SUPREME COURT OF QUEENSLAND

CITATION:	*R v Surace* [2020] QCA 134
PARTIES:	**R** **v** **SURACE, Giuseppe** **(applicant)**
FILE NO/S:	CA No 255 of 2019 SC No 1672 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 9 September 2019 (Boddice J)
DELIVERED ON:	19 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	6 May 2020
JUDGES:	Mullins JA, Lyons SJA and Ryan J
ORDERS:	**1. The application for leave to adduce evidence is refused.** **2. The application for leave to appeal against sentence is allowed.** **3. Appeal against sentence is allowed on Count 3 and Count 5.** **4. The sentence on Count 3 is varied by reducing the term of imprisonment to six years.** **5. The sentence on Count 5 is varied by reducing the term of imprisonment to six years.** **6. The date the appellant is eligible for parole is fixed at 8 September 2021.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant and his brother were both charged on a six count indictment in respect of two complainants – where on day two of the joint trial, the applicant's brother pleaded guilty to attempted murder and grievous bodily harm with intent (Counts 2 and 5 on the indictment) – where the jury was discharged and on day one of his new trial the applicant pleaded guilty to assault occasioning bodily harm while armed and in company as

against one of the complainants, and grievous bodily harm with intent in respect of both complainants (Counts 1, 3 and 5) – where the applicant was subsequently sentenced to concurrent sentences of eight years in relation to Counts 3 and 5 and four years in relation to Count 1 – where no pre-sentence custody had been served and his parole eligibility was fixed at 8 September 2022, three years from the date of sentence – where the applicant now seeks leave to appeal the sentences imposed on the basis they are manifestly excessive – whether there was an element of pre-meditation in the applicant's actions – whether the learned sentencing judge did not take into account the true nature of the applicant's criminal responsibility and accordingly the sentence imposed was manifestly excessive – whether the sentencing judge proceeded to impose the sentence on the applicant on an incorrect basis – whether the sentencing discretion miscarried

R v Granato [2006] QCA 25, considered
R v Laing [2008] QCA 317, considered
R v Marks; Ex parte Attorney-General of Queensland [2002] QCA 34, considered
R v Singh [2006] QCA 71, considered
R v W [2004] QCA 124, considered
R v Warne [2015] QCA 9, considered

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

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

[1] **MULLINS JA:** I agree with Lyons SJA.

[2] **LYONS SJA:**

Background

[3] The applicant and his brother Francesco Surace were both charged on a six count indictment. On Count 1 he was charged with assault occasioning bodily harm to Raymond Wensley while armed and in company. On Count 2 he was charged jointly with Francesco with attempting to unlawfully kill Isaac Wensley. Alternatively, on Count 3 they were both charged with doing grievous bodily harm to Isaac Wensley with intent to do grievous bodily harm. On Count 4 both were charged with the attempted murder of Raymond Wensley and in the alternative Count 5 charged them with grievous bodily harm with intent. Count 6 charged Francesco with possession of a weapon.

[4] Both defendants went to trial on 27 November 2018. On day two, Francesco Surace pleaded guilty to the attempted murder of Isaac Wensley (Count 2) and grievous bodily harm with intent with respect to Raymond Wensley (Count 5). The jury was discharged and the applicant's bail was extended pending a new trial.

[5] On 2 September 2019, the first day of his trial, the applicant pleaded guilty to Counts 1, 3 and 5. He was subsequently sentenced on 9 September 2019 to concurrent sentences of eight years in relation to Counts 3 and 5 and four years in relation to Count 1. No pre-sentence custody had been served and his parole eligibility was fixed at 8 September 2022, three years from the date of sentence.

[6] The applicant was 42 at the time of sentence and had a minor and irrelevant criminal history in New South Wales and Queensland for which fines had been imposed. He had no previous convictions for offences of violence and had never been to prison. He now seeks leave to appeal the sentences imposed on Counts 3 and 5 on the basis they are manifestly excessive.

This Application

[7] The applicant is self-represented. Whilst his initial application for leave to appeal against sentence filed on 26 September 2019 indicated that the basis of his application was that the sentences imposed were manifestly excessive, the amended outline filed on 24 April 2020 stated that the applicant sought to have his conviction overturned. The outline indicated that he was not acting in concert or with a common purpose with Francesco to cause grievous bodily harm to Raymond or Isaac Wensley.

[8] The applicant made it clear at the hearing that he did not wish to pursue his appeal against conviction and was only seeking leave to appeal the sentences imposed on the basis that they were manifestly excessive as follows:

> "MULLINS JA: All right. Yes. So you don't want to – even though you've actually in your outline argued that you want the court to consider setting aside your conviction, you don't really want to do that.
>
> APPLICANT: I don't really want to be dragged through court again, your Honour, or them either, the – like, both sides. I really don't want us to be going through court again and have to deal with this all again."[1]

[9] The applicant sought to rely on his affidavit sworn on 1 May 2020 which contained additional factual material that was not before the sentencing judge. The court treated the applicant as making an oral application for leave to adduce the additional evidence and invited submissions on whether that leave should be given. The respondent opposed the court receiving the affidavit, as some of the factual matters to which the applicant deposed contradicted the agreed statement of facts on which the sentencing had proceeded. The applicant was not in a position to put before the court any material that would warrant receiving new evidence. The application for leave to adduce evidence is therefore refused.

[10] In his outline of submissions the applicant argues that he should have been sentenced on the basis of the agreed statement of facts which made it clear that there was no element of premeditation in his actions and that the unlawful common purpose was formed in his mind only at the point he approached the scene. The applicant also argued he should have received greater credit for his cooperation and willingness to accept responsibility for his actions.

