SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cleland* [2018] QCA 273
PARTIES:	**R** **v** **CLELAND, Robert Jamie** (applicant)
FILE NO/S:	CA No 240 of 2017 DC No 74 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Gladstone – Date of Sentence: 10 March 2017 (Burnett DCJ)
DELIVERED ON:	16 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	18 July 2018
JUDGES:	Sofronoff P and Gotterson JA and Boddice J
ORDERS:	**1. Leave to appeal be granted.** **2. The appeal be dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant was convicted by a jury of one count of unlawfully doing grievous bodily harm (count 1) and one count of unlawful wounding (count 2) – where the applicant had pursued the complainant to another property, following an altercation between the complainant and the applicant's partner – where the applicant and complainant were armed – where the applicant had punched, hit with a hockey stick, and stabbed the complainant – where the applicant was sentenced to six years imprisonment for count 1, and two years imprisonment for count 2 – whether the sentencing judge erred by ascribing a specific intent to count 1, not the subject of the offence for which the applicant was convicted by the jury – where the sentencing judge's remarks referred to an intention by the applicant to cause grievous bodily harm – where such an intention was not an element of the offence for which the applicant was convicted – whether the sentencing judge's discretion miscarried by sentencing for a more serious offence than the conviction – where a re-exercise of the discretion does not warrant a lesser sentence *Kentwell v The Queen* (2014) 252 CLR 601; [2014] HCA 37,

applied
R v Jaramillo [2007] QCA 420, cited
R v Thomason; Ex parte Attorney-General (Qld) [2011] QCA 9, cited

COUNSEL: P F Richards for the applicant
J D Finch for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Boddice J and the orders his Honour proposes.

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

[3] **BODDICE J:** On 10 March 2017, a jury found the applicant guilty of one count of unlawfully doing grievous bodily harm and one count of unlawful wounding. The applicant was sentenced to six years imprisonment on the count of unlawfully doing grievous bodily harm and a concurrent two years imprisonment on the count of unlawful wounding. The applicant's parole eligibility date was set at 9 March 2020.

[4] The applicant seeks leave to appeal the sentence of six years imprisonment on the count of unlawfully doing grievous bodily harm on the ground "the learned sentencing judge erred in ascribing the applicant with a specific intent and sentencing him on that basis".

Background

[5] The applicant was born on 7 May 1970. He was 45 at the time of the offence and 46 at the date of sentence. He has a past criminal history, both in Queensland and in Victoria. His past criminal history includes offences of violence and breaches of court orders.

Offences

[6] On 24 January 2016, a dispute arose outside a residence near Gladstone. The dispute was between the male complainant and the applicant's partner. At issue was ownership of a utility the complainant was proposing to tow home to his own residence.

[7] During the dispute there was a physical assault by the complainant upon the applicant's partner. The applicant came to his partner's aid, armed with a hockey stick.

[8] The complainant left the area but was pursued by the applicant. An altercation occurred between the applicant and the complainant. The applicant was armed with a hockey stick and a knife. The complainant was armed with a baton.

[9] The applicant approached the complainant, who sought to retreat. The applicant threatened to get and/or kill the complainant. He struck the complainant twice with

the hockey stick. On the second occasion the hockey stick was dislodged from the applicant's hands.

[10] At some point, the complainant had his back against a mail box in the front yard of the property. The complainant punched the applicant about four or five times and struck the applicant in the head with the baton about three times.

[11] The applicant then stabbed the complainant in the arm and, later, in the abdomen. As the complainant fell to the ground the applicant said "I'm going to kill you".

[12] The complainant suffered a five centimetre stab wound to the front right chest area and a two centimetre deep stab wound to the right arm. He suffered a 50 per cent collapse of the right lung as a consequence of the stab wound to the chest.

Sentencing remarks

[13] The sentencing judge noted there were a number of aggravating features as well as mitigating features in the applicant's conduct.

[14] The aggravating features were that the applicant intended to both wound and do grievous bodily harm by opening the knife and stabbing the complainant on two occasions; the offending arose out of a sense of vigilantism, in which the applicant took the law into his own hands; the applicant must have felt the knife puncture the complainant's torso and was callous in leaving the complainant after he had been struck with the knife and the applicant had a significant criminal history. The sentencing judge observed the applicant was fortunate there was not an application for the court to declare him to be convicted of a serious violent offence.

[15] The mitigating factors included that the applicant had a lengthy history of employment; was in a long term relationship; had five children and had undertaken rehabilitation courses, including anger management. The applicant was therefore not beyond rehabilitation. He had also cooperated in the course of the investigation.

[16] The sentencing judge sentenced the applicant on the basis the offending had caused ongoing consequences for the complainant and had occurred in the context of a vigilante-type response on a public street, in circumstances where there was a need to protect the community who were entitled to security and quiet enjoyment of residential premises.

[17] Relevantly, for present purposes, the sentencing judge said:

> *"I think it is the case that when you took that knife and opened that knife and had it in the fight, that you did intend the effect of you producing the knife, that is the wound and the GBH. That was not only something that I think was intended, but it was something that was entirely foreseeable."*

Applicant's submissions

[18] The applicant submits the sentencing judge erred in ascribing to the applicant a specific intent and in sentencing the applicant on that basis. The applicant was convicted only of the offence of unlawfully doing grievous bodily harm simpliciter. That offence did not have as an element, a specific intent. Accordingly, the

sentencing judge's discretion miscarried in that the applicant was sentenced for a more serious offence than that of which he was convicted by the jury.

