SUPREME COURT OF QUEENSLAND

CITATION:	*R v Chang-Time* [2017] QCA 92
PARTIES:	**R** **v** **CHANG-TIME, Conrad Jude** (appellant/applicant)
FILE NO/S:	CA No 235 of 2016 DC No 362 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Cairns – Date of Conviction: 4 August 2016; Date of Sentence: 5 August 2016
DELIVERED ON:	16 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	24 April 2017
JUDGES:	Sofronoff P and Morrison JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is dismissed.** **2. The application for leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PROSECUTION NOT HELD TO PARTICULARS – where the particulars were amended during the trial after the evidence was concluded – where the trial judge directed the jury in relation to the amended particulars – where there was no complaint about the direction of the trial judge during the trial or on appeal – whether there was a miscarriage of justice CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – INTERVENTION OF TRIAL JUDGE DURING THE TRIAL – where the trial judge asked various questions throughout the trial – where these questions related to evidence or directed the attention of witnesses to the content of the examination – whether there was a miscarriage of justice occasioned by his Honour's questions CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was convicted of extortion – where the appellant was sentenced to four years' imprisonment – where

the appellant claimed that the trial judge failed to have proper regard to several matters relevant to penalty – whether the sentence was manifestly excessive

R v Cifuentes [2006] QCA 566, followed, applied
R v Taouk [2012] QCA 211, applied

COUNSEL: The appellant/applicant appeared on his own behalf
D Nardone for the respondent

SOLICITORS: The appellant/applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** The appellant appeals against his conviction for demanding a sum of money, without reasonable cause, with intent to gain a benefit for himself and another and with a threat to cause a detriment to FP. He was charged with a co-accused, one Thomas Conti.

[2] The complainant, Mr FP, was the neighbour of the appellant's co-accused, Conti. Mr FP said that on 28 October 2014 he began to receive phone calls from Conti, who asked to borrow money from Mr FP and also asked for other money "for B's father". He wanted $30,000. It was put to Mr FP, in a variety of ways, that Conti and the appellant knew that he, Mr FP, had in some manner dealt indecently with B.

[3] At the time, according to Mr FP, he had met B, a boy of 11 or 12, but had never met B's father and did not know who he was. The next day, on 29 October 2014, Mr FP began to receive text messages from Conti asking him to call.

[4] A text message from Conti read:

> "This is B's dad. You've got one hour to ring me or I'll get the police onto you. Don't back out of you know what."

[5] A little later on the same evening he received a text message that read:

> "You won't to go to jail."[1]

[6] There then followed two separate text messages within minutes of each other which read, respectively:

> "I am in Gordonvale. I am waiting.
>
> I am going home, call me."

[7] A further text message on the same evening consisted of a number of dollar signs followed by happy face Emoticons. This was followed by a message reading:

> "Where are you"

[8] Another text message on the same evening read:

> "That what B dad text to me, bro."

[9] On 30 October he received another call from Conti who then handed the phone to another person who identified himself as B's father. This person, who was actually

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[1] [*sic*]. Each of the text messages referenced throughout the judgment are quoted verbatim with their respective spelling and grammatical errors.

the appellant, told Mr FP that he, the appellant, and B had talked that night and had discussed matters and had decided to ask Mr FP for $20,000 each. The appellant, posing as B's father, accused Mr FP of having done something "wrong" to B. During the same conversation Conti told Mr FP that he, Conti, was a go-between between B's father and Mr FP.

[10] On the evening of 30 October Mr FP received another text message from Conti's telephone which read:

> "This is B's dad. You've got one hour to ring me or I'll get the police onto you. Don't back out of you know what."

[11] On the next day Mr FP received a further text message, reading:

> "This is B dad. Meet me at Tom tomorrow at noon."

[12] On 31 October Mr FP began to receive text messages from a different telephone number. The first such message read:

> "[Meet] at Tom place, lunch time Saturday, B dad."

[13] Later that day he received a further message from the same number:

> "This is B dad. Meet me at Tom tomorrow at noon."

