Queensland Sentencing Advisory Council

Key Concepts

Circumstance of aggravation, concurrent sentence, head sentence, manifestly excessive sentence, mitigating circumstances, parole, pre-sentence custody, sentencing range, voluntary intoxication.

CASE IN FOCUS

R v Cooney [2019] QCA 166

Case law summary

Mr Cooney applied to the Queensland Court of Appeal for leave to appeal against his sentences for the serious assault of two police officers and attempting to unlawfully enter a vehicle with intent to commit an indictable offence, with violence.

The facts

Depressed after the sudden death of a friend, Mr Cooney started using methamphetamine to self-medicate. This only made his depression worse.

One day, when he took an excessive amount of methamphetamine, he had a psychotic experience. He became paranoid that 'bikies' were out to get him. [4]–[5]

He cut his arm with glass and walked along a busy road in moving traffic. He stopped a car, told the driver to "*get out or do you want to be shot in the head?*", opened the door and tried to pull him from the car. The driver accelerated away. [6]–[7]

When two police officers later found him and took hold of his arms to direct him to the sidewalk, he resisted and swung punches at them, which did not make contact.

He was screaming "*Hells Angels! They're trying to kill me. They aren't real police!*" [8]–[10]

The police noticed large, deep lacerations to his left arm. They bandaged and applied pressure to these. He yelled his own name, that 'Josh' was trying to kill him, and that he had HIV. [10]–[11]

One of the police officers noticed that he had sustained cuts to the back of his left hand which were covered in Mr Cooney's blood.

This injury was sustained when taking Mr Cooney to the ground, as opposed to Mr Cooney directly applying force through punches. [12]

Mr Cooney was taken to hospital, sedated, charged and remanded in custody. [13]

About the offender

Mr Cooney was 40 years old at the time of the offending and sentence.

He had previously been convicted of dangerous operation of a vehicle while adversely affected, obstructing police and wilful damage, all committed in 2012. [17]

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The sentence

Mr Cooney stayed in custody and pleaded guilty at an early stage in the District Court, to three charges, 75 days later. The 75 days spent in pre-sentence custody was declared as time already served under the sentences. [2] The charges, and the sentences imposed (by the sentencing court, and then on appeal), were: [2]

1. Attempted unlawful entry of a vehicle with intent to commit an indictable offence, with violence: 18 months' imprisonment (changed on appeal to 12 months);
2. Serious assault of police while acting in execution of duty (the officer with the injured hand) – two years' imprisonment (changed on appeal to six months);
3. A second serious assault charge, of a second officer – 18 months' imprisonment (changed on appeal to six months).

These sentences were made to run together (concurrently) so that the effective 'head' sentence was two years (changed on appeal to 12 months).

Mr Cooney was released on parole on the same day he was sentenced, and this was not changed on appeal.

The police officer with the injured hand provided a victim impact statement. It spoke of his psychological stress from fearing he may have contracted HIV, the interference with normal intimacy with his partner and the angst and stress of waiting for test results. [14], [33]

The sentencing judge had regard to Mr Cooney's early pleas of guilty, mature age, reasonable employment history, past good character other than his previous convictions, letters of apology to the officers, remorse, community interest in his rehabilitation and a psychologist's report. [21]

The judge noted that Mr Cooney was suffering from a psychotic episode due to his voluntary consumption of amphetamine, and while the psychotic delusions explained his behaviour, self-intoxication was not a mitigating factor. [22]

Why the sentence was appealed

Mr Cooney applied for leave to appeal his sentences for two reasons (or 'grounds of appeal').

The first was that the sentencing judge made an error by having regard to a circumstance of aggravation which Mr Cooney had not been convicted of. [3] This ground failed. [35], [42]

The second ground of appeal was that the sentences imposed on all charges were, in all the circumstances, manifestly excessive. This ground succeeded.

For information of a general nature about appeals and sentencing see our Queensland Sentencing Guide.

What the court decided

The difference in sentences for the two assault charges was due to the emotional impact on the officer who provided the victim impact statement. [27]

Mr Cooney argued the judge should have disregarded the cut hand and its emotional impact. He had not been convicted of a circumstance of aggravation (such as applying a bodily fluid to an officer, or causing bodily harm), which can be charged as part of a serious assault charge.

