt or I'll fucking hurt you*". He then used his right forearm and pushed the complainant in the chest, causing the complainant to stumble backwards towards a wall. The complainant pushed Mr Summers' arm away, telling him to "*stop fucking touching me enough's enough*".

[11] Sometime during their exchange of words Mr Summers pulled a black iPhone from his pants pocket and told them "*this is what I got from the last person*".

[12] After a further exchange of words, Mr Summers told the complainant "*If you don't do what I say I will have your fucking phone as well*", before asking the complainant his name and where he was from. The complainant told him his name was "*Corey and I'm from Logan*". Mr Summers asked the brother and the friend their names and where they were from. After they told him their names, and that they were also from Logan, Mr Summers said "*Ah fuck, you guys are from my hood*", telling them he worked in Logan and "*I can't be doing this to my brothers*".

[13] Mr Summers went to shake the complainant's hand but the complainant did not take it. Mr Summers then asked, "*Are we good*", to which the complainant replied "*Yeh whatever*".

[14] The complainant and his companions walked away; and Mr Summers walked off. Police were conducting foot patrols in the immediate vicinity and spoke to Mr Summers. Seeing that, the complainant approached the police and told them what happened. Police spoke to Mr Summers again and he was placed under arrest for public nuisance.

[15] Police asked Mr Summers, who was carrying a backpack, if the backpack was his. He told them "*yes*". Officers then asked him if he had alcohol in his backpack and he replied "*yes*". An officer asked if he minded showing police what was in the backpack. Mr Summers took off the backpack, placing it on the ground and opening the top slightly.

[16] An officer opened the backpack and observed a sum of money ($1,500 cash in 28 x $50 notes and 1 x $100 note) folded in half. The officer then located a large clip seal bag with two smaller clip seal bags inside it. The smaller clip seal bags, weighing

0.965 grams and 0.903 grams respectively, both contained a white substance in which cocaine was detected.[1] The larger clip seal bag contained approximately 1 gram of cannabis.[2]

[17] When asked about the contents located by police, Mr Summers told police the backpack was not his. Police then told him they were going to conduct a "pat down search" and asked if he had anything to declare. Mr Summers said "*no*". When asked if he had a phone down his pants he again replied "*no*".

[18] During their pat down search police located a black mobile phone in Mr Summers' pants.[3] When asked about the phone Mr Summers told police he had found it.

[19] He was then placed under arrest for suspected stolen property and transported to Surfers Paradise Police Station. At the police station he told police that his fingerprints would be on the two clip seal bags of white powder. In relation to the cash, police located a further $50 note which Mr Summers said was his. In relation to the $1,500 located in the backpack, Mr Summers told police it was not his. He declined to participate in a formal police interview.

[20] Without objection, counsel for Mr Summers told the learned sentencing judge a number of additional matters. Mr Summers was heavily intoxicated at the time, having consumed 10 beers at a work function. It was said that behaviour was unusual for him as "ordinarily he wouldn't take [it] at all" and alcohol was "taboo … in [his] family".[4]

[21] It was also said that Mr Summers had taken drugs that evening. Taking drugs had been "a feature in his life", and something he took occasionally.[5] That submission was amplified when his counsel referred to "his inability to control his conduct after he consumes alcohol, although he doesn't consume it regularly".[6]

[22] Finally, counsel for Mr Summers told the learned sentencing judge about what the complainant said in his victim impact statement:[7]

> "One of the strangest things I found in the brief when I read the victim's statement was my client said to the victim – shortly after pushing him in the chest and the victim resisting his demands to hand over the hand (sic) my client says to the victim, "I want to commemorate you guys for standing up for yourselves, especially you. You've done it admirably. You guys are okay and can be my friend." It's an odd thing for someone to say given what his previous demand of the victim was."

Mr Summers' antecedents and criminal history

[23] Born at Tweed Heads on 11 March 1993, Mr Summers was about 20 years and eight months at the time of the offences, and almost 22 at sentence.