[14] On 1 November he received a further message from the same number:

> "Today is your last day. I'm going to the police, me and my son, to have you lock up for the rest of life."

[15] A little later on the same day the following message was sent from the same phone:

> "Ring Tom and let him know where you going to meet up with me today. I promise you nothing will happen to you and you'll be free. If you don't I will have you lock up for the rest of your life behind bar. I do have in-laws that work with the police force. What you did to my son was wrong but I'm willing to forget and forgive if you make the deal the way we talk about. I'm in control, not you."

[16] Finally on that day he received a further message:

> "My son B told me what you did to him. You make him have a shower and then you fuck him up the arsehole and then you fuck him with a black dildo. How dare you did that to my son."

[17] On 5 November Mr FP reported the matter to police.

[18] Police took possession of Mr FP's telephone. On 6 November, while the phone was in the hands of police, the following text message was received from a different phone number:

> "FP, this is B dad. I'm going to the police on Friday to have you lock-up. Ring Tom. I know the company that you work for, VD and your last name too. I'm not waiting anymore."

[19] On the next day another message came from the same phone number:

> "I'm going to Cairns police today to have you lock-up and to your work place to have you sacked from work."

[20] On the same day another message arrived:

> "You got until Monday to come up with the 20. This is your last day."

[21] On the same day, at the instigation of police and in their company, Mr FP made a call to this number, purportedly that of "B's father". In fact the number was that of the appellant. In the course of a conversation, the appellant repeated his threats.

[22] They made arrangements to meet in the carpark of a McDonald's restaurant. When the appellant and Conti arrived in a car driven by a female acquaintance of the appellant, they were arrested. In the rear of the car, where the appellant had been sitting, the police found a blank notebook. Examination of the notebook revealed impressions of writing on a previous page that had been torn out. The writing found in that fashion was as follows:

> "FP, you are a free man from today. I'm a man of my word. I have [*indistinct*] my friend from the laws to leave you alone and I will destroy the evidence, the paperwork that I have from the doctor to have you lock up. Don't you ever do what you did to my son, B, to anyone else again. Promise me that. Stick to your word. If you don't, I'm going to the newspaper and radio station and I'll let your friend know what you did to my son and all 57 news on TV enjoy the rest of your life with your family. Give the money to mate, Tom. If you don't, I will destroy your life. Good luck."

[23] None of these facts were the subject of challenge at the trial. Instead, the appellant's defence was based upon a contention that, having learned that Mr FP had sexually abused B, the appellant and Conti wanted to arrange a meeting with Mr FP so that the appellant could "punch him up for what he did". He admitted writing a note in terms of the writing revealed by the examination on the discarded writing pad. However, he claimed he threw the note away because he had decided he would not give it to the complainant "otherwise I'll get in trouble with the police". The appellant gave evidence that although money had been demanded on the phone and in text messages, he did not want any of it. Money was talked about, he said, because he was "just trying to line him up so we can meet up with him and so I can punch him". He said that the complainant had tried to bribe him. The appellant candidly admitted that he knew that Conti was demanding money from the complainant. He admitted that he had threatened the complainant that if he did not pay the money that was being demanded then he and Conti would "go to the police" and "have him locked up".

[24] The defence was simply that there was no intention to get any money and that the demand was merely a ruse to lure Mr FP to a place where the appellant could beat him up for what the appellant claimed he had done to B. In short, the appellant disputed only the element of intent to obtain a benefit.

[25] B's actual father gave evidence. Of course, he had made no calls to the complainant and had never demanded any money.

[26] On appeal there were no complaints about the learned trial judge's summing up. His Honour directed the jury that the prosecution had to establish beyond a reasonable doubt that the accused had made a demand with intent to gain a benefit for himself

(or for someone else). The second element was that the demand had been made with a threat to cause detriment to some person other than the accused. The third element was that the demand was made without reasonable cause. His Honour correctly directed the jury that the issue that was really in dispute, identified as such by both prosecution and defence, was whether the appellant had any intent to gain a benefit by way of money for himself or for anyone else. This raised for the jury's consideration the appellant's evidence that he lacked intent to obtain any money; his only intent was to meet the complainant so that he could assault him.

