SUPREME COURT OF QUEENSLAND

CITATION:	*R v Woods (No 2)* [2018] QCA 312
PARTIES:	**R** **v** **WOODS, Storm Danyon** (appellant/applicant)
FILE NO/S:	CA No 277 of 2017 DC No 362 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Cairns – Date of Conviction & Sentence: 10 November 2017 (Clare SC DCJ)
DELIVERED ON:	13 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	1 June 2018 Written submissions received 6 September and 7 September 2018
JUDGES:	Morrison JA and North and Henry JJ
ORDERS:	**1. The application for leave to appeal against sentence is granted.** **2. The appeal is allowed.** **3. The sentence imposed for grievous bodily harm is set aside and instead the applicant is sentenced to four years imprisonment.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted by a jury of doing grievous bodily harm and unlawful wounding – where the conviction for unlawful wounding was quashed on appeal – where after appeal the prosecution elected not to pursue the charge of wounding – where the applicant was sentenced to five and a half years imprisonment for grievous bodily harm and two years for the unlawful wounding – where the prosecution contends the wounding forms part of the circumstances of the offence of grievous bodily harm – whether sentence manifestly excessive *Corrective Services Act* 2006 (Qld), s 184(2) *Penalties and Sentences Act* 1992 (Qld), s 9(3)(d)

R v Baker [2012] QCA 237, cited
R v Bryan; Ex parte Attorney-General (Qld) (2003) 137 A Crim R 489; [2003] QCA 18, cited
R v Campbell [2016] QCA 42, cited
R v D [1996] 1 Qd R 363; [1995] QCA 329, discussed
R v Johnson [2012] QCA 141, cited
R v Johnston [2004] QCA 12, cited
R v Norris [2012] QCA 57, considered
R v Sargent [2016] QCA 32, cited
R v Woods [2018] QCA 167, referred to

COUNSEL: J A Greggery QC for the appellant/applicant
M R Byrne QC, with M L Franklin, for the respondent

SOLICITORS: Phillip Bovey and Co Solicitors for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I agree with the reasons of Henry J and the orders his Honour proposes.

[2] **NORTH J:** I agree with the reasons for judgment of Henry J and with the orders proposed by his Honour.

[3] **HENRY J:** The applicant was convicted by a jury of doing grievous bodily harm to Mitchell Robinson and unlawfully wounding Tiffanie Hansen. He was sentenced to concurrent terms of imprisonment of five and a half years for grievous bodily harm and two years for unlawful wounding. He appealed his convictions and applied for leave to appeal sentence. This court allowed the appeal against conviction for unlawfully wounding Ms Hansen.

[4] The consequence of that outcome for the application for leave to appeal sentence was explained in *R v Woods*[1] as follows:

> "[91] Argument on the application for leave to appeal sentence was predictably targeted at the sentence of five and a half years' imprisonment for grievous bodily harm. That sentence appears to be a particularly significant sentence for an offence of grievous bodily harm simpliciter by a 21 year old first offender. That is particularly so bearing in mind it was committed during an altercation prompted, at least in part, by the complainant's behaviour and in circumstances where the knife used to inflict the grievous bodily harm was grabbed spontaneously from the kitchen bench against or near which the physical altercation was already underway.
>
> [92] However, before giving more detailed consideration to the application for leave to appeal sentence the consequence for sentence of the quashing of the conviction on count 2 ought be considered. At first instance, the learned sentencing judge did

[1] [2018] QCA 167.

> not specifically state the sentence imposed in respect of count 1, which was imposed concurrently with the sentence on count 2, was any higher than it would have been if he was only being sentenced in respect of count 1. Nonetheless, the respondent unsurprisingly highlighted the infliction of injury "upon a second victim" as an aggravating feature relevant to the overall quantum of sentence. The parties' submissions on the application for leave to appeal sentence did not deal with the potential significance to the outcome of that application of the quashing of a conviction on count 2.
>
> [93] The parties ought be permitted to make further submissions to this court in light of that outcome. …"

[5] Since that decision the prosecution has informed this court it will not further pursue the prosecution of the charge of unlawfully wounding Ms Hansen. There is thus no obstacle to proceeding to determine the application for leave to appeal the sentence for grievous bodily harm. Further submissions have been received to that end.

