MAGISTRATES COURTS OF QUEENSLAND

CITATION:	*Queensland Police Service v Clarke-Davis* [2014] QMC 15
PARTIES:	**QUEENSLAND POLICE SERVICE** (complainant) **v** **ANDREW BARTON CLARKE-DAVIS** (defendant)
FILE NO/S:	MAG-00246050/13(9)
DIVISION:	Magistrates Courts
PROCEEDING:	Charge - Sentence
ORIGINATING COURT:	Magistrates Court at Brisbane
DELIVERED ON:	20 January 2014
DELIVERED AT:	Brisbane
HEARING DATE:	16 January 2014
JUDICIAL OFFICER:	Judge Tim Carmody QC, Chief Magistrate
ORDER:	**That the defendant be imprisoned for nine (9) months for riot and 1 month concurrent imprisonment for obstruction. Parole release date is 28 April 2014. Conviction recorded.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE - sentencing principles - riot *Penalties and Sentences Act* 1992
COUNSEL:	Carruthers (sergeant) for the complainant A McGuiness for the defendant
SOLICITORS:	Complainant on own behalf McGuiness and Associates for the defendant

[1] The offender pleaded guilty last Thursday to participating in a riot on 27 September 2013 at the Gold Coast and a second charge of obstructing police attempting to arrest him for the major offence on the 13 December 2013. Both pleas are accepted and the offender is convicted accordingly (s 145(1), *Justices Act* 1886 (Q)).

The Facts

[2] The offender is a former Bandidos prospect involved in the infamous bikie brawl at the Aura Tapas & Lounge Bar at Broadbeach. He was one of up to 60 so-called

outlaw motorcycle gang members congregating on the footpath outside the venue while a core group of 20 or so went inside the crowded restaurant at peak hour during a school holiday period to threaten two rival gang members who were dining there.

[3] A rowdy public fistfight ensued. A greatly outnumbered police contingent arrived to quell the disturbance. After a tense 20 minute standoff the rioters dispersed and the ring leaders were detained. Some unspecified items of property were damaged and patrons, including families with children, were noticeably distressed by the incident.

[4] In his witness statement the maître d' on duty that night described how he felt "quite extremely intimidated".

[5] He went on to explain at paragraph 25 that: "the whole place just went totally quiet (when the Bandidos arrived). He couldn't hear any cutlery or glasses moving. All of a sudden it felt very eerie inside there."

[6] Most of the incident was captured on CCTV and other audio/visual footage recorded on the flash drive marked exhibit 4 in the proceedings.

[7] After a brief chase comprising of the obstruction charge, the offender was apprehended 11 weeks later at home in Brisbane

The parties' submissions

[8] The police prosecutor, Senior Sergeant Carruthers, submits for a six-month term of imprisonment suspended after two months for 15 months for the riot with a fine for the obstruction.

[9] The prosecution relies on the seriousness of the offence, the potential for personal injury, general and personal deterrents and community disapproval and protection from gang violence.

[10] Mr McGuinness, for the offender, contends for a custodial sentence of four months imprisonment fully suspended after time already served of 38 days for 18 months plus a nominal fine for the police offence. The defence points to the offender's age, his comparatively minor role in the incident limited to encouragement by presence only, the early plea, presentence custody and considerations of parity and hardship of past and likely future solitary confinement under the new departmental segregation policies for bikie inmates.

The sentencing process

[11] Criminal sentencing is one of the most important and correspondingly difficult judicial functions.

[12] In *Veen v R* (No. 2) (1988) 164 CLR 465 at 476 to 477 Mason CJ, Brennan, Dawson and Toohey JJ noted that:

> "Sentencing is not a purely logical exercise and the troublesome notion of the sentencing discretion arises in a large measure from unavoidable difficulty in giving weight to each of the purposes of punishment which sometimes point in different directions.

> Perceptions about how well the task of sentencing is performed largely determines the level of satisfaction and confidence of the public in the judiciary and the administration of criminal justice by the courts. However, there is no clear consensus within the community about what sentences are 'right' or 'wrong'. And the range of sentencing options will always be narrower than the divergence of opinion on such a contestable and indeterminate issue".

[13] In *Wong v The Queen* (2001) 207 CLR 578 at [77] the High Court identified the core difficulty as:

> "…the complexity of the sentencing task. A sentencing judge must take into account a wide variety of matters which concern the seriousness of the offence of which the offender stands to be sentenced and the personal history and circumstances of the offender. Very often there are competing and contradictory considerations. What may mitigate the seriousness of one offence may aggravate the seriousness of another. Yet from these the sentencing judge must distil an answer which reflects human behaviour in the time or monetary units of punishment."

[14] Likewise, Lord Fraser observed in the English family law case of *G v G* (1985) FLR 894 at 897:

> "All practical solutions to human problems are imperfect and, therefore, to some extent will always be wrong from someone's point of view."

[15] To promote predictability and consistency of approach in the sentencing of offences and enhance public understanding of the process in Queensland sentencing laws have been consolidated into the *Penalties and Sentences Act* 1992 (the PSA).