[24] Mr Summers had a minor prior criminal history of street offences, drug offences and property offences:[8]

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1 This was the subject of count 2.
2 This was the subject of count 3.
3 This was the subject of count 4.
4 AB 12-13.
5 AB 13.
6 AB 14.
7 AB 13. That statement was not before this Court.
8 AB 21.

(a) as a 17 year old: wilful damage by graffiti and possessing a graffiti instrument for which no conviction was recorded, but 120 hours of community service was ordered; also public nuisance, convicted and fined; and contravening a direction, where no conviction was recorded but a six month good behaviour bond was imposed; and

(b) as a 20 year old: possession of a dangerous drug, utensils and tainted property, breach of bail and wilful damage, for which no convictions was recorded but fines were imposed.

[25] In none of those previous offences could it be said that lack of employment was a factor, as Mr Summers was in active employment on all occasions.[9] The current offences were committed four months after the last of the previous offences, and about seven weeks after the last fine for possessing tainted property.

[26] The indictment for the current offences proceeded by way of a full hand up committal, and the prosecutor accepted it was an early plea.

[27] Mr Summers left school at 17 and obtained a traineeship with the Guanaba Indigenous Land Council, working in bush regeneration. After completing the traineeship Mr Summers gained a certificate 3 in Land Conservation Management and Bush Rejuvenation. He then worked in that area of work for six months with Bushcare Services. After some employment in a different field he was able to return to bush regeneration type work about when he turned 20, with a firm called Activeco. At that time he moved into rental accommodation with his partner. He worked up the chain at Activeco, reaching team leader. He was able to get full time employment with the Gold Coast City Council, in January 2015, in a similar area of work.

[28] A reference from the Gold Coast City Council[10] said he was an enthusiastic, well thought of, and committed worker. Another reference was from a supervisor in bush regeneration who had supervised Mr Summers when was 17 and gaining his certificate.[11] He described Mr Summers as a fast learner, a good student, and a dedicated, professional, loyal and trustworthy worker. It also spoke of his regret and shame over the offences.

[29] Other character references described him in praiseworthy terms, as a maturing, respectful person, striving for a better future.[12] They also spoke of his remorse and embarrassment, and that the offences seemed out of character. In addition one spoke of the fact that Mr Summers came from "a respected Aboriginal family of high achievers, who also give back to our Community by way of valued volunteer service".[13]

[30] Counsel told the learned sentencing judge that Mr Summers had a very supportive family, who were at the sentencing hearing.

The approach of the learned sentencing judge

[31] The learned sentencing judge took into account the following matters when sentencing:[14]

(a) the seriousness of the attempted robbery offence, and its prevalence on the Gold Coast;

(b) the need for general deterrence as well as personal deterrence;

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9 His work history is summarised at AB 12 by his counsel.
10 AB 25.
11 AB 26-27.
12 AB 28-29, 32.
13 AB 32.
14 AB 17-18.

(c) the prevalence of drug offences;

(d) the "relatively limited criminal history";

(e) the early plea of guilty which demonstrated remorse, and assisted the administration of justice;

(f) the fact that the matter proceeded by way of a full hand-up committal;

(g) the fact there had been no offences since the current ones;

(h) the fact that the violence was low level and no injuries were caused in the short confrontation;

(i) the references which spoke highly of Mr Summers, the fact that he was in full time, secure employment, and also contained expressions of remorse;

(j) whilst the attempted robbery may have been out of character, the other offences were reflected in Mr Summers' prior history; and

(k) the conduct occurred when he was heavily intoxicated, but that did not excuse the offending.

[32] Having done that the learned sentencing judge said:

> "I consider that I have no option but to impose a sentence of imprisonment upon you, notwithstanding the various factors in your favour."