[6] The proposed ground of appeal is:

> "The sentence imposed by the learned trial judge was manifestly excessive and failed to pay sufficient regard to features favourable to the applicant."

[7] The facts of the offence were canvassed in *R v Woods*. In short, the grievous bodily harm was occasioned after the applicant reproached Mr Robinson on witnessing him behaving badly towards Ms Hansen. Mr Robinson approached the applicant and a physical tussle ensued, moving against the kitchen bench where a knife happened to be out on the counter. The applicant grabbed the knife as the two men struggled, and the knife penetrated Mr Robinson's torso more than once as the struggle continued, occasioning grievous bodily harm. Ms Hansen was wounded by the knife when she moved to intervene in what seems to have been the closing stage of the struggle.

[8] Just as the applicant did not fall to be sentenced for intentionally doing grievous bodily harm to Mr Robinson – an aggravated charge of which he was acquitted – nor, as it turns out, did he fall to be sentenced on the basis he had committed the offence of unlawful wounding upon Ms Hansen. The prosecution accepts as a matter of inference that the sentence of five and a half years' imprisonment imposed in respect of the charge of grievous bodily harm must, in part, have been justified by the now quashed conviction for the unlawful wounding of Ms Hansen.

[9] The prosecution submits the appropriate sentence is one of five years' imprisonment. The applicant on the other hand contends, particularly having regard to the applicant's personal circumstances and prospects of rehabilitation, that the appropriate sentence is one of three to four years' imprisonment, suspended after a "period which could fairly be less than 50% of the head sentence".

[10] In conceding this court ought sentence afresh in respect of the offence of grievous bodily harm the prosecution contends the wounding of Ms Hansen forms part of the circumstances of the offence of grievous bodily harm upon Mr Robinson in a way which should influence this court's calculation of the appropriate sentence.

[11] Can the fact Ms Hansen was injured increase the sentence which would otherwise be imposed for causing grievous bodily harm to Mr Robinson? This question highlights the tension between a sentencing court being permitted to have regard to the circumstances of the offence, per s 9(3)(d) *Penalties and Sentences Act* 1992 (Qld), but being precluded from sentencing an offender for an offence as if guilty of an circumstance of aggravation, or more serious offence, of which the offender has not been convicted.

[12] The authorities relevant to that tension were canvassed at length in *R v D*,[2] culminating in statements of general principle, including the following:

> "1. Subject to the qualifications which follow:
>
> (a) a sentencing judge should take account of all the circumstances of the offence of which the person to be sentenced has been convicted, either on a plea of guilty or after a trial, whether those circumstances increase or decrease the culpability of the offender;
>
> (b) common sense and fairness determine what acts, omissions and matters constitute the offence and the attendant circumstances for sentencing purposes; and
>
> (c) an act, omission, matter or circumstance within (b) which might itself technically constitute a separate offence is not, for that reason, necessarily excluded from consideration.
>
> 2. An act, omission, matter or circumstance which it would be permissible otherwise to take into account may not be taken into account if the circumstances would then establish:
>
> (a) a separate offence which consisted of, or included, conduct which did not form part of the offence of which the person to be sentenced has been convicted;
>
> (b) a more serious offence than the offence of which the person to be sentenced has been convicted; or
>
> (c) a "circumstance of aggravation" of which the person to be sentenced has not been convicted; i.e., a circumstance which increases the maximum penalty to which that person is exposed."[3] (citations omitted) (emphasis added)

[13] The prosecution here submits the wounding of Ms Hansen ought be taken into account in the calculation of the sentence for the grievous bodily harm because the fact the applicant "wounded a person … without realising she was there" evidences how "determined and violent" the "attack" on Mr Robinson was. Such a categorisation does not give fair weight to the reality that it was the complainant who moved towards the applicant and that the applicant grabbed the knife in the midst of the ensuing fight. Nor does the evidence support such a categorisation.