[16] The PSA's primary objective is to avoid appealable error and injustice by identifying the relevant sentencing considerations and eliminating all the rest to make it easier for sentencers to calculate and express in units of time and money. (*Weininger v R* (2003) 212 CLR 629 at [24].

[17] In addition, the PSA states the intended policy purposes of the sentencing process and provides a sound framework of guiding principles and a range of different options for achieving them.

Purposes of sentencing

[18] Sentencing courts have a responsibility of sending unambiguous messages to the community about the inevitability and the consistency and severity of the punitive consequences of crime.

[19] The sole purposes of sentencing in Queensland are identified in section 9(1) PSA as:

(a) just punishment or retribution;
(b) aiding rehabilitation and reform;
(c) deterrence or crime prevention; and
(d) denunciation and community protection.

[20] These objects reflect the traditional criminal law aims mentioned by the High Court in *Veen* at 476 and derive from rival theories of punishment.

[21] The goals are deliberately not ranked in order of importance or priority. Each competes for paramountcy on a case by case basis.

[22] They are "conflicting and contradictory" and have to be "reconciled and rationalised" when the nature and quantum of a proper sentence is being determined.

[23] Retribution refers to the retributive theory based on the concept of just desserts or the belief that moral wrongdoing justifies punishment regardless of whether any harm is actually done or not. In other words, offenders should be punished commensurately with the gravity of the crime and degree of moral culpability or blameworthiness of the criminal. However, that purpose cannot legitimately be pursued without moderation or achieved by more punitive or coercive measures than are necessary.

[24] Deterrence, both personal and public, is mentioned in paragraph 9(1)(c) PSA. The underpinning assumption of the notion of deterrence if that crime can be prevented from being committed in the first place or again if the punishment, actual or perspective, is certain and severe enough.

[25] In *R v Radich* (1954) NZLR 86 the New Zealand Court of Appeal explained at 87 that:

"One of the main purposes of punishment is to protect the public from the commission of crime by making it clear to the offender and other persons with similar impulses that if they yield to them they will be given condign punishment. Self-evidently general deterrence only works to the extent that members of the community, especially potential delinquent members, are aware of the prescribed penalties for the unlawful conduct they might commit". (cf *R v Wong & Leung* (1999) 48 NSWLR 340 at [127] – [128] per Spigelman CJ.)

[26] Deterrence will have little practical effect in cases where the perceived benefit outweighs the probable cost or whenever the risk of detection is lower than the potential gain, such as, in the case of organised criminal activity. Nor is it likely to stop would be terrorists who believe that the reward they seek is not attainable here on earth. To have any preventative value a sentence must actually discourage or dissuade the criminally minded from taking the risk of getting caught and punished.

[27] Deterrence is especially important in relation to prevalent offences and persistent offenders resistant to rehabilitation.

[28] Specific deterrence assumes that repeat offending occurs, at least, partly, because the last punishment was inadequate to deter or correct and that this time a heavier penalty is warranted to achieve those purposes. Arguably, general deterrence is most significant in cases of extreme violence and those that compromise public safety and community welfare or victim the most vulnerable members of society.

[29] Like deterrence rehabilitation also has a crime prevention objective, but not through disincentive, but by helping rather than hurting, to treat not punish. It is premised on the assumption that crime rates can be reduced by remedying or removing the underlying causes and changing negative behaviour. There is, of course, a strong public interest in encouraging rehabilitation and reform even when the objective

seriousness of the crime calls for detention. When rehabilitation is possible it has many social, as well as, potential personal benefits. It reduces crime and saves scarce law enforcement related resources.

[30] Accordingly, genuine consideration must be given to whether rehabilitation is likely or of greater or less significance in a particular case than punitive aspects of sentencing.

[31] Non-parole periods are designed to promote reform and rehabilitation through conditional liberty once the minimum or shortest possible time in custody required to meet other sentencing purposes has been served. (*Bugby v R* (1990) 169 CLR 525, 536). Denunciation by the community of criminal conduct is also a stated sentencing purpose (S 9(1)(d) PSA). It is closely allied with deterrence.

[32] As Kirby J noted in *Ryan v R* (2001) 206 CLR 267 [118] a denunciation represents "a symbolic collective statement that an offenders conduct should be punished for encroaching on society's basic code of values as enshrined within our criminal law".

[33] Punishment also has an obvious purpose of reinforcing the standard society expects of its members. Denunciation or community disapproval works on the basis of the theory that a sentence can have an educative effect on both the offender, his peers, and the wider community by condemning deviant behaviour.

[34] In *Inkson v R* Underwood J said:

> "The community delegates to the Court the task of identifying and weighing the outrage and revulsion that an informed and responsible person would have to criminal conduct".

[35] Deterrence and denunciation also have a protective as well as preventative and punitive objects. They act as a safeguard against the deleterious effects of crime on society by stopping it from happening in the first place or again.

[36] The role a sentencing court plays in community protection may sometimes require that the purposes of retribution or deterrence are given significantly more weight than others, such as rehabilitation, even in the case of a young offender with a limited history of offending, especially when immaturity is not a major factor and the crime committed was of considerable gravity.

