



Key Concepts

Totality, parole, head sentence, aggregate sentences, cumulative sentences, pre-sentence custody (remand), aggravating factors, re-offending during prison term.

CASE IN FOCUS

R v Bahcehan [2019] QCA 278

Case law summary

Mr Bahcehan applied to the Queensland Court of Appeal for ‘leave’ (permission) to appeal against his sentences (offenders do not have an automatic right to appeal their sentence).

The facts

Mr Bahcehan was sentenced to 8 years’ imprisonment in August 2014, with an order that he was eligible to apply for parole after he had served one-third of that time (in November 2015). He was in fact paroled in March 2016, after serving 3 years. [52], [82] He had been disqualified from holding or obtaining a driver licence absolutely as part of that sentence. [48]

While on parole, he was charged with obstructing police and possessing drugs on 22 July 2016. He was granted bail the next day. [9], [12] His parole was suspended from 25 July because of a presumptive positive drug test. [52], [56] This meant he was also ‘unlawfully at large’ [67].

He remained in the community. On 10 August 2016 he committed further serious offences (the ‘new’ offences). On that day, he was arrested and returned to custody.

First, he drove a car dangerously for more than 17 minutes around Beenleigh. He drove on the wrong side of the road, forced cars to take evasive action, drove on after one wheel lost a tyre and was resting on the rim (including while speeding past a primary school), ran red lights narrowly missing other cars and collided with two cars (and almost with a third). [1], [13]-[23]

The third car’s driver chased, tackled and held him when he fled on foot with his bags. Mr Bahcehan stabbed the driver’s thumb and left chest with a flick knife and ran away. [2], [24]-[26], [41] The driver had an overnight hospital stay, with nine stitches to the 10-centimetre wound to his chest, a lacerated right thumb and an abrasion to one knee. [42]

Mr Bahcehan then attempted to highjack three cars at a carwash at knifepoint. Each driver refused to hand over their car. [27]-[31]

He next threatened a driver at a McDonald’s drive-through. They struggled and Mr Bahcehan stabbed him in the abdomen and upper arm. [32]-[34] The driver was hospitalised overnight with internal stitches, with the torso wound close to his bowel. [42] Despite that, the fourth driver and several others held Mr Bahcehan and eventually disarmed him. But first, he spat in a woman’s face and threatened to kill her. He stabbed two other men, one in the upper arm (requiring stitches) and another, as he swung the knife around, in the calf. He tried to bite the fourth driver’s arm. [2], [3], [35]-[38] Later, in the watchhouse, he tried to inject a drug with a homemade syringe. [5], [45]



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The facts *continued*

His (already suspended) parole was cancelled on 19 August 2016. [56]

Then, in October, he committed a further offence ('dealing with a prohibited thing'). For this, he was sentenced in 2018 to another 3 months' imprisonment. That was ordered to run on top of the 8-year sentence (cumulatively), so that he was then serving an aggregate (total) of 8 years and 3 months.

A new parole eligibility date ('PED') was set in January 2018 (though he was not granted parole). [49], [55]

The sentence

Mr Bahcehan pleaded guilty to the new offences (11 indictable and 7 summary offences) in February 2019, after they were listed for trial. The sentences were:

[7], [9], [60].

Count #	Offence	Offence section	Sentence (years in prison)
1	Dangerous operation of a vehicle, with a previous conviction	Criminal Code ('Code') s 328A(2)(c)	3 years (and disqualified absolutely)
2, 9	Wounding x 2 (the 'third car' driver, thumb/ chest and 'first disarmar', arm)	Code s 323	3 years
3-6	Attempting to unlawfully enter a vehicle with intent to commit an indictable offence, while armed x 4 (car wash, McDonald's cars)	Code ss 427(2)(b)(ii), 535, 536	18 months
7	Wounding x 1 (the 'McDonald's driver', arm)	Code s 323	5 years
8	Common assault (spitting in woman's face)	Code s 335	6 months
10	Assault occasioning bodily harm while armed (the 'second disarmar' – calf)	Code s 339(3)	18 months
11	Possessing a dangerous drug	<i>Drugs Misuse Act 1986</i> s 9	6 months
–	7 summary offences (including possessing a knife, possessing drugs and drug utensils, disqualified driving, obstructing police)	Various	Convicted and not further punished, but disqualified from holding a licence for 5 years