[14] How Ms Hansen came to be wounded was not witnessed. It appears she moved in and tried to intervene at a time after the knife had been introduced into the struggle, but while both men continued to struggle. The inference arising is that her sudden

---

2 [1996] 1 Qd R 363.

3 Ibid 403.

positioning, vis-à-vis the moving protagonists, coincided unintentionally on anyone's part with physical contact as between her and the knife. Not only can the applicant not be sentenced on the basis he "unlawfully" wounded her, for instance by way of criminal negligence, the evidence does not show her wounding resulted from any deliberate movement of the knife by him, as distinct, for example, from it being held in a fixed position but that position moving in incidental consequence of the force of the struggle. Nor does the evidence show to what degree the movement as between Ms Hansen's body and the knife was the product of her body moving as compared to the knife moving.

[15] In the absence of more specific evidence of how Ms Hansen's wounding occurred, the prosecution's position dilutes down to an essentially illustrative proposition. It is that the fact of Ms Hansen's wounding reflects the inherent dangerousness of the applicant choosing to grab and wield a knife during a struggle in the circumstances then prevailing. That point does not depend upon the materialisation of risk to be relevant. The introduction of a knife into any fight is dangerous because of the inherent risk of serious injury, not only to the fighters but also to persons at incidental risk, for instance because they are so close as to be within physical range of contact or because they are driven by moral obligation to intervene. That consideration of risk already informs the weight placed by sentencing courts upon the need to deter knife related violence as well as a Court's assessment of the inherent dangerousness of an offender's conduct in a particular matter.

[16] Here the level of inherent dangerousness was especially high because the risk of incidental injury to bystanders or potential interveners was especially high. That is because of the circumstances that the protagonists were in an enclosed space with persons closely associated with them nearby. Those circumstances elevated the seriousness of the applicant choosing to use a knife against Mr Robinson. The fact of Ms Hansen's wounding illustrates that seriousness but ought not, as a matter of logic or fairness, increase the sentence which should otherwise be imposed upon the applicant for the offence of doing grievous bodily harm to Mr Robinson in those circumstances.

[17] Turning to the appropriate sentence, the gravity of the offence cannot be gainsaid. The abdominal injuries suffered by Mr Robinson, from which he recovered after treatment, were life threatening. The applicant did not intend to do grievous bodily harm to Mr Robinson but he very nearly killed him. Further, there is no suggestion the applicant tried to warn Mr Robinson off, by announcing he had a knife, before resorting to its use. He moved it quickly and in such a way as to penetrate Mr Robinson's torso more than once, before Mr Robinson even realised a knife was being used. Where knives are used to commit offences upon the person, particularly where such grave harm results, it is inevitable that significant weight must be given to general deterrence.

[18] This court was referred to four cases of grievous bodily harm involving the infliction of extremely serious injuries by knives. They were *R v Bryan; Ex parte Attorney-General (Qld)*[4] where a sentence of six years' imprisonment was imposed on appeal, *R v Johnston*[5] where a sentence of six years' imprisonment was not disturbed on appeal, *R v Baker*[6] where a sentence of four years' imprisonment (concurrent

---

4 (2003) 137 A Crim R 489.
5 [2004] QCA 12.
6 [2012] QCA 237.

with an existing term of imprisonment) was not disturbed on appeal, and *R v Sargent*[7] where a sentence of six years' imprisonment was not disturbed on appeal. None of those cases are closely comparably to the present. Each are more serious.

[19] The respondent in *Bryan* had previous convictions and engaged in an unprovoked vicious and cowardly knife attack on an innocent passer-by on a public street.

[20] The applicant in *Johnston* had previous convictions. At a social function he approached the complainant whilst wielding a knife and stabbed him with it, without there having been any prior provocation or dispute.