[37] Youth does not always demand an objectively proportionate sentence to be moderated at the expense of increasing risks to community safety and welfare.

[38] On the other hand, the recognition in section 3(b) PSA that ensuring community protection can appropriately be a paramount consideration does not permit proportionate punishment to be increased just to protect the community from the perceived risk of future offending.

Sentencing principles

[39] The principles of sentencing are the overarching legal rules controlling the sentencing process. They are distinguished from sentencing purposes, (which identify the goals or objectives a sentence is intended to achieve) and from

sentencing factors (which are the specific matters relevant to sentencing a particular offender).

[40] The principle of proportionality is the primary mechanism for ensuring that sentences are both fair to the offender and society. It operates to restrain excessive arbitrary and capricious punishment (ALRC 103 (2006) 557). The principle is "rooted in the respect for basic human rights (R. Fox, "*The Meaning of Proportionality in Sentencing*", 1994, 19 MULR, 489 of 492).

[41] A just punishment is adequate for the intended criminal justice purpose – no more or less. It is neither overly lenient nor too heavy. In applying the principle, the objective seriousness of an offence is measured by reference to the offending conduct, its circumstances and consequences intended or otherwise.

[42] A related principle of parsimony operates to prevent the imposition of sentences that are needlessly severe or excessive. It requires the minimum, not the maximum sentence the offence justifies, in the overall public interest.

[43] Consistency or predictability are also fundamental principles that sentencing courts should give practical expression to so as to maintain a fair and respected criminal justice system. Inconsistency can cause injustice and reflect error.

[44] No discretionary decision-making system is perfectly uniform. Reasonable variation is to be expected. However, there are definite limits beyond which disparity and discrepancy cannot be tolerated (*Wong v R* [2001] (2007) CLR 584 at 591, per Gleeson CJ). Too much inconsistency tends to erode public confidence in the structural fairness of the system and can reduce the deterrent effect of sentences by undermining the perception of reasonable certainty of punishment (*Griffiths v R* (1977) 154 CLR 606, at 611).

[45] As Mason J pointed out in *Lowe v R* (1984) 154 CLR 606, at 610 – 611:

> "…avoiding unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and the community".

[46] The subsidiary principle of parity between co-offenders requires more or less equal treatment by the law of offenders with joint criminal responsibility. Parity or equal justice is subject to the requirements of the competing and sometimes contradictory principle of individual justice.

[47] Thus, although like cases must be treated alike, no two offenders are identical and some variation may be justified by more stronger claims of punitive sentencing purposes and different principles in one than the other of the PSA; however, any disparity in co-offender sentences must not be so substantial as to give rise to a justifiable sense of grievance on the part of the offender with the heavier penalty to pay (*Postiglionie v The Queen* (1997) 189 CLR 295).

[48] The effect of the totality principle noted in subsections 9(2)(l) and (m) is that the aggregate sentence involved for multiple offences must be just and equitable, that is, not crushing. In other words, the sum total of a series of individual sentences must not be more than the minimum punishment required to meet the legitimate purpose of sentencing or be manifestly excessive compared to the overall criminality

involved in the individual sentences for which the offender is dealt with (*R v Baker* (2011) QCA 104 at [39]).

[49] While there are cases emphasising the need to consider the legal basis, degree of participation and level of responsibility of the conduct of each co-offender in determining their respective liability to punishment (e.g. *Lowe v R* (1984) 154 CLR 606 at 609; *R v Houldsworth* (1999) QCA 322; and *R v Morton* (1997) 95 A Crim R 380), offenders pursuing a common intention to commit a crime in company may properly be regarded as equally responsible for the purpose of sentencing.

[50] For example, in *R v Cotter* (2003) NSW CCA 273 there were four offenders involved in a home invasion, and Carruthers AJ, with whom Beazley JA agreed said at [87] – [89]:

> "The law is clear that where there are two or more persons carrying out a joint criminal enterprise each is responsible for the acts of the other or others in carrying out that enterprise. A joint criminal enterprise exists where two or more persons each have an understanding or arrangement amounting to an agreement between them that they will commit a crime. The understanding or arrangement need not be expressed and its existence may be inferred from all the circumstances. It need not have been reached at a particular time before the crime was committed. The circumstances in which two or more persons are participating together in the commission of a particular crime or crimes may themselves establish an unspoken understanding or arrangement amounting to an agreement formed between them to commit that crime. If the agreed crime is committed by one or other of the parties to the joint criminal enterprise all parties are equally guilty of the crimes regardless of the part played by each of them in its commission."

[51] I note, however, that it is open to the sentencing judge to depart from this basic approach and take into account the actual conduct on the part of the offender in a riot by way of aggravation or mitigation (*See R v McCormack and Others* (1981) VR 104 at [109]).

[52] A majority of the Queensland Court of Appeal distributed criminal responsibility among three participants in the 2004 Palm Island riot because of the different roles they played. (*R v Poynter and Others; ex parte Attorney General* (2006) QCA 517 at [33] per de Jersey CJ) approving the sentiments expressed in *McCormack* at 109).