[19] Further, an issue at trial was whether the applicant, in using a knife during the altercation, acted in self-defence against a provoked assault, but was not entitled to the defence as his response was disproportionate. The jury's verdict was consistent with a finding that the stabbing of the complainant occurred in the context of disproportionate acts of self-defence. Such a finding was inconsistent with the applicant being sentenced on the basis he had a specific intent at the time he committed the offences.

[20] Such a basis rendered reliance upon yardsticks involving gratuitous violence against strangers in public, not comparable sentences. An appropriate exercise of the sentencing discretion, absent that error, was a sentence of five to five and half years imprisonment, with parole eligibility at one half of that head sentence.

Respondent's submissions

[21] The respondent submits there was no error on the part of the sentencing judge. The reference to intent was not in the context of ascribing a specific intent to the applicant. It was a reference to the introduction of the knife and the opening of the knife, during the altercation, being deliberate. The applicant's counsel had submitted the stabbings "were not deliberate". The finding excluded as a basis for sentence, a negligent use of the knife. The exclusion of such a basis was consistent with the jury's verdict.

[22] Alternatively, the respondent submits that if the sentencing judge did err, that error made no difference to the sentence properly to be imposed upon the applicant. The applicant was a mature offender with a significant history of violent offending. His actions involved a degree of vigilantism, where he became the aggressor and confronted the retreating complainant, whilst armed with a hockey stick and whilst carrying a knife. When the complainant appeared to be successfully resisting the applicant's physical aggression, the applicant introduced a knife and inflicted serious injury to the complainant. The applicant thereafter demonstrated callous disregard for the complainant's welfare. The applicant exhibited no remorse for his actions.

Discussion

[23] Whilst the applicant's counsel did contend, at sentence, that the knife was not introduced deliberately, the sentencing judge's reference to intent was not in the context that the knife was introduced deliberately. It was specifically that the applicant intended the result of producing the knife, namely the wounding and grievous bodily harm of the complainant.

[24] Intention was not an element of either of the offences of which the applicant was convicted by the jury. Further, it was inconsistent with the proper basis for the jury's verdicts of guilty, namely, that the complainant was stabbed in the course of a disproportionate response to what was the complainant's own aggression towards the applicant's partner.

[25] The sentencing judge in ascribing that intent to the applicant, erred in law. As a consequence, the sentencing discretion miscarried and it is necessary for that

discretion to be exercised afresh. In exercising that discretion, this court must determine whether, taking into account the purposes and application of sentencing principles, some other sentence is warranted in law.[1]

[26] In re-exercising that discretion, the following factors are relevant. First, the offending occurred in the context of the applicant having pursued the complainant after he had retreated from the initial altercation. The applicant pursued the complainant to a different location and engaged with a retreating complainant, whilst armed with a hockey stick and a knife.

[27] Second, the complainant was stabbed with the knife by the applicant, after he had successfully repelled the applicant's aggression. The applicant's conduct resulted in the complainant suffering two stab wounds, one to the chest, with a consequent partial collapse of the lung.

[28] Third, the applicant showed callous disregard for the complainant's serious injuries, rendering no assistance and leaving the scene. The applicant exhibited no remorse thereafter for his actions.

[29] Fourth, the applicant was a mature age offender with a not insignificant past criminal history involving offences of violence. Whilst he had shown cooperation in the course of the police investigation, had a reasonable work history and had taken steps toward addressing issues of anger management, the need for deterrence, both general and personal, looms large.

[30] The authorities put forward as yardsticks, indicate the breadth of circumstances relevant to sentences for the offence of grievous bodily harm simpliciter. For example, the infliction of grievous bodily harm, in the context of escalating violence,[2] may warrant the imposition of a lesser sentence than a case of gratuitous violence on a stranger in public.[3]

[31] Those authorities support a conclusion that a sentence of six years imprisonment is warranted in the present case. Far from involving the infliction of grievous bodily harm, in the context of escalating violence, the acts of violence involved the use of a knife on a retreating complainant who had been pursued by the applicant, with significant actual injury being inflicted on that complainant.

[32] Such a sentence properly balances the need for deterrence against all of the circumstances in mitigation, such as the applicant's work history, family commitments and attempts at rehabilitation since the offences. A sentence of two years imprisonment is also appropriate for the offence of wounding. Those sentences are to be served concurrently.

[33] Having regard to the applicant's lack of remorse, there is no reason why the applicant ought to be afforded the benefit of an earlier parole eligibility date than as allowed for by the legislation.

[34] As the sentence imposed in re-exercising the sentencing discretion, is the same as the sentence imposed at first instance, it is appropriate to grant leave to appeal but to dismiss that appeal.

---

1 *Kentwell v The Queen* (2014) 252 CLR 601 at [38] – [43]; [2014] HCA 37.
2 *R v Jaramillo* [2017] QCA 420.
3 *R v Thomason; Ex parte Attorney-General (Qld)* [2011] QCA 9.

[35] I would order:

1. Leave to appeal be granted.
2. The appeal be dismissed.