He pointed to a legal principle that says that a circumstance of aggravation can only be taken into account if the offender is convicted of it (which Mr Cooney was not).[1] [28]–[29]

However, the facts of the case did not match the required legal definitions for circumstances of aggravation, so Mr Cooney could not have been convicted of one. The cut to the officer's hand occurred unnoticed and at most, it was an unintended consequence of the close physical proximity of the police and Mr Cooney. [32]

Given that the circumstance of aggravation principle did not apply, the sentencing judge was entitled to have regard to the emotional harm caused by the officer's fear of infection. [42] The court noted that the *Penalties and Sentences Act 1992* (Qld) requires a sentencing court to have regard to, amongst other things, the nature and seriousness of the offence, including a victim's physical, mental or emotional harm.[2] [36], [38]

However, the Court of Appeal noted other aspects of the incident which should have lessened the weight which the sentencing judge gave to that victim impact.

The fact that depositing the blood was an unintended and indirect consequence of the offending was relevant. The fact that both assault charges were based on identical offending but had a difference of six months in their head sentences, strongly suggested that this moderation did not happen. [43]

It was within the sound exercise of the sentencing discretion to take the emotional harm into account without necessarily imposing different head sentences. [43]

This is what the court ultimately did, after it examined other Court of Appeal decisions regarding serious assault sentences. [60]

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What the court decided *continued*

It noted that a sentence can be discounted to allow for mitigating circumstances through different ways — by reducing the time to be served before parole release or eligibility, by reducing the head sentence, or by reducing both.

While just reducing the non-parole period was a legitimate approach, the court then looked at the objectively appropriate range of head sentences for serious assaults.

It noted that a head sentence cannot be increased beyond an appropriate range because a parole release date is set earlier. [45]

Comparing Mr Cooney's sentences with those of five comparable cases from the Court of Appeal demonstrated that both head sentences for the serious assaults were manifestly excessive. [59]

Those cases showed examples of more serious physical acts (such as threatening with a knife, punching, kicking and pulling out hair, or spitting blood or saliva into an officer's face or mouth) that received the same, or significantly shorter, head sentences than those of Mr Cooney.[3]

The court repeated comments from one case, that people who treat police officers in that way should ordinarily expect actual imprisonment, and "*it is often the fact of imprisonment rather than the particular duration of the term imposed which secures the necessary deterrence*".

The court also upheld the appeal against the sentence for the charge of unlawful entry of a vehicle with intent to commit an indictable offence, with violence,[4] reducing the head sentence from 18 months' imprisonment to 12 months. [69]

Lawyers for both sides could not find comparable appeal cases regarding this offence. [62]

The court noted that this offence was charged as an attempt, meaning that the maximum penalty applicable was seven years' imprisonment, not 14 years.[5] [64]–[63]

Ultimately, the 18-month sentence was disproportionate to the gravity of the offending and was manifestly excessive.

Why this case is of interest

The court explained why the three sentences were imposed concurrently (running together, not one after the other which would be cumulatively).

The court referred to established legal principles from High Court cases:

- A court can allow for the overall criminality when imposing concurrent sentences, by imposing a sentence for the most serious offence, which is more severe than it would be if that offence were to be dealt with in isolation.
- However, that more severe sentence must remain within a just range of punishment for the offence. Otherwise, it would offend the overarching principle that a sentence must not be so severe that it is disproportionate to the gravity of the offence.

The court also noted how important it is to look at the particular facts of each case when sentencing.

It commented that, "*Serious assault on police is an offence which can occur in circumstances of widely variable levels of criminality, ranging, for example, from physical acts of minor resistance to arrest through to deliberately dangerous, degrading or prolonged attacks. For these reasons the range of appropriate sentences for serious assault of police is inevitably very broad*". [46]

It made a similar comment regarding the unlawful entry of a vehicle charge. Mr Cooney's behaviour regarding the car and driver could attract a variability of charges. This makes it important when sentencing "*to focus upon the charge in question rather than on popular badges such as car-jacking or attempted car-jacking*". [64]

You might also be interested in

In response to Terms of Reference on penalties for assaults on public officers, the Council published a *Sentencing @ a glance* fact sheet, providing high level statistics about sentencing for serious assault, and an information sheet covering off 'what is assault', 'offences that can be charged', and 'mandatory sentencing provisions'. These resources, a literature review, and other reports and information related to the Terms of Reference are available on our website.

[1] This principle is created by case law. Section 340 of the Criminal Code (Qld) creates the offence of serious assault, and has aggravating circumstances which increase the maximum penalty from 7 years' imprisonment, to 14 years. See paragraphs [30], [32]–[35], [38]–[41], [47] of the court's judgment. [2] *Penalties and Sentences Act 1992* (Qld) s 9(2)(c). [3] See paragraphs [48]–[57] of the judgment. [4] Section 427 of the Criminal Code (Qld). [5] Section 536 of the Criminal Code (Qld).