[53] Riot, like affray, involves violence and public alarm, because they are both either actually or potentially dangerous.

[54] The sentencing principle in s 9(2)(a) at (i) – (ii) that jail time is an option of last resort and less preferable than a community-based order does not apply for violent offences even when committed by young men with no or limited relevant prior history (see section (9)(3)(a) – (b)). Requiring the Courts to be less reluctant to send violent offenders to jail is intended for the protection of the community (*R v Lovell* [1998] QCA 036 at p 4 per Byrne J). Nonetheless, age remains a material consideration where there are reasonable rehabilitation hopes.

[55] Accordingly, although the 17 mandatory factors listed in section (9)(2)(c)–(r) of the PSA are still relevant the prime considerations in all cases of violence are those in s 9(4) and (8).

Incapacitation for community protection from risks of harm.

[56] Incapacitation aims to restrain an offender from re-offending and to provide community safety and welfare. The most common form of incapacitation is imprisonment.

[57] The punishment of imprisonment should be calculated primarily by reference to past and proven, not predicted future, conduct.

[58] However, subsection 9(4) requires the Court to have principle regard to (a) the risk of physical harm to any members of the community if a custodial sentence were not imposed, (b) the need to protect any members of the community from that risk and (f) any disregard by the offender for the interests of public safety.

[59] A custodial sentence will generally be warranted when the punitive or coercive purposes of punishment such as retribution, denunciation and deterrence assume the dominant role.

[60] Despite this, care must be taken in considering future risk not to imprison an offender by reference to an anticipated form of misconduct. It may never actually occur.

[61] As Gleeson CJ noted in *Fardon v the Attorney-General of Queensland* (2005) 223 CLR 575 at 589:

> "The way the justice system responds to preventable risks is an almost intractable problem however assessed dangerousness as a criteria for involuntary detention is becoming increasingly common in Australia and predictive conclusions have been recognised by the High Court as integral to the criminal sentencing discretion".

[62] Still, risk is an unruly basis for depriving a citizen of liberty. A risk based finding is at best a forecast about what might never actually happen and past behaviour may be the only but not the most reliable predictor.

[63] The potential for injustice exists whether preventative steps such as incapacitation are taken or not. On the one hand, a false positive can result in unjust incarceration, while on the other, a false negative can be socially harmful.

[64] The challenge is to determine whether the probabilities and severity of the assessed risk justify departure from the general rule in s 9(2) PSA.

[65] No sentencing decision is risk free. But there are dangers that are at such a high level as to be unacceptable for the Courts to take with the safety of others.

[66] In making a risk assessment for the purposes of sentencing, all relevant factors must be taken into account, including the offender's past record of violence, his overall character and associations, the chance of rehabilitation, other lesser preventative options likely to minimise the assessed risk or reduce it to a level of acceptability while at the same time, providing adequate community protection.

[67] I note, in this context, the unprecedented legislative encroachments on traditional civil rights and protections that the Broadbeach riot provoked to deter conduct of a

similar kind in the future, maintain civil authority and protect the community from the activities of criminal gangs like the Bandidos.

[68] The Bandidos is a declared criminal organisation under the *Criminal Code (Criminal Organisations) Regulation Act 2013*. As such, its participating members are deemed to be an ongoing risk to community safety, welfare and order (see section 1(a)(ii) of the Criminal Code).

[69] The government has taken what it calls a zero-tolerance crackdown on the unlawful activities of declared or defined criminal organisations. A range of tough, new so-called anti-bikie laws was introduced late last year. See, for example, the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013*.

[70] Section 72 (affray) of the Criminal Code was amended to create a circumstance of aggravation where the offender is a participant in a criminal organisation, with that circumstance carrying a maximum penalty of seven (instead of one) years imprisonment and a mandatory minimum penalty of six months actual detention in a jail.

[71] Affray is traditionally regarded as a less serious offence than riot, however the increased penalty is not applicable here because the offence took place before it was enacted.

[72] Both research and experience shows that peer networks with sub-cultural norm of blind loyalty and lawlessness leads to violence as a primary dispute resolution method. Rioting in public streets is inimical to community welfare and the peaceful enjoyment of life. It endangers public safety and security of property. It is an affront to the rule of law, especially when directed at the police service.

[73] Participating in a riot involving "the threat that lies in the power of numbers" (*McCormack* at 109) in the current circumstances demonstrates a total disregard for public safety and the risk of harm to innocent bystanders, including children and any police unlucky enough to be caught up in such a dangerous situation.

Antecedents, age, character and past record

[74] The offender is 22 years old. He is a single man who usually resides in Brisbane. He is an out of work labourer with previous convictions. At the time of the offence, he had been a prospect member of the Bandidos Motorcycle Club for nine months.

[75] The chance of future violent offending within the community in this case, in my assessment, is within the middle range. The consequences if that risk becomes a reality are likely to include physical harm to members of the public, but it is hard to say how serious that harm will probably be.

[76] Significantly, the offender has served a short term of imprisonment for assaulting police in 2012 and illicit drug possession. He was imprisoned for 12 months in 2011 for setting off homemade chlorine bombs on police property.

