SUPREME COURT OF QUEENSLAND

CITATION:	*R v Thiemann* [2015] QCA 195
PARTIES:	**R** **v** **THIEMANN, Chrisopha Kim** (applicant)
FILE NO/S:	CA No 117 of 2015 DC No 87 of 2015 DC No 78 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Toowoomba – Unreported, 21 May 2015
DELIVERED ON:	16 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	1 October 2015
JUDGES:	Gotterson JA and Philip McMurdo and Peter Lyons JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal granted.** **2. Appeal allowed and the sentences passed on 21 May 2015 quashed.** **3. Sentences imposed for the offences in identical terms to those imposed on 21 May 2015 save that:** **(a) the sentences imposed under these orders, apart from that offence which was count 1 upon the indictment, be served concurrently with the imprisonment which the offender is serving for any other offence;** **(b) the sentence for the offence which was count 1 upon the indictment be served cumulatively with any other term of imprisonment which the offender is liable to serve;** **(c) the applicant's eligibility date for parole be 17 August 2015.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to serve various terms of

imprisonment to be served concurrently with each other but cumulatively upon an existing period of imprisonment – whether the resulting sentences were manifestly excessive – where the sentence imposed for one offence against s 75(1)(b) of the *Criminal Code* had to be ordered to be served cumulatively by operation s 156A of the *Penalties and Sentences Act* 1992 (Qld) – where the sentencing judge's reasons indicated an intention to make the order that the offence against s 75(1)(b) be served cumulatively but did not indicate an intention that the other sentences be served cumulatively – where the other offences were not required to be served cumulatively – apparent inconsistency between the sentencing judge's reasons and the orders recorded in relation to whether all terms were to be served cumulatively – where, absent an order or any intention expressed in the sentencing judge's reasons of an intention to make each of the terms cumulative upon the existing period, the sentences were to be served concurrently: *Penalties and Sentences Act* 1992 (Qld) s 155

Criminal Code (Qld), s 75(1)(b)
Penalties and Sentences Act 1992 (Qld), s 155, s 156A

COUNSEL:	The applicant appeared on his own behalf D C Boyle for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

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

[2] **PHILIP McMURDO J:** On 21 May 2015, the applicant pleaded guilty to charges upon an indictment and several summary charges. Various sentences were imposed, the largest being two terms of 18 months for the unlawful use of a motor vehicle. All of these terms were ordered to be served concurrently with each other but cumulatively upon an existing period of imprisonment which was to expire in December 2016.

[3] The applicant, who is without legal representation, seeks leave to appeal against the sentences imposed in May upon the ground that they are manifestly excessive. According to his written outline, the same terms could have been imposed but not cumulatively with the other imprisonment which he was then serving.

[4] However, one of the terms imposed in May had to be ordered to be served cumulatively upon the previously imposed period. That was a term of nine months for the first count on the indictment, which was an offence against s 75(1)(b) of the *Criminal Code Act* 1899 (Qld), of threatening violence. That offence, like the others for which he was sentenced in May, was committed in early October 2014, when the applicant was on parole. An offence against s 75 is one against a provision mentioned in schedule 1 of the *Penalties and Sentences Act* 1992 (Qld). Consequently, by s 156A of that Act, the sentence imposed for that offence had to be "ordered to be served cumulatively with any other term of imprisonment the offender is liable to serve".

[5] The other offences for which he was sentenced in May were not required to be served cumulatively, either by s 156A or otherwise, although it was open to the sentencing judge to do so.

[6] Importantly, the sentencing judge's reasons indicate that it was not her intention to make each of these terms, most relevantly the terms of 18 months, cumulative upon the existing period. In other words, the reasons do not accord with the sentences contained in the judgment record. In particular, the orders pronounced by her Honour in court do not accord with those in the record, because in court her Honour did not order any cumulative term.

[7] Further, her Honour's reasons did not explain why the terms, other than that of nine months for the s 75 offence, had to be served cumulatively. Her Honour singled out the s 75 offence by saying that "the [sentence for the offence of] threatening violence must be cumulative to the term you're currently serving". But nothing was said about the other terms being cumulative sentences.