[21] The applicant in *Baker* had a criminal history for violence and was on parole at the time of doing grievous bodily harm to his brother, with whom he had earlier been engaged in a drunken physical argument at the driveway of a domestic residence. Following the argument, *Baker* had gone inside the house and fetched two knives. He then came back outside and stabbed the complainant in the chest.

[22] The applicant in *Sargent*, who was 41 and without relevant criminal history was drinking with teenagers at a skate park at night. For no apparent reason, he committed a violent assault upon a female and the complainant came to her aid by tackling *Sargent*. *Sargent*'s response was to produce a knife with a retractable blade, open the blade and stab the complainant. The offending was categorised, like that in *Bryan*, as an unprovoked vicious and cowardly attack upon an innocent person in public.

[23] In the present case, the 21 year old applicant became involved in a physical altercation with the complainant after taking the complainant to task in relation to his behaviour towards a female. It was the complainant who moved towards the applicant at the outset of the fight which then ensued between them. This was not a case, like those discussed above, of the applicant already "going armed" with a knife[8] or electing after some deliberation to fetch a knife. The heat of the moment grabbing and use of the knife occurred when the protagonists were already locked in their physical tussle and coincidentally moved nearby to where a knife happened to be.

[24] Of course, the applicant's decision to grab and use the knife, causing extremely serious injury to the complainant, was deplorable. However, the spontaneous circumstance under which the knife came to be used is nonetheless important to a fair assessment of the appropriate sentence range. The level of culpability here in play, when considered in light of the applicant's relative youth and absence of previous convictions, calls for a more moderate sentence than that contended for by the prosecution.

[25] Head sentences of four years' imprisonment have from time to time been imposed in cases of grievous bodily harm inflicted by knives – see for example, *R v Johnson*[9] and *R v Campbell*.[10] In each of those cases there was a more considered resort to

---

7 [2016] QCA 32.

8 On the accounts of the applicant and his girlfriend he did grab a bat as he entered, having perceived serious misbehaviour by Mr Robinson. However on their accounts it did nothing to prevent Mr Robinson crash-tackling the applicant and it was not used in the ensuing struggle. None of the other witnesses even noticed a bat.

9 [2012] QCA 141.

10 [2016] QCA 42.

the use of a knife than occurred here. Admittedly they were unsuccessful prisoners' appeals but this court's reasons in each do not suggest they were unusually lenient sentences. As much is confirmed by reference to *R v Norris*[11] where this court reduced a head sentence of five years' imprisonment down to three years in respect of grievous bodily harm inflicted by stabbing with scissors. There a 19 year old applicant with minor criminal history had been involved in a physical fight with the complainant at a service station. She then went to her vehicle and fetched scissors from her handbag before chasing and stabbing the complainant in the chest, puncturing her lung. She also cut the complainant's companion with the scissors, giving rise to an additional offence of assault occasioning bodily harm whist armed.

[26] Considered collectively the circumstances in *Norris* called for a greater degree of moderation in the head sentence than the present case. While *Norris* did obtain her weapon in less spontaneous circumstances than occurred here the extent of injury inflicted, whilst serious, was not as grave as that inflicted by the present applicant.

[27] In my view a head sentence of four years imprisonment would be a just sentence in the circumstances of this case.

[28] While the applicant's counsel's further submissions sought a partial suspension of the sentence, potentially after less than 50 per cent of it, no persuasive basis has been advanced in support of such a course. It is admittedly noteworthy the applicant was acquitted at trial of a circumstance of aggravation and his conviction of the unlawful wounding was quashed on appeal. However, he did not at trial admit his guilt of doing grievous bodily harm nor is it suggested he ever offered to do so. There is no good reason why the applicant ought not be subject to the statutory regime for parole. This Court ought follow the common course after a trial of allowing the applicant's eligibility for parole to be as provided for by s 184(2) *Corrective Services Act* 2006 (Qld).

[29] I would order:

1. The application for leave to appeal against sentence is granted.
2. The appeal is allowed.
3. The sentence imposed for grievous bodily harm is set aside and instead the applicant is sentenced to four years imprisonment.

---

11 [2012] QCA 57.