[77] In an affidavit sworn on 18 October 2013 (exhibit 7) the offender purports to renounce his membership of the Bandidos. I have no way of knowing, with any degree of confidence, whether the affidavit was an expedient ploy with bail in mind, or a sign of genuine resignation from a declared criminal organisation.

The prescribed punishment

[78] The maximum penalty for rioting at the time the offence was committed was three years imprisonment. The maximum provides a starting point and basis for comparison between this offence and the worst possible case (*Markarian v R* (2005) 79 ALJR 1048 at [31]).

[79] The penalty for obstructing police performing their duty is a $400 fine or short term of imprisonment.

[80] In my opinion, the riot offence lies in the middle range of seriousness for offences of its type. It was an apparently premeditated, arrogant and dangerous act of mob violence that threatened to escalate out of control in a busy street. It put public safety at real risk.

[81] While the level of violence was not high, the obvious risk of serious injury clearly was. The gravity of the offence and culpability of the offender are measured by the potential as well as the actual degree of associated violence (*McCormack* at 107-108).

[82] There is no reason for supposing that the offender did not appreciate the dangers. Knowingly participating in mob violence for an unlawful purpose is an aggravating feature (*McCormack* at 108).

[83] Another aggravating factor is the fact that the rioters turned their attention from the original targets to police doing their duty (*McCormack* at 109). While riot cannot be described as a prevalent offence in Queensland, it is an extreme example of street violence and public nuisance, both of which are reportedly on the increase nationally.

[84] Deterrence and denunciation are therefore of great weight in determining the proper punishment of this offender. As Bray CJ said in *R v Thompson* (1975) SASR 217 at 222:

> "… as I have said in other contexts recently on more than one occasion, there are offences where the deterrence principle must take priority and where sentences of imprisonment may properly be imposed, even on first offenders of good character, to mark the disapproval by the law of the conduct in question and in the hope that other people will be deterred from like behaviour. Offences against public safety may often legitimately fall into this class."

[85] In assessing the objective gravity of the offence and the blameworthiness of the offender, I propose to take the basic approach to sentencing a rioter approved by the full court in *McCormick* at 108-109. Consistently with the elements of the offence necessarily admitted by the plea of guilty riot involves joint liability of all those involved. Thus, the offender is not sentenced for his individual acts considered in isolation. He is sentenced for what the riotous crowd he was a part of did. His criminal responsibility derives its gravity from "becoming one of those who by weight of numbers pursued a common and unlawful purpose" (*McCormick* at 109).

Range of sentencing options

[86] The first decision to make is whether imprisonment or some lesser penalty is called for. Imprisonment involves involuntary loss of liberty and is the most severe form of punishment available in Queensland. It is costly and has a doubtful record of crime control (ALRC 103 (2006) [7.59]). However, it has the obvious advantage of community protection, retribution, deterrence and enunciation effects.

[87] An offender can be ordered to serve all or part of a term of imprisonment and a parole release date may be fixed. Pre-sentence custody must be deducted as time already served.

[88] The benefit of short terms of imprisonment to the offender and community is debatable (ALRC 103 (2006) [7.68]-[7.69]). However, they are an available option in appropriate cases.

[89] If a custodial sentence is justified by the purposes of sentences consistently with the statutory principles and relevant factors of aggravation and mitigation, a determination then has to be made as to the proper length and finally, how it should be served. That is, in full time custody or by way of a suspended sentence (*Dinsdale v The Queen* (2002) CLR 321 at [79]).

[90] The sentencing process is, however, more art than science (*Wise v R* (1965) Tas R 196 at 200). The nature and extent of a just punishment cannot be calculated exactly by the application of mathematical rules or methods.

[91] A suspended sentence is not made available to courts by the legislature as a soft option when it is "not quite certain what to do" (*Dinsdale* at [79]).

[92] The primary purpose of a suspended sentence of imprisonment is to denote the seriousness of the offence and the proportionate punishment for such offending while at the same time giving a particular offender the chance to avoid all or some of those adverse consequences for as long as he or she remains of good behaviour.

[93] Courts repeatedly assert that the sentence of suspended imprisonment is a penultimate penalty known to the law, and this statement is given credence by the terms and structure of the statute. However, in practice, it is not always viewed that way by the public, by victims of criminal wrongdoing, or even by offenders themselves. (cf *Elliot v Harris (No 2)* (1976) 13 SASR 516 per Bray CJ).

[94] If a suspended sentence is not regarded as sufficiently severe punishment to achieve the purposes of sentencing it should not be imposed. Where nothing less than an actual custodial order is necessary to adequately satisfy the punitive aspects of punishment, a suspended sentence even in conjunction with pre-sentence custody and the disciplining effect of a lengthy operational period, would be overly lenient.

[95] As Kirby J pointed out in *Dinsdale* at [74], there is "a conceptual incongruity" involved in the notion of a suspended sentence and despite the rhetoric such sentences are seen by some not to constitute much punishment at all. At [80] his Honour discussed the community attitude towards suspended sentences:

> "The question of what factors will determine whether a suspended sentence will be imposed once it is decided that a term of imprisonment is appropriate, it is presently starkly because in cases where the suspended sentence is served

completely without reoffending the result will be that the offender incurs no custodial punishment".