[8] I am left with the impression that there was a mistake in the preparation of the judgment record. But if there was not that mistake, in my view her Honour apparently failed to consider the particular question of whether the other sentences should be also served cumulatively upon the existing period. Either way, there is an error which warrants the grant of leave to appeal if another sentence is warranted.

[9] Before going to the subject offences and the sentencing judge's reasons, it is necessary to discuss the applicant's prior criminal history and imprisonment. The applicant was born in April 1989. He appeared in Magistrates Courts for various summary offences in 2007-2010 for which he received non-custodial sentences. In May 2010, he was sentenced in the District Court for armed robbery in company, for which there was a term imposed of three years' imprisonment, suspended after six months for a period of three years. In June 2011, he was convicted of a breach of that suspended sentence and he returned to prison until released on parole in November of that year.

[10] On 8 November 2012, he was sentenced in the District Court for burglary and two counts of threatening violence. He was also required to serve the balance of the partially suspended sentence which had been imposed in May 2010. A parole eligibility date of 8 August 2014 was then fixed. He was paroled in August 2014, only two months before committing the subject offences.

[11] On 6 October 2014, the applicant was a passenger in a car being driven by the complainant as they travelled from the house of a mutual friend in Toowoomba. The applicant then produced a flick knife, pointed it at the driver and said that the driver should get out of the car or he would be stabbed. The driver did so and the applicant drove away in his car. It was that threat which was the offence against s 75 and that unlawful use of a car which was the other offence upon the indictment.

[12] Police attempted to intercept the car but the applicant accelerated away from them. Eleven days later, the applicant was found and arrested. The car was located by police in Brisbane two weeks later.

[13] The summary charges included a further offence of unlawful use of a motor vehicle. The applicant took a vehicle from an address in New South Wales and it was found

in Toowoomba, with stolen licence plates, about a week later. The other summary offences were committed over this same period in early October 2014: stealing petrol, driving whilst disqualified, failing to stop when directed, stealing goods from a shop and obstructing police and contravening their requirements.

[14] At the sentence hearing, the applicant had been back in custody since his arrest on 17 October 2014. According to a certificate which was then tendered, he was serving a period of imprisonment which was to expire on 11 December 2016.

[15] In his submissions to the sentencing judge, the prosecutor referred to certain aggravating circumstances, most importantly that the offences were committed whilst the applicant was on parole. But in the applicant's favour, the prosecutor then said:

> "There are also totality considerations to take into account. As I already stated, the defendant is currently serving a term of imprisonment with a full time discharge date of 11 December 2016. …
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> Under section 156A of the *Penalties and Sentences Act*, a sentence for threatening violence must be ordered to be served cumulatively, as it is a schedule 1 offence. Any sentence imposed today will have to be cumulative to that period of imprisonment. So adjustments to a sentence today will need to be made to take - made to take into account totality considerations."

It is to be noted that the prosecutor did not suggest that any sentence other than that for the schedule 1 offence be made cumulative to the applicant's existing period of imprisonment.

[16] Similarly, the applicant's counsel told her Honour that the sentence for the schedule 1 offence would have to be served cumulatively upon his existing period. Defence counsel submitted that the sentence should be "tempered" by reducing what would otherwise be a term of 12 months to one of six months. He submitted that a new parole eligibility date should be fixed at two months from the sentence hearing.

[17] In her reasons, her Honour said that she took into account the applicant's early plea of guilty and his relative youth. She remarked that if the applicant could "get some sort of handle on [his] drug addiction" he could be a "productive member of the community". Her Honour then said:

> "You're currently serving a sentence of four years and seven months. So whatever sentence I impose, there's a parole eligibility date attached. The threatening violence must be cumulative to the term you're currently serving, in my view, given that this all was committed [in] such a short period of time after your release from parole it needs to reflect the seriousness of the offending.
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> Taking into account your serious previous convictions, the fact that you were on parole for a threatening offence at the time that you committed the threatening offence, the fact that you have recent previous convictions for the failure to stop and for unlawful use, that you have previous convictions for violence, you are sentenced as follows. …"

[18] Her Honour then pronounced the terms of imprisonment for each of the offences before concluding with a "recommendation" that the applicant be eligible for parole

on 17 August 2015 "which is 10 months from when [the applicant] went into custody". There was no specific order for any sentence to be served concurrently or cumulatively. It fairly appears, however, that her Honour intended to make the order, which was required by s 156A, that the term of nine months imposed for the schedule 1 offence be served cumulatively. On the other hand, her Honour's specific reference to that offence in the passage which I have set out indicates that she did not intend that the other sentences should also be served cumulatively upon the applicant's existing period.

