SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ellis* [2018] QCA 70
PARTIES:	**R** **v** **ELLIS, Mitchel Wayne** (applicant)
FILE NO/S:	CA No 195 of 2017 DC No 315 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Cairns – Date of Sentence: 22 August 2017 (Morzone QC DCJ)
DELIVERED ON:	17 April 2018
DELIVERED AT:	Brisbane
HEARING DATE:	22 March 2018
JUDGES:	Morrison and Philippides JJA and Brown J
ORDER:	**The application for leave to appeal against sentence be refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced on his pleas to three offences: torture for which he was sentenced to six and a half years imprisonment, assault occasioning bodily harm for which he received 18 months imprisonment, and malicious act with intent for which he received six years imprisonment – where a total of 326 days of pre-sentence custody was declared as time already served – where the offence of torture was declared a serious violent offence and the period of an existing Protection Order was extended by five years to 16 November 2023 – where the applicant had a prior criminal history – where the impact of the offending on the complainant included disfigurement and the complainant feeling fearful and detached from family and friends – where the sentencing judge had regard to matters of mitigation referring to the pleas of guilty – where the sentencing judge took into account the applicant's personal history including the applicant's history of substance abuse – where the sentencing judge took into account the totality of the offending – whether the sentence of six and a half years imprisonment for torture was manifestly excessive in all the circumstances

Penalties and Sentences Act 1992 (Qld), s 9(10A), s 13, s 161B(3)

R v BH; ex parte Attorney-General (2000) 110 A Crim R 499; [2000] QCA 110, considered
R v Bojovic [2000] 2 Qd R 183; [1999] QCA 206, cited
R v Compton [2017] 2 Qd R 586; [2017] QCA 55, considered
R v Galleghan [2017] QCA 186, considered
R v HAC [2006] QCA 460, considered
R v Mitchell [2006] QCA 240, considered
R v Roelandts (2002) 131 A Crim R 603; [2002] QCA 254, considered

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

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

[1] **MORRISON JA:** I agree with the reasons of Philippides JA and the order her Honour proposes.

[2] **PHILIPPIDES JA:** On 22 August 2017, the applicant was sentenced on his pleas to three offences, being: torture (count 1) for which he was sentenced to six and a half years imprisonment; assault occasioning bodily harm (count 2) for which he received 18 months imprisonment; and malicious act with intent (count 3) for which he received six years imprisonment. A total of 326 days of pre-sentence custody was declared as time already served. The offence of torture was declared a serious violent offence pursuant to s 161B of the *Penalties and Sentences Act* 1992 (Qld) (the PSA) and the period of an existing Protection Order was extended by five years to 16 November 2023.

[3] The applicant seeks leave to appeal against his sentence on count 1 on the basis that it was manifestly excessive.

Circumstances of the offending

[4] The 39 year old complainant had been in a relationship with the applicant for some two months. In the days immediately before the offending, the applicant began making aggressive jealous accusations towards the complainant alleging infidelity by her. As a result, on the day before the offences, the complainant ended the relationship by telling the applicant that she had left his belongings outside her house and for him to pick them up. On 25 September 2016, the day of the offences, at 5.30 pm, the applicant attended the complainant's home unannounced. Given the applicant's cordial demeanour and pleasantries, the complainant allowed the applicant into her home, but it was not long after that the applicant again accused the complainant of being with another man or other men.

[5] The complainant went to leave and walked towards the front door. The applicant pursued her and she ran to reach the door, however, he caught her. The following acts (which include the acts constituting counts 2 and 3), formed the torture count and took place over a period of approximately four hours:

- The applicant grabbed the complainant by her shirt, which tightened around her neck and arm, causing bruising to the area under her arm.
- Despite her resistance, the applicant dragged her to a bedroom and threw her onto a bed with sufficient force to break her bra. There the applicant repeatedly demanded an apology of the complainant, who by this stage had become frightened.
- The applicant demanded the complainant "fuck off" into a bathroom and clean herself as she was bleeding. Notwithstanding that the complainant explained she was bleeding because she was menstruating, the applicant insisted it was because she had had sex with numerous different men.
- The applicant slapped the complainant across the face as she sat on the toilet. He told her that he wanted "a name", referring to the accusation of having slept with other men. The applicant then punched her head very hard, causing bleeding from a 3 cm laceration, which required suturing, and left the complainant feeling like she was going to black out. The applicant boasted that he did not hit people because he "make[s] them bleed". This blow and the resultant injury constitute count 2.
- During this altercation, the applicant ripped an earring from the complainant's earlobe, which caused bleeding and an injury that also required sutures. The complainant was made to shower to wash the blood from various parts of her body. The applicant then continued to demand the names of men she was sleeping with and, when she did not answer, the applicant repeatedly punched her to the ribs and slapped her to the face.
- The two moved to an area near the laundry where, upon noticing a door had been jemmied open, the applicant accused the complainant of leaving the door open for other men. In the laundry, he picked up a garden trowel, striking the complainant very hard on the legs, repeating his demand for names. The complainant crouched into a ball. The applicant threatened to increase the violence or to lock her in a cupboard if she screamed and gave her an eight minute deadline to provide a name.
- A period of time passed, during which the applicant paced around the house, randomly returning to the complainant, as she lay on the ground, to strike her on the arms and legs with the trowel. The applicant indicated time had expired and demanded that the complainant get into a cupboard. She complied out of fear. The applicant shut the door and again demanded "what's the name". After about 10 minutes, the applicant dragged the complainant out of the cupboard by the hair.
- The applicant then proceeded to heat the trowel over the flame of a lit gas stove. When the metal was hot, he demanded the complainant to remove her jeans and underwear. Crying, the complainant removed only her jeans. The applicant shoved a shirt into the complainant's mouth to stop her from screaming. At this stage, the complainant was curled up on the floor of the kitchen. The applicant brought the heated trowel into contact with the complainant's leg, he threatened to burn her vagina and "glue her vagina together with the trowel". He burnt her on the legs ignoring her pleas to stop, saying he "tortures people for a living". He burnt her leg near her vagina. There were intervals when the applicant returned to heat up the trowel and would comment on how "red" the trowel was. The complainant was shaking

and begging the applicant to stop. (These events marked the commencement of count 3, malicious act with intent.)

- The applicant told the complainant that there was "more to go" and heated a butter knife telling her he was going to put it on her eyelids so she would not have any eyes. He struck her with the heated knife in multiple locations over her body.
- The complainant managed to grab a kettle and doused the stove. In response, the applicant said "you shouldn't have done that" and grabbed a jar of chilli and put the chilli on her left arm, causing more pain. The applicant then boiled the kettle and attempted to pour the boiled water on the complainant. Only a little struck the complainant, most, however, poured onto the applicant.
- The applicant told the complainant to shower and that they were going to both go for a walk. The complainant felt skin hanging off her body and did not want to undergo more pain from the water in the shower, but she eventually complied. At one stage, the applicant thought he heard sirens. In an effort to calm the applicant, the complainant told him that she would say everything was ok. The complainant dressed. The applicant recommenced the alleged infidelity inquisition. As they moved outside, the applicant repeatedly kicked and hit the complainant. The complainant again tried to escape. The applicant restrained her, yelling that she apologise. When she did so, the applicant bit her on the nose, causing her to bleed.

[6] The applicant's yelling drew the attention of neighbours, who called police. In an effort to drag the complainant back into the house, a door broke striking the applicant. This caused the applicant to release the complainant and she seized the opportunity to run away. The applicant did not chase the complainant. He left the house before police arrived.

[7] The applicant was located five days after the offending. He took part in a recorded interview, making admissions but also sought to minimise his behaviour.

The injuries and impact of the offending on the complainant

[8] The applicant inflicted more than 15 burns to the complainant's upper thigh and left leg extending from the buttock to the mid-calf. They were partial thickness burns, removing the superficial skin layer. There was also a superficial burn 4 cm from the labia majora that was 3 cm by 2 cm in size. The injuries were conservatively treated with standard topical treatments and dressing. The disfigurement caused by the burning of the skin will result in the emergence of pale areas of depigmented skin which will significantly contrast with the complainant's natural dark skin. It was this disfigurement that constituted the disfigurement for count 3. Other injuries suffered by the complainant included bruising to the inner and outer aspect of her thighs, bruising to her inner right kneecap and bruising to the left side of her rib cage. She also suffered swelling and tenderness to her right arm and both legs.