Non-parole periods

[96] If a period of imprisonment is not suspended a parole release date can be fixed under section 160B PSA. Although there is no general rule if imprisonment is ordered it will generally be in the interests of certainty and "truth in sentencing" for a significant proportion to be spent in actual detention.

[97] According to the Australian Law Reform Commission (ALRC 103 (2006) at [9.38]) in general it should be no more than 75 per cent and no less than 50 per cent of the sentence.

[98] The non-parole period should reflect the minimum term of imprisonment that the prisoner must serve as punishment for the offence. It provides a lower limit to custodial punishment necessary to satisfy the sentencing purposes. The purpose of fixing the non-parole period or date is not to convert a punishment into an opportunity for rehabilitation. The greater the non-parole period the more the deterrent effect the sentence is likely to have.

[99] Nonetheless, any day of the sentence may be fixed, including the day of sentence or the last day of the sentence (s 160G(1)).

Prior convictions

[100] Prior record of offending is relevant to sentencing because it sets the boundary within which the objective circumstances lie. As stated in *Veen* (No. 2) at 477 it also:

> "… shows whether the incident offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the incident offence a continuing attitude of disobedience of the law. In the latter case retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted." However, prior criminal records cannot be given such weight as to lead to the imposition of a disproportionately severe sentence than the circumstances justify. Offences committed after the date of the commission of the principle offence for which the offender is to be sentenced may be taken into account, not for the purposes of imposing a heavier sentence, but for deciding whether the offender is deserving of leniency."

Plea of guilty

[101] A plea of guilty is ordinarily taken into account in mitigation of sentence. First, because it is usually evidence of some remorse on the part of the offender and second, on the pragmatic ground that the community is spared the expense of a contested trial. The actual extent of the mitigation may vary depending on the circumstances of the case. (*Siganto v The Queen* (1998) 194 CLR 656 at 663 [22])

[102] Regardless of whether or not an early plea represents contrition or the acceptance of the strength of an overwhelming Crown case, the utilitarian value of the plea to the criminal justice system generally must be given credit. In this case the plea was entered at an early opportunity.

Pre-sentence custody

[103] Mr McGuinness submits that the fact that the offender has served a period of time in pre-trial custody under a segregation order since 3 January this year as an identified member of a declared criminal organisation, which means that he is not accommodated with other prisoners and is kept in solitary confinement for up to 22 hours a day with the loss of other ordinary privileges is a relevant sentencing factor because it makes the conditions of his detention more onerous than other inmates. I accept, as a matter of principle, that the conditions of detention in custody is relevant to sentencing.

[104] In *R v Allinghan and Others* (1994) QCA 43 the sentencing Judge gave a remand prisoner a weeks credit for every day spent in an over crowded watch house instead of a prison in accordance with the approach that had been taken in earlier cases. However, unlike this case that was not a matter of policy nor did the over crowded watch house represent a deliberate regime.

[105] The policy of the Corrective Services, in respect of identified participants in criminal organisations, reflects Government policy aimed specifically at deterring membership of outlaw motorcycle gangs and other criminal organisations.

[106] In *Callahan and Attendee Z* [2013] 013 QSC 342 Applegarth J reduced a notional term of five months imprisonment for contempt to four weeks on account of the likely detrimental effects of solitary confinement. In doing so his Honour considered at [54] that a "substantial allowance" should be made because of the "unusually harsh" punitive effect of segregation on the prisoner.

[107] Whealy J was less generous in *R v Lodhi* [2006] NSWSC 691 when sentencing for a terrorism offence. He said at [88]:

> "In my view the court is entitled to make some allowance in the sentencing process for the conditions of imprisonment. This is particularly so because of the fact that those conditions of imprisonment are imposed by virtue of the classification follow on conviction from terms of a regulation rather than by way of detailed, subjective assessment. However, I do not consider that the allowance should, in any sense, be a substantial one and even on – or even one that can or should be mathematically calculated. It needs to be borne in mind that the offender was in fact coping very well with his prison situation and this is no doubt, at least in part, occasioned by his religious convictions. Secondly, it is clear that his classification is not set in concrete and that the possibility of less onerous reclassification is by no means out of the question. As a sentencing Judge I would recommend to the prison authorities that they ought not lose sight of the need to reconsider the reclassification to reconsider the classification of the offender at a relatively early stage of his prison term."

[108] In other cases it has been recognised that hardship of custody can be taken into account but most of those, including the one relied on in *Attendee Z*, related to protective custody. That is, conditions designed to protect police informers rather than to make their prison time more onerous.

[109] The practical effect of protective custody, of course, is that their conditions in prison, although not intended by the sentencer, are significantly more burdensome than normal prison time.