[19] Absent an order that those other sentences be served cumulatively, they were to be served concurrently with the sentences which made up the existing period, by the operation of s 155 of the *Penalties and Sentences Act* 1992 (Qld) which provides as follows:

> "155 Imprisonment to be served concurrently unless otherwise ordered
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> Unless otherwise provided by this Act, or the court imposing imprisonment otherwise orders, if—
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> (a) an offender is serving, or has been sentenced to serve, imprisonment for an offence; and
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> (b) is sentenced to serve imprisonment for another offence;
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> the imprisonment for the other offence is to be served concurrently with the first offence."

[20] Consequently, according to the reasons and the orders which were pronounced by the sentencing judge, it was only the term of nine months which was to commence on the expiry of any other term of imprisonment, with the result that the applicant's new period of imprisonment would expire on 11 September 2017.

[21] However, the judgment record[1] was issued with the notation that:

> "Terms of imprisonment imposed on 21/05/2015 are to be served concurrently with each other, but the overall term of 18 months is to be served cumulatively with the term of imprisonment the offender is currently serving."

Consequently, the applicant was imprisoned for a period to expire on 11 June 2018.

[22] The result is that the period of imprisonment was effectively extended by nine months without any reason being given. Moreover, there had been no submission to the sentencing judge that any term apart from that for the schedule 1 offence should be ordered to be served cumulatively. Had that been her Honour's intention, fairness would have required that defence counsel have an opportunity to address it and her Honour's reasons for that intention should have been revealed in the sentencing remarks. It seems, however, that that was not the intention of the sentencing judge and the error was in the recording of the orders. Alternatively, there was an error in not providing the applicant's counsel with an opportunity to address this question. And if the sentencing judge considered that the consequence of s 156A was that all of these terms had to be served cumulatively, that was an error of law. On any of these alternatives, there was an error in the sentencing of the applicant.

[23] The question then is whether some other sentence is warranted. For the respondent, it is submitted that the outcome is appropriate, considering the applicant's criminal

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1 Issued under r 62 of the *Criminal Practice Rules* 1999 (Qld).

history, including offences of violence, the commission of these offences so soon after being paroled and the length of the terms which were imposed. It is submitted that these were relatively short terms which give due allowance for the circumstance that they would be served cumulatively with the existing period. The respondent's submissions accept that any term to be served cumulatively upon the existing period was to be reduced for that circumstance. The sentence of nine months for the schedule 1 offence reflects that approach. But I am not persuaded that the same can be said for the terms of 18 months imposed for each of the offences of unlawful use of a vehicle. Notably that the sentencing judge fixed these terms apparently without any adjustment for this circumstance. In my view, those terms and the others, apart from that for the schedule 1 offence, should have been imposed concurrently with his existing period. In other words, the appropriate outcome was that according to the sentencing judge's reasons and the orders which her Honour pronounced in court.

[24] I would make the following orders:

1. Grant leave to appeal.

2. Allow the appeal and quash the sentences passed on 21 May 2015.

3. Impose sentences for each of those offences in identical terms to those imposed on 21 May 2015 save that:

   (a) the sentences imposed under these orders, save for that offence which was count 1 upon the indictment, be served concurrently with the imprisonment which the offender is serving for any other offence;

   (b) the sentence for the offence which was count 1 upon the indictment be served cumulatively with any other term of imprisonment which the offender is liable to serve;

   (c) the applicant's eligibility date for parole be 17 August 2015.

[25] **PETER LYONS J:** I have had the advantage of reading in draft the reasons of Philip McMurdo J, with which I agree. I also agree with the orders proposed by his Honour.