About the offender

Mr Bahcehan was 32 when he offended. The son of Turkish immigrants; he had a traumatic background. He grew up with his mother. His father was violent. He served 16 months of national service in Turkey, including active service in Syria. He had a drug habit involving amphetamines and heroin. He had a good work history. [54], [56]

His criminal history was extensive. In Queensland, it started in 2012 and included an 8-year sentence relating to numerous offences including armed robbery, arson, malicious act with intent and dangerous operation of a motor vehicle. [8]

New South Wales convictions starting in 2000 included property, dishonesty, drugs, weapons and violent offences. [8], [46]–[51]

The explanation for his offending was that he knew he had failed a drug test, which would affect his parole. He feared returning to prison and panicked. [53]

NOTE: This summary is an incomplete summary of the Court's reasons and is not legal advice. It includes explanations of legal concepts not set out in the judgment. It is not approved by, or affiliated with, Queensland Courts and is not to be regarded as a substitute for the Court of Appeal's judgment. Numbers in square brackets refer to paragraph numbers in the judgment.



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The sentence *continued*

Mr Bahcehan fell under a mandatory sentencing law in section 156A and schedule 1 of the *Penalties and Sentences Act 1992* (Qld) ('PSA'). This requires any imprisonment for listed offences to be served cumulatively (on top of) any existing imprisonment, if the new offence was committed when the offender was a prisoner serving a term of imprisonment or was released on parole (amongst other things). The charges numbered 1, 2, 7, 9 and 10 above are on this list.

The sentencing judge said that amphetamine use was probably a partial explanation 'for this frenzy of serious, dangerous criminal activity' and unless this was treated, Mr Bahcehan was 'likely to remain a danger to the community' on his release. [56]

He considered an overall sentence of 6 years' imprisonment. [57] He noted the maximum penalty for wounding was 7 years and stated Mr Bahcehan was 'close to deserving' it. [57]

However, in order to avoid imposing a 'crushing' sentence, given the existing sentences already being served, he 'moderated' the new sentences. [58]–[61] The head sentence imposed was 5 years' imprisonment. All new sentences were ordered to run together (concurrently) but made cumulative to (to be served on top of) the existing sentence he was still serving. [80]

This meant an aggregate sentence of 13 years, 3 months' imprisonment. [88]

The sentencing judge set a new PED. This meant setting one date for the total 'period' of his imprisonment (meaning his total head sentence of 13 years, 3 months) (sections 160C and 160F of the PSA). [68]–[75] A PED was set after serving 15 months of the 5-year sentence (in October 2022), to give him some credit for his guilty plea. [58]–[61], [64]–[66]

Because he reoffended, Mr Bahcehan would have to serve (at least) all of his 8 year and 3 month sentence, and a quarter of the new 5 year one, in prison. This was after once being able to live in the community under parole supervision, 3 years into the original 8-year term. It would be up to the Parole Board Queensland to decide if, and when, he should be given parole again.

If anything in this case summary has raised issues for you and you need to talk to someone, support is available:

- **Lifeline Australia: 13 11 14**
- **Kids Helpline: 1800 55 1800**
- **Victim Assist Queensland: 1300 546 587(business hours)**
- **MensLine Australia: 1300 78 99 78.**

Why the sentence was appealed

Mr Bahcehan's reason ('ground') for applying for leave to appeal his sentences was that they were manifestly excessive. He alleged a 'failure to take into account the totality principle, both in respect of the head sentence and in the setting of the [PED]'. [10], [76], [80] Both arguments failed. The Court did not grant leave to appeal against the sentences. [90]

His lawyers cited a High Court case (*Mill v The Queen* (1988) 166 CLR 59) about the totality principle, which requires 'a sentencer who has passed a series of sentences, to review the aggregate [combined] sentence and consider whether [it] is "just and appropriate"'. [62]

They made several specific arguments:

- With an aggregate sentence of 13 years, the 5-year head sentence was 'an inadequate moderation'. It should have been 3.5 - 4 years. [62]
- He was serving existing sentences during the 2.5 years spent in custody between his arrest and 2019 sentence. That time could not be declared as 'time served' on the new sentence but was relevant to what was 'just in all the circumstances'. [63]
- He would have to serve 9 years, 2 months of the 13 years before becoming eligible to apply for parole. This was said to offend against the totality principle. [64]
- Parole eligibility should have been set at between a third and half of the 13-year aggregate sentence. [64] The Court should set it on the appeal date – he had served almost half (6 years, 2 months) of the 13-year sentence by then. [65] This would mean a PED 8 months into the new sentence. [86]

What the court decided

Justice of Appeal Morrison ('Morrison JA') wrote a judgment. The other two appeal judges (Justices Mullins and Henry) agreed with him.

He first examined the head sentence. He discussed a Court of Appeal case (*R v Herbert* [2013] QCA 62) that confirmed that the legislation 'does not require that the [PED] must be calculated as some proportion of the period of imprisonment'. [75]

He explained difficulties with the defence arguments. [77] First, Mr Bahcehan's sentencing lawyer had agreed that a sentence of about 5 years (the sentence that was imposed) was appropriate. [78] There were no special circumstances indicating he should not be 'bound by the conduct of his case' in the sentencing court.



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What the court decided *continued*

In fact, 'the objective seriousness of the offending' meant that even 6 years was not 'beyond the bounds of discretion'. [78]

Second, the Court was not provided with any case law showing that 5 years was manifestly excessive. Decisions provided to the sentencing judge showed it was 'within the proper exercise of discretion, accepting that it was a moderated head sentence'. [79]

In examining the PED, Morrison JA found several reasons why the sentencing judge did not go beyond his discretion in setting it further into the future. [83]

First, legislation gives the courts an 'unqualified discretion' when setting a PED. The sentencing judge wanted to ensure the cumulative sentence did not have a crushing effect. He had deliberately moderated both the head sentence and the PED to reflect 'effectively, the only thing' in Mr Bahcehan's favour – his late guilty plea. Setting the PED below the one-third mark of the 5-year sentence was additional moderation. [84]

Second, the objective seriousness of the offences was aggravated by being committed on bail and on parole. Further, Mr Bahcehan knew he had also breached parole through a contaminated urine sample (showing he had been using drugs) so that he would be returned to custody. It was a 'terrifying public rampage' and 'he endangered many people, wounded three, and threatened others'. [85]

To set a PED as at the appeal date would not be 'just and appropriate. The extraordinarily serious nature of the current offences called for condign [fitting and deserved] punishment. By his multiple breaches of his parole order [he] placed himself in the position where it was almost inevitable that he would serve the full eight years and three months' of the existing sentence. [86]

Third, Mr Bahcehan had demonstrated no rehabilitative efforts. He was 'a mature person with a significant criminal history including violent offences, and who squandered his parole by committing even more serious violent offences'. [87]

Fourth, sentencing afresh would probably not change the result. The PED was 1 year, 5 months beyond the halfway point of the total sentence. A court imposing imprisonment for offences committed on parole cumulatively to an existing term, need not first identify some 'good reason' before they can fix the PED after the mid-point of the total term. 'In other words, the constraint that might normally be considered when going beyond the halfway point ... does not apply in this case'. [88]

Why this case is of interest

This case shows how offending on bail and parole are aggravating sentencing factors.

It also demonstrates how parole is designed to address the entirety of a prisoner's offending conduct, and there will only be one parole date for all sentences.

While the legislation can give a judge wide discretion when considering when to set parole eligibility, case law principles must be applied. An example is the totality principle, when the total sentence must fairly reflect the overall criminality of different offending.

The individual circumstances of each episode of offending have to be examined individually. But a prisoner who keeps offending in spite of the opportunities given to them on parole can expect to spend more of their sentence in actual custody. Reoffending also jeopardises the chance of being granted parole by the independent Parole Board Queensland again in future.

The likelihood that the court will make additional sentences cumulative (whether in its discretion or as required by legislation) also increases with reoffending on parole.

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