[110] The *Corrective Services Act* 2006 was recently amended to enable for the segregation of identified participants in criminal organisations and to restrict their movements. This was a conscious decision on the part of the government because it was considered necessary and justified as an appropriate and effective way of dealing with serious issues associated with criminal organisations including motorcycle clubs, as well as to address unacceptable, violent, intimidating and anti social behaviour that the community has been subjected to, in recent times, by bikies (see Explanatory Note *(Criminal Law)(Criminal Organisations Disruption) and Other Legislation Amendment Bill*, [2013] at page 5-7).

[111] Similarly the Explanatory Note explains (at p 8):

> "The amendments…provide for the segregation and restricted management regime of prisoners identified as participants in a criminal organisation. It also establishes the power of the Chief Executive to restrict the movement and monitor and require drug tests of offending in the community, on community based orders and parole orders, who are also identified participants in a criminal organisation. It is arguable the amendments do not have sufficient regard to the rights and liberties of individuals. However, the proposed amendments only impact on prisoners and offenders who are identified as members of a criminal organisation. While prisoners have rights they are not entitled to the same rights and liberties as others."

[112] As Brennan J noted in *R v Lindale* (1989) 64 ALJR 241 and 242

> "…it would be a mistake for one branch of Government to assume the jurisdiction of another in the hope that what is perceived to be an injustice (perpetrated by the other) can be corrected. Important public policy issues of crime and punishment and law and order are the traditional province of the legislature not of the courts."

[113] I see real problems associated with the routine recognition, by sentencing courts, of prison standards. As a basis for lessening might otherwise be an appropriate sentence.

[114] It leaves the court vulnerable to criticism that it is violating the separation of powers doctrine or subverting legitimate legislative public policy purposes, in reverse, by adapting sentencing practices to circumvent or negate legislative or administrative power or another independent arm of Government.

[115] However, as I have said, I propose to give this offender a discount for the conditions under which he has served presentence detention and for likely future segregation.

Comparable cases

[116] As already noted, consistency and the parity principle require that sentences imposed by courts do not stray outside an established range for the relevant offence. However, considering previous sentences imposed in other similar cases, even on co-offenders, by first instance courts, may not be as helpful in arriving at the appropriate sentence as reliance on the statutory sentencing regime itself. Beyond

using prior decisions to identify the permissible range, or pattern, of sentences for a particular category of offences and offenders searching for a correlation between the current case and an earlier one can offend the requirement of individual justice and amount to a wrongful delegation by the sentencing court of it's own discretion.

[117] Subject to a proper application of the parity principles different sentences for the same offence provide a guide to the range only.

[118] However, I am acutely mindful of the need to ensure that any difference in sentences between co-offenders is not so marked as to give rise to a justifiable sense of grievance on the part of the offender with the heavier penalty.

[119] Nonetheless just because sentences for the same offence are different does not mean that one or other of them must be wrong. To require a subsequent sentencer to follow the sentence imposed on a co-offender on the basis of the assumption that any substantial departure is therefore erroneous, and, in my respectful opinion, misstates the requirements of the sentencing laws.

[120] Moreover, the same body of evidence is apt to produce equally reasonable but opposite conclusions neither of which can be scientifically or definitively demonstrated to be correct or otherwise. (See *CDJ v VAJ* (1998) HCA 67 at [151]

[121] In *McCormack v R* (1981) VR 104, four applicants aged between 17 and 24 with no significant convictions spontaneously joined in a riotous crowd of about 200 outside the Frankston Police Station – police were outnumbered ten to one. The riot lasted for 30 minutes. Although the risks were described as "quite enormous", no serious injury or damage in fact resulted. The riot was characterised by the sentencing judge as a "grave disorder". He imposed a less severe sentence than he otherwise would have because the applicants did not appear to appreciate the full gravity of the mob mentality.

[122] The Full Court at 109 said:

> "The judge was entitled to give great weight to the consideration of deterrence. These were the first prosecutions and the first convictions in Victoria for some time for a riot of this type. This riot was serious and dangerous. It was an occasion when it was appropriate by the imposition of substantial sentences to make clear the gravity with which the law and the community view the crime of riot and the substantial sentences to be expected for it. Such sentences make it less likely for others to follow the applicant's example by joining in a riot."

[123] The fact that the rioters had acted against the police in execution of their duty was treated as another aggravating feature.

[124] However, the Full Court held that the original sentence of 18 months imprisonment exceeded the applicable range and resentenced each offender to nine months imprisonment without differentiating between their roles.

[125] In *Poynter*, *Norman & Parker; ex parte A-G* (Qld) - (2006) QCA 517, the majority of the Queensland Court of Appeal (de Jersey CJ and Chesterman J concurring, McMurdo P dissenting) set aside sentences imposed on three participants in the Palm Island riot by 300 residents lasting nearly four hours in 2004.

[126] Deterrence and denunciation were regarded as prime considerations in light of the targeting of a smaller number of police officers and the burning down of the police station.

[127] Poynter was charged with riot. He was the youngest at 26 years old and had a lengthy criminal history for assault, obstruct police, wounding and breach of domestic violence orders. He had been sentenced to two and a half years imprisonment in 2001 for going armed in public. He had served eight days in pre-sentence custody and was sentenced to 12 months imprisonment to be served by way of intensive correction order, that is, in the community, not in prison.