[9] Through a victim impact statement, the Court was informed of the physical pain suffered by the complainant and the fear for her life that she endured during the applicant's offending. The complainant remained in hospital for several days, during which time her three and four year old children were unable to return to her

from the care of their father. The complainant was left still feeling very fearful and paranoid and, as a result, increased security at her house. She has detached from family and friends.

Prior criminal history

[10] The applicant was 34 years old at the time of the offences and 35 years old at the time of sentence.

[11] The applicant has a criminal history arising in three states: Queensland; Victoria; and Western Australia. His criminal history commenced in Victoria with offences of hindering and resisting police which together attracted a fine by way of penalty. In 2002, he was dealt with on two separate occasions for offences reflecting violence including offences of recklessly causing injury.

[12] The applicant's criminal history suggests that he then moved on to Queensland where offences of public nuisance and possession of a knife in a public place were committed in March and April of 2005. The applicant was then convicted of offences in Western Australia. From July 2006 to March 2012, he continued to offend in that state resulting in 11 further Magistrate Court appearances relating to 29 offences of dishonesty, bail breaches, driving offences, as well as two other offences involving violence. On 31 July 2007, the applicant was placed on a community based order for a period of eight months for an offence of assault occasioning bodily harm and, on 2 October 2009, he was fined $1,500 for an offence of common assault. The offence of assault occasioning bodily harm arose as a result of the applicant punching a staff member of a pub from which he was ejected because of his level of intoxication. That staff member suffered swelling and redness. The victim of the common assault was the applicant's then partner, who he had punched and kicked. The applicant returned to Victoria where further offences of violence were dealt with in October 2013 and May and June of 2014.

Sentencing remarks

[13] At the sentencing hearing, the Crown contended for a penalty for the offence of torture within the range of six to eight years imprisonment, submitting that a sentence at the midway point of the range combined with a declaration would be an appropriate sentence. In that regard, reference was made to *R v Mitchell*;[1] *R v Compton*;[2] *R v HAC*;[3] and *R v BH; ex parte Attorney-General*[4] as comparables to be considered in imposing a sentence appropriate to this case. The applicant's counsel contended for the imposition of a sentence at the lower end of the range put forward by the prosecutor and that a declaration not be made.

[14] In imposing sentence, the sentencing judge had regard to matters of mitigation in the applicant's favour. His Honour referred to the pleas of guilty and cooperation with police. His Honour also took into account the applicant's personal history, which included growing up in an environment where he and his mother were victims of domestic violence. The applicant also had a history of substance abuse, predominantly alcohol but later methylamphetamine. He demonstrated a capacity for

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1 [2006] QCA 240.
2 [2017] QCA 55.
3 [2006] QCA 460.
4 [2000] QCA 110.

sound rehabilitation. He had completed schooling to year 11 and had qualifications, including a coxswain's ticket and had a solid employment history.[5]

[15] The sentencing judge took into account the totality of the offending in the sentence imposed on count 1. In exercising the discretion to declare the torture offence a serious violent offence, the sentencing judge had regard to the following features of the offending:

- the applicant's conduct was unprovoked, protracted and sustained over a period of four hours;
- the offending was delivered in different modes and by different levels of violence, and included forcible dragging of the complainant into rooms and confinement in a wardrobe, with the violence inflicted escalating from punching and hitting to the use of weapons which were heated over a flame and used to hit and burn the complainant;
- the complainant was additionally forced to shower, causing more intense pain;
- throughout the offending, the applicant also verbally taunted the complainant, was domineering and, when his demands were not met, became angrier; and
- the complainant suffered permanent scarring and significant emotional and psychological impacts.