[27] The trial therefore turned on whether, despite the inference about intent that could be drawn from the fact that the appellant and Conti said that they were trying to get money for themselves, there was a doubt about that fact, in part by reason of the appellant's evidence to the contrary.

[28] The appellant's notice of appeal set out two grounds of appeal. The first was that the prosecution had not been held to its particulars and that, as a consequence, there was a miscarriage of justice.

[29] The particulars originally provided by the prosecution stated, relevantly, that:

> "The demands by the defendant were made with the threat of a detriment, namely that the defendant would report the complainant to police or otherwise publicise information harmful to the complainant."

[30] After the evidence had concluded, counsel for the appellant submitted to the judge that the case had deviated from these particulars because evidence had been given that one of the detriments which had been threatened to be caused by the appellant was a threat to withhold information favourable to the complainant. As a result of that submission having been made, the particulars were amended so that the relevant part read:

> "The demands by the defendant were made with the threat of a detriment, namely that the defendant would report the complainant to police and/or otherwise publicise information harmful to the complainant and/or withhold information beneficial to the complainant."

[31] The submissions by defence counsel were merely technical in the sense that in the course of making them he said:

> "Of course, your Honour would realise the matter for the jury is the question of whether there was an intent to gain a – to gain a benefit, but … as it stands now, the particulars and the way the case is being presented are somewhat different."

[32] After the amended set of particulars were tendered, defence counsel told his Honour:

> "My point about the particulars is just that there was an opening of two very clear matters and particulars are not perfectly aligned with them. Nothing much turns on it."

[33] Ultimately, the learned trial judge directed the jury in terms that two "detriments" were relied upon by the Crown in support of that particular element of the offence. One of these two elements was the element that had been added to the amended particulars. There was no complaint about the direction of the trial or on this appeal. As has been said, the character of the threatened detriment was never a live issue at the trial.

[34] Consequently, no miscarriage of justice has been occasioned as a result of the way the trial was conducted with respect to the particulars and this ground fails.

[35] The second ground relied upon in the notice of appeal was that the learned trial judge had intervened during the trial "such that the development of the defence case was limited thereby occasioning a miscarriage of justice".

[36] An examination of the record does not support the second ground of appeal. Like any judge, his Honour asked questions from time to time. In every respect these questions were appropriate; they sought clarification of evidence that was unclear or sought to direct a witness's attention, including the appellant's attention, to the content of the question so that the evidence was responsive. On the dozen or so occasions upon which his Honour asked questions, the character of his enquiries were not such as to stifle or affect in any way the conduct of the defence case. No miscarriage of justice was occasioned by his Honour's questions and this ground of appeal, therefore, fails.

[37] The appellant represented himself on the appeal. In his own written outline of argument he raised two matters to advance his case. Neither of these matters address the grounds of appeal.

[38] The first matter was a contention that the complainant had tried to "bribe" the appellant. The appellant contended that Conti knew that this was so but had not been called as a witness.

[39] Conti had been charged as a co-accused. He was represented by counsel before the learned trial judge on the first day of the trial on 1 August 2016. His trial was adjourned to a mention date on 30 August 2016. The trial proceeded with respect to the appellant alone notwithstanding that the indictment charged them jointly. The Crown was not, of course, in a position to call the appellant's co-accused as a witness in the Crown case under those circumstances.

[40] In any event the issue raised by the appellant, whether the complainant had tried to "bribe" him, is irrelevant. Upon the admitted facts the appellant had demanded that money be paid to him posing as "B's father". The sole issue for the jury was whether or not, having admittedly made that demand for money, the appellant had an intention to get the money. That was the way the case was conducted by both parties and it is not possible to see how any independent offer of payment of money by the complainant to the appellant could make any difference to that issue.

[41] The second matter raised by the appellant in his written outline is that the letter which he had written, containing threats and demands, and which he had thrown away, was a letter he had written at the instigation of the complainant who had himself been induced by police to invite the appellant to write such a letter. The appellant contends that this request was made so that the police officers could use the letter as evidence of extortion.