[128] He was dealt with by the original sentencing judge on the basis that his conduct was "at the tail end of things", that is, after the police station had been burned down and "in the lower echelon of offences".

[129] On appeal, de Jersey CJ said at [50]:

> "Poynter's substantial past criminal history is highly significant for its violence and the circumstances of his involvement - joining the affray when he knew that serious harm had been and was being wrought and arming himself with an iron bar which he used to threaten police. These, taken with the overall need for appropriately deterrent sentences, meant that he should have been actually imprisoned, notwithstanding the maximum penalty for his offence was three years and not longer."

[130] Importantly, Poynter was an Attorney-General's appeal which traditionally attracts a moderate approach on re-sentencing.

[131] The appeal against Poynter's sentence was allowed to the extent that the intensive correction order was set aside, and in lieu he was imprisoned for 15 months. A parole release date of five months was fixed.

[132] In *Yassin v Williams* (2007) WASC 8, a self-represented 20 year old first offender was sentenced to eight months immediate imprisonment for pleading guilty for taking part in a riot between two groups. The actions of the group scared and endangered onlookers and significantly disturbed the peace. Shopkeepers locked themselves into the premises for safety. The event lasted for about 20 minutes before police arrived and the crowd dispersed. The accused was identified by video surveillance. The prescribed penalty for riot in Western Australia then was two years more than it now is in Queensland, but on summary conviction carried a penalty of one year less, namely, two years and a fine of up to $24,000. The Chief Magistrate of Western Australia, after noting the maximum on summary conviction of two years, imposed an eight month sentence of imprisonment.

[133] The appellant was born in Somalia and was on leave from studying a university course. He was not represented by a lawyer at the sentence. It was noted by the appellant court that there was no established pattern of sentencing for the offence of riot because convictions were something of a rarity. However, it was emphasised, that the maximum penalty provided indicated that the law regards the offence of taking part in a riot as less serious than assault occasioning bodily harm, for instance.

[134] An aggravating feature of the riot was its brazen nature and the prolonged period over which shopkeepers were disturbed and traffic hindered.

[135] On appeal it was said that the appellant had committed a moderately serious offence of participating in a riot as a first offender with excellent antecedents. When those factors were considered collectively, a suspended term of imprisonment was more commensurate with the seriousness of the offence.

[136] Accordingly, the eight month term of imprisonment was suspended immediately for a year.

[137] I note, however, that the relevant legislation in Western Australia required that - imprisonment is to be reserved as a sentencing option of last resort. As noted earlier that is not the case here in Queensland when violence is involved.

[138] Finally, a co-offender, Craig Jackson, appeared before the Magistrates Court at Southport on 13 December last year. The transcript of the sentence hearing provides a detail not only about his involvement in sentence, but also of two other co-offenders named Levitt and Al Sheikh who had been sentenced previously.

[139] Levitt was identified on CCTV as holding a chair. He did not enter the restaurant. He was sentenced to four months imprisonment suspended after 21 days for an operational period of 15 months. He had prior convictions for affray and various street offences.

[140] Al Sheikh was seen yelling at police after the violence in the restaurant had erupted. He was 21 years of age with a relevant history including wounding and assault occasioning bodily harm in company for which he'd been sentenced to imprisonment. It seems that the prosecution sought and was given community service for Al Sheikh. Although it's not noted in the judgment, I'm told that he was ordered to perform 150 hours community service.

[141] Jackson was sentenced to six months imprisonment suspended after one-third with an operational period of two years. Jackson was part of the group that entered the restaurant. In referring to Jackson's participation, the Magistrate (at page 8, line 25) noted that his presence added to the intimidation and weight of numbers inside the restaurant. Jackson is 39 years of age and had a dated prior criminal history for assault occasioning bodily harm.

[142] As the length of my reasons for sentencing might suggest, I have found it difficult to resolve the competing sentencing principles and factors in a way that adequately satisfies the statutory purposes of sentencing.

[143] Had it not been for the sentences imposed previously on the co-offenders, I would have fixed a head sentence of 12 months full-time custody on this offender to reflect what in my mind is the objective seriousness of the offence. I would have set a parole release date at the end of six months, that is, on 20 June 2014, would have been set on account of his age, plea of guilty and the circumstances in which he has and is likely to serve his sentence in a correctional facility.

[144] However, because of the lighter sentences already given to others involved in this riot, it seems to me that, imposing the sentence that I think the offender deserves, will give rise to an understandable sense of grievance.

[145] Accordingly, doing the best I can to impose a just sentence that satisfies all pertinent purposes of sentencing according to the statutory principles and giving full credit for the mitigating factors without ignoring the aggravating features of the offence, I order that the offender be imprisoned for a period of nine months. A parole release date is fixed for 4.5 months of that time, that is, 28 April 2014.

[146] I declare the 38 days presentence custody to be taken as time already served in respect of that sentence.

[147] For the offence of obstructing police, the offender is sentenced to a concurrent term of imprisonment of one day.

[148] Convictions will be recorded.