The applicant's submissions

[16] The applicant submitted that the sentence was manifestly excessive for the following reasons:

1. A serious violent offence declaration ought not to have been made in respect of count 1 because the offending was not outside the norm for this type of offending, particularly in circumstances where it was a single incident.
2. His Honour erred by failing to articulate his starting point for the sentence in respect of count 1 prior to moderation and to make it clear how he had moderated the head sentence for the pleas of guilty.
3. In making a serious violent offence declaration, his Honour erred in his approach by not imposing a sentence towards the bottom end of the six to eight year range and then further moderating the head sentence to take into account the pleas of guilty.
4. His Honour placed too much weight on the nature of the scarring, when there was no evidence for the Court as to the nature and extent of the scarring as at the date of sentence and the victim did not produce any photos of scarring in the sentence proceeding.
5. His Honour placed too much weight on the psychological impact of the injuries upon the victim in circumstances where there was no medical evidence, such as psychological reports, as to the nature and extent of any psychological injuries and as a result the sentence was excessively harsh.

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5 AB at 36.42 to 37.5.

[17] The applicant contended that, in the event that the sentence was found to be manifestly excessive, he ought to be resentenced at the lower end of the range, that is six and a half years, with no declaration being made and with parole eligibility after two to three years (in lieu of the five years required to be served under the sentence imposed by the sentencing judge).

Consideration

[18] Grounds 4 and 5 may be dealt with briefly and are clearly without substance. The sentencing judge correctly recorded the nature of the scarring which constituted the disfigurement. It was the subject of an agreed fact in the schedule of facts. As to the psychological aspects of the offending, these were set out in the victim impact statement made by the complainant for which treatment had not then been sought. The nature of the injuries inflicted upon the complainant were not challenged at sentence and the sentencing judge gave them due regard.

[19] As to the complaint that the sentencing judge erred in his approach in not sentencing at the bottom of the appropriate sentencing range given that a declaration was also made, at the sentencing hearing, reliance was placed on the following statement of Moynihan SJA and Atkinson J, in *BH*,[6] concerning the exercise of the sentencing discretion under s 161B(3) of the PSA in favour of the making of a serious violent offence declaration:

> "When such a declaration is made it is likely to have consequences on the rest of the sentencing discretion. Firstly the sentencing judge may impose a sentence towards the lower end of the applicable range.[7] Secondly if there is a plea of guilty, the appropriate reduction in sentence[8] will reduce the head sentence rather than require a recommendation for parole earlier than half the sentence to be served."

[20] That passage was referred to the sentencing judge in regard to the submission made on behalf of the applicant that, if a declaration was to be made, the sentencing judge ought to commence the exercising process by adopting the bottom end of the range, being six years, and then further moderate the head sentence to recognise the pleas of guilty, so as to reduce the head sentence to five years imprisonment. The applicant submitted, to this Court, that the sentencing judge appeared not to have imposed a sentence "towards the lower end of the applicable range" before then moderating further for the pleas of guilty and that his Honour had seemingly adopted the Crown's submission that an appropriate sentence was one of seven years, in the middle of the range, and then further moderated it by six months for the pleas of guilty.

[21] The declaration under s 161B(3) of the PSA is, as recognised in *BH*, a part of the exercise of the sentencing discretion which is an integrated process[9] rather than a series of discrete steps. There is no reason to believe that the sentencing judge approached his sentencing discretion in the mathematical manner suggested rather than a part of an integrated sentencing process, nor that he failed to have regard to the balancing process referred to in the quoted extract to which he was referred. In

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6 [2000] QCA 110 at [32].
7 *R v Bojovic* [1999] QCA 206; CA No 4 of 1999, 8 June 1999 at [31].
8 *Penalties and Sentences Act* 1992 s 13.
9 *R v Bojovic* [1999] QCA 206; CA No 4 of 1999, 8 June 1999 at [31].

BH, Moynihan SJA and Atkinson J observed,[10] in relation to the discretion to make a declaration, that it is likely that a person who is convicted of the crime of torture, particularly where it involves the intentional infliction of pain or suffering on more than one occasion, will be declared a serious violent offender and that that "reflects the nature of the offence".