Contentions

[33] Senior counsel for Mr Summers submitted that the learned sentencing judge fell into error by finding that there was no option but to impose a period of actual custody, and that the imposition of any period of actual custody meant that the sentence was manifestly excessive having regard to the following features:

(a) Mr Summers' minor criminal history, and no previous offences of violence;

(b) the amateurish nature of the offence, and the minimal personal violence;

(c) that he had desisted and attempted to make amends with the complainant;

(d) he had spent three days in custody, and it was the first time in custody;

(e) his remorse, expressed independently of the plea;

(f) his youth;

(g) his good work history, current employment and the references;

(h) that his drug problem would benefit from a supervisory order; and

(i) his family support.

[34] No attack was mounted on the head sentence of 12 months on the attempted robbery charge, nor on the sentences imposed otherwise, except as to the requirement to serve a period of actual custody.

[35] The Crown contended that the sentence was not manifestly excessive, relying upon: the fact that Mr Summers, while young, was not a "youthful first time offender";[15] he

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15 Adopting that phrase from *R v Taylor & Napatali; Ex parte Attorney-General (Qld)* (1999) 106 A Crim R 578, at [15]. (***Taylor***)

was in employment when all offences in his history were committed; there was no evidence of any rehabilitative steps in relation to his drug problem; intoxication by alcohol or drugs was not a mitigating factor; and he had served 26 days of the total of 120 days imprisonment.[16]

Discussion

[36] The learned sentencing judge expressed the view that he had "no option but to impose a sentence of imprisonment … notwithstanding the various factors in [Mr Summers'] favour". I do not consider that his Honour meant that he was constrained to do that which he otherwise would not do, namely impose a sentence of actual imprisonment. In context it was meant to indicate that his Honour considered the appropriate sentence to be one comprising a period of actual imprisonment.

[37] That notwithstanding, the factors in favour of imposing a sentence that did not include a period of actual imprisonment, but rather a period of supervision, were compelling.

[38] Mr Summers was only some months short of 21 when he offended. Whilst he was not a first time offender in the sense of that phrase in *Taylor*, his criminal history was minor, with the only conviction recorded being in relation to public nuisance charges in 2010, and no offences of a violent nature. Further, the previous offending has been in two periods, one when he was only 17 and the other three years later. The second set of offences reveal the impact of drug use, reflected in the latest offending conduct.

[39] At the time of the offences, and sentence, he was in full time employment and his performance as an employee had won him the trust and respect of his employers, who attested to his dedication, professional approach, loyalty and trustworthy nature. He also had strong family support.

[40] The offending conduct involved verbal threats, but from an intoxicated man. They were apparently not viewed so seriously as to make the complainant or his two companions fearful of their safety to the point of running away. In fact the complainant actively rebuffed the threats and the physical contact.

[41] The assault was minor, consisting of a push with the forearm in the chest, enough to make the complainant stumble backwards, but not enough to cause any injury. Mr Summers desisted of his own volition, for reasons which have the flavour of someone wishing to get out of the situation he had generated. He asked where the complainant and his companions were from. When they said Logan, he responded that Logan was his "hood" and where he worked (both of which was untrue), and he "can't be doing this to my brothers".

[42] He then sought, in a bizarre way, to make amends. He said, according to the complainant: "I want to commemorate you guys for standing up for yourselves, especially you. You've done it admirably. You guys are okay and can be my friend." It may be doubted that he actually used the words "commemorate" and "admirably", but, be that as it may, there is no doubt that he totally ceased any attempt to assault or rob.

[43] Albeit that the two statements have all the hallmarks of intoxication talking, they nonetheless show Mr Summers backing off, and in a sense apologising.

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[16] Three days pre-sentence custody, plus the 23 days between sentence and being granted bail on 31 March 2015.