[42] The request, if it was made and whether it had been made at the instigation of police, or at the instigation of a complainant himself, furnished undoubted evidence in the case against him. However, that letter did not constitute the offence, which had already been committed before the writing of that letter.

[43] There was no objection to the letter being admitted as evidence by the appellant's experienced trial counsel.

[44] As a consequence, no miscarriage of justice has been occasioned by the admission into evidence of the contents of the letter that the appellant had written.

[45] The appellant has also applied for leave to appeal against his sentence. He was sentenced to four years' imprisonment with a parole eligibility date fixed at 13 April 2018. This constitutes the half way mark of the sentence after taking into account 114 days of declared pre-sentence custody.

[46] In *R v Cifuentes*[2] Jerrard JA, with whom Holmes JA and Helman J agreed, observed that the course of sentencing for the event of extortion demonstrates that an appropriate sentence will generally involve a period of imprisonment because the deterrent element of sentencing is of particular importance. This is undoubtedly right.

[47] In this case, apart from the element of deterrence, the learned trial judge observed that the demand for $20,000 had its origin in the appellant's knowledge that the complainant had either received or was about to receive a substantial sum of money in respect of an insurance claim arising out of the destruction by fire of his house. The conspiracy in which he engaged with Conti was directed towards obtaining some of that money. His Honour correctly remarked that the appellant's conduct involved a great amount of planning and the making of persistent threats and demands over a number of days. Although it was Conti who had made the initial overture, it was the appellant who ultimately took control of the interaction.

[48] The appellant has shown no remorse and, indeed, no acceptance of any responsibility at all for his criminality. Instead, during his interview with police he made serious allegations against the complainant, described by the trial judge as a "vicious tirade against the complainant in this case accusing him of the most vile behaviour and expressing opinions as to what should happen to him" and concluded at trial with an implausible fiction about the demand for money being a mere sham.

[49] In short, there was entire lack of any substantial mitigating factors in this case.

[50] The learned trial judge considered and took into account two decisions of this Court.[3]

[51] In those cases the respective sentencing judges considered that an appropriate penalty would be four years and four and a half years respectively. These were reduced by reason of the factors in mitigation to three years and three and a half years.

[52] No two cases are alike, of course; however, the two cases which the learned trial judge took into account do demonstrate that the sentence imposed in this case was not, at least on its face, so excessive as to imply an error in discretion.

[53] It has already been observed that there are no substantial factors in mitigation in this case. On the other hand, it has been established that the deterrent element involved in cases of extortion normally calls for a sentence of imprisonment. The demands in this case were persistent demands sometimes made repeatedly over the course of a single day. The sum of money that was demanded was large. The threat was one which would have had consequences for the complainant in terms of his reputation which would have been difficult or impossible to eradicate. The appellant does not get the benefit of any credit for a plea of guilty. He has shown not only an absence of remorse but a refusal to accept any responsibility for his actions.

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2 [2006] QCA 566.

3 *R v Taouk* [2012] QCA 2011; *R v Cifuentes* [2006] QCA 566.

[54] For all of these reasons it cannot be said that the sentence that was imposed was so excessive so as to demonstrate an error in the exercise of his discretion.

[55] The ground of appeal in support of the application for leave to appeal against sentence also raises a contention that the learned judge failed to have "proper regard to several matters relevant to penalty". A consideration of his Honour's detailed sentencing remarks does not demonstrate any failure of that kind. On the contrary, his Honour took into account all of the matters that have been set out earlier, all of which were highly material, and did not omit to refer to, or to consider, any matters that might have been relevant to a mitigation of the sentence actually imposed.

[56] Leave to appeal against sentence should be refused.

[57] **MORRISON JA:** I have read the reasons of Sofronoff P and agree with those reasons and the orders his Honour proposes.

[58] **ATKINSON J:** I agree with the orders proposed by Sofronoff P and with his Honour's reasons.