[22] The respondent referred to the decision of this Court in the matter of *R v Galleghan*[11] delivered soon after the sentence imposed in the present case. The applicant in *Galleghan* was sentenced to eight years imprisonment with a declaration pursuant to s 161B of the PSA in relation to one offence of torture, 12 months' imprisonment in respect of a count of common assault and six months for threatening to kill in a way likely to cause fear of bodily harm. The circumstances of the offending in that case were that, after a period of separation from the complainant (the offender's former partner), the offender visited the complainant as part of a group. The group, but not the complainant, consumed alcohol. At about 8.00 pm, some people left, after which the offender and the complainant began to argue. A couple, who had left, returned and attempted to stop the argument but were ineffective. The offender inflicted the following on the complainant over a period of up to four hours. He put his right thumb to her left temple and pushed her head sideways and smashed it down a number of times onto a side table. He put his hand around her neck and held her down on the couch and used his elbow to hit her about five times to the face. He then picked her up by her hair and threw her down onto a tiled floor. He head butted her a number of times despite her bleeding and crying and begging for him to stop. He threw her to the floor and kicked her a number of times in the kidney area causing difficulty breathing. He then put his foot on her bladder area and stamped down twice saying "now you won't be able to have kids". He put his arm around her neck and applied pressure causing her to lose consciousness. He put his thumbs into each of her eyes and pressed inwards. He banged her head against the wall and hit her face with open palms. He put two fingers on either side of her mouth and pulled her cheeks away from her teeth hurting her. He then took a knife and put the blade of it to her neck saying, "It would be so easy to kill you right now. It's not hard for me to slit your throat".

[23] The offender swung a number of punches at a man attempting to stop the violence, two of which connected (constituting the offence of common assault). He then chased the man with a knife and threatened to kill him. The offender then resumed his attack on the complainant, throwing her onto the tiled floor again and repeatedly striking her around the face. He dragged her to a shipping container and put her on a metal trolley face up in the container. He then tied her to the trolley with wire, removed her underwear pushing the underwear into her mouth before wrapping wire around it to secure the underwear inside. The offending ended only with the intervention of police to whom the applicant lied about the location of the complainant. By mere luck, she did not suffer permanent physical injuries from her ordeal. That applicant had a previous criminal history including convictions for assault occasioning bodily harm in 2002, wounding in 2004 and a serious assault in 2010 for which terms of imprisonment had been imposed.

[24] The offending in *Galleghan* had more serious aspects than the present case, that were reflected in the substantially higher sentence upheld in that case, but the complainant in that case was not left with permanent disfigurement as was the case

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10 [2000] QCA 110 at [32].
11 [2017] QCA 186.

here. That decision supports the sentence imposed in this case as being well within the sound exercise of the sentencing discretion. The Court in *Galleghan* referred to the decision in *R v Roelandts*,[12] where a sentence that was, effectively, one of four and a half years was imposed. In refusing leave to appeal de Jersey CJ, observed that the sentence:

> "… should be regarded as unsustainably lenient, indeed absurdly so. It is certainly obviously not manifestly excessive. Offending of this substantial proportion warrants a condign response from the Court. The nature of this offence was close to attempted murder. I consider the appropriate starting point was eight to 10 years reduced to six for the plea of guilty."

[25] *BH* likewise demonstrates that the sentencing discretion did not miscarry. It concerned an Attorney-General appeal against a sentence of seven years imprisonment with a serious violent offender declaration imposed on a respondent convicted of the torture of his 17 year old daughter. That sentence was not disturbed on appeal, the Court finding that the appropriate sentencing range, in the circumstances of that case, was imprisonment for between seven and 10 years, together with a declaration that the respondent was a serious violent offender.

[26] As the respondent submitted, the matters relevant to the level of penalty which distinguished the various comparatives put before the Court were properly recognised by the sentencing judge. Although the offending concerned a single episode, it involved the protracted perpetration of violence of a callous and brutal nature calculated to inflict physical and mental torture. The violence was inflicted in the complainant's house where she was entitled to be safe and protected and in the context of the applicant's irrational jealousy after the complainant ended their relationship. In addition the conviction for domestic violence offences, was required to be treated by the Court as an aggravating factor.[13]

Order

[27] In all of the circumstances, the sentence has not been demonstrated to have been manifestly excessive. The application for leave to appeal against sentence should be refused.

[28] **BROWN J:** I respectfully agree with Philippides JA.

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12 (2002) 131 A Crim R 603; [2002] QCA 254.

13 Section 9(10A) of the PSA - operational on 5 May 2016.