[44] The offences had been committed on 9 November 2013, and there had been no re-offending between then and the sentence, some 16 months later. In particular there had been no reoffending in relation to drugs. In addition he continued full time employment at Activeco earning considerable praise from his supervisor for being a trustworthy, hardworking, respectful individual, who had matured greatly since the charges were laid.[17]

[45] The comparable cases urged below and before this Court included *R v Francis*,[18] *R v Norton*[19] and *R v Kolodziej*.[20]

[46] Both sides rightly accepted that *Norton* and *Francis* were objectively more serious cases than the present one. Therefore there is no need to review them.

[47] *Kolodziej* involved a sentence of two years' imprisonment, fully suspended, imposed on a plea of guilty to robbery of a taxi driver. The 24 year old offender and two friends took a taxi, and part way through the journey one friend got out, paying $20 towards the fare. The taxi driver heard the offender and the remaining friend discussing the fact that they could not pay the fare. He ordered them from the taxi and phoned the police. The remaining friend gave his bankcard to pay $30 for the fare. He and the offender thought that they would be driven to their destination. Instead the taxi driver drove off. When he did a U-turn to return to the City, they stopped the taxi and demanded to be driven to their destination. The taxi driver agreed.

[48] During the resumed journey the offender complained of being ripped off, and punched the security camera and the meter, damaging the camera and the GPS. The offender demanded the return of the $30, which the taxi driver did do when they reached the destination.

[49] The robbery was the forced return of the $30. It was unsophisticated, not pre-meditated, and there was no personal violence, but the ordeal was accepted as being terrifying for the taxi driver. The conduct also involved a persistent course of threats and intimidation. The offender had a criminal history of minor offending which included wilful damage, but had only been fined. One point noted by the Court was the need to protect persons in positions of vulnerability, such as taxi drivers.

[50] After reviewing comparable cases the Court reduced the sentence to 18 months' imprisonment but maintained the order suspending it. The characterisation of the offence by Muir JA was:[21]

> "The robbery concerned the drunken retrieval of a $30 fare in respect of which the applicant harboured an unjustified but not irrational sense of grievance. The applicant's acts were not premeditated, no weapon was involved, no blow was struck and there appeared to be genuine remorse."

[51] Muir JA agreed with the reasons of A Lyons J, who explained why the sentence should be suspended:[22]

> "[54] It then falls to the court to either suspend the term of imprisonment, partly or wholly, or to fix a parole release date. The applicant

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17 AB 28.
18 [1996] QCA 217. (***Francis***)
19 [2007] QCA 320. (***Norton***)
20 [2008] QCA 184. (***Kolodziej***)
21 *Kolodziej* at [3].
22 *Kolodziej* at [54]-[55].

> had a minor criminal history, including a previous offence of wilful damage, and an alcohol problem. Given these circumstances, there is therefore some indication that the applicant would benefit from some supervision in the community which could be supplied by way of parole.
>
> [55] However the applicant has good references, he is in good solid employment, and it would seem that his behaviour was seriously out of character. He has also acknowledged that he has a drinking problem which he has taken some steps to remedy. Accordingly, I consider that a period of imprisonment which is fully suspended for an operational period of 18 months is the appropriate penalty."

[52] In my view those comments are equally applicable to Mr Summers' case. Considering his prospects of rehabilitation whilst undergoing a four month period in prison, as compared to those if he was able to continue in his employment in the community with parole supervision, the latter is preferable.

[53] This was not a case where a period of actual imprisonment was warranted. For that reason the sentence was manifestly excessive.

[54] As it happens Mr Summers has already served 26 days of imprisonment, being granted appeal bail on 31 March 2015. For the reasons given above I would vary the sentence to the extent of setting the parole release date at 31 March 2015.

Conclusion and orders

[55] I would propose the following orders:

1. The application for leave to appeal against sentence is granted.
2. The appeal is allowed.
3. The order made on 9 March 2015, setting the parole release date at 6 July 2015, is set aside, and in lieu thereof the parole release date is set at 31 March 2015.
4. The sentences otherwise imposed on 9 March 2015 are confirmed.

[56] **PHILIPPIDES JA:** I agree with the orders proposed by Morrison JA for the reasons given by his Honour.