---

1 T1-3 ll 39-45.

The Agreed Statement of Facts

[11] At the hearing, an agreed statement of facts was tendered.[2] All of the offences occurred on 26 December 2016. The applicant was 39 at the time of the offences and Francesco was 41. The complainants were father and son, Raymond Wensley and Isaac Wensley, who were aged 58 and 24 respectively. The complainants and the applicant were not known to each other.

[12] Raymond Wensley owned an 11 acre property at Pimpama from which he operated a caravan storage business and he lived on the property with his wife. At 6.30 on the morning of 26 December 2016, Mrs Wensley heard a screen door in the kitchen open, and Francesco Surace was seen entering. She considered his behaviour was odd and he was making statements claiming ownership of the property. Raymond Wensley came to investigate and confronted Francesco who continued to make comments about owning the property.

[13] Francesco ultimately left the house but walked around the property and Raymond Wensley followed him in a golf buggy. He attempted to remove Francesco from the property and got out of the buggy to approach him however Francesco became aggressive and eventually kicked Raymond Wensley in the leg. A wrestle evolved during which Raymond grabbed a pick handle from his golf buggy and used it to strike Francesco. Francesco then left the property, with Raymond Wensley again following.

[14] Police arrived and Francesco was arrested. Francesco's car, a Barina, was left parked on the side of Old Wharf Road. Francesco was ultimately released on bail with a condition that he not attend Old Wharf Road and have no contact with Raymond Wensley.

[15] During the day, Raymond Wensley took his tractor to where Francesco's car had been left and drove his tractor into the Barina a number of times. He then used straps attached to the tractor to flip the Barina onto its roof. Francesco returned later in the day with the applicant to retrieve the car. Raymond Wensley and his son Isaac became aware of their presence and attended. They were unhappy that Francesco had returned and at some point Raymond grabbed a pick handle from his utility. Francesco, who had alighted the applicant's station wagon, then ran back and jumped into the passenger side of it and the applicant drove in the direction of both Raymond and Isaac Wensley. Raymond used the pick handle to strike the driver's side window of the car as it drove by, smashing it.

[16] The applicant's mother was informed that the Barina was on its roof and she asked a neighbour to attend in a truck to turn the Barina onto its wheels so that it could be towed away. The neighbour's attendance at the Wensley's property was brought to the attention of Raymond who travelled to the Barina in his utility with his caretaker. Isaac Wensley also attended in a golf buggy with another man. The applicant's sister, Angelina Surace, was present as the men arrived and got out of their vehicles. Raymond Wensley was speaking with a neighbour when he saw Francesco walking from the back of his sister's car. He was described as walking back and forth. He was shirtless, and had a black backpack behind him. Francesco was described as hugging the tree line as he headed towards Raymond and Isaac

---

2 Exhibit 3 ARB pp 45-49.

Wensley. Raymond Wensley grabbed the pick handle from his car and Isaac Wensley took a cricket bat from the golf buggy. At that point Francesco held out his hands saying he did not have anything in them. He kept saying, "don't come anywhere near me". Francesco then stopped and pulled a sawn-off shotgun from the bag behind his back and dropped the black bag. He then pointed the gun at Raymond.

[17] At a time when the sawn-off shotgun was being pointed at Raymond, the applicant came driving down the road in his station wagon at speed and pulled up suddenly. He got out of the station wagon carrying a metal bar and ran towards Raymond and Isaac. He appeared to be focused on Raymond and was screaming abuse as he ran in. At that point the applicant held the bar above his head and brought it down and used it to strike Raymond Wensley to the top of the head. The strike with the bar caused a laceration to Raymond's scalp measuring 10 cm. Raymond was dazed and fell to his knee. The applicant lifted the bar again, at which point Isaac Wensley rushed forward with a cricket bat intending to hit the applicant. At that point Francesco discharged the sawn-off shotgun, shooting Isaac Wensley to the face and a short time later, Francesco discharged the second bullet, shooting Raymond Wensley to the groin. The whole incident took place between 5.01 pm and 5.13 pm.

[18] Both the applicant and his brother fled the scene. The injuries suffered by Isaac were caused by multiple shotgun wounds to the face and neck and included:

(i) Blindness in the right eye;

(ii) Craniofacial fracture;

(iii) Multiple fragments to the face and neck;

(iv) Pellet to the right tonsillar fossa, right lateral pharyngeal space, right parotid space;

(v) Right supraclavicular fossa haematoma;

(vi) Fragment in the right middle lobe lung and small pneumothorax;

(vii) Ingested metallic debris;

(viii) Right middle cranial fossa metal object with likely cerebral contusion;

(ix) Facial swelling;

(x) Bilateral neck hematomas; and

(xi) Carotid cavernous fistula.

[19] Those injuries amounted to grievous bodily harm and Isaac suffered permanent loss of vision in his right eye.

[20] Raymond Wensley suffered a 10 cm laceration to the posterior scalp and had multiple pellet wounds including six wounds to the right pelvis, one wound to the right groin, two wounds to the right chest and one to the right arm.

[21] Raymond Wensley was treated with sutures to the scalp laceration and required a general anaesthetic to remove the pellets from his flank and thigh. Had he not received emergency treatment including surgery, he would have suffered major bleeding, widespread tissue infection and severe pain, which may have been life-threatening. It is expected he will suffer permanent scarring and disfigurement.

[22] The applicant was subsequently interviewed and whilst he admitted his presence at the earlier incident, he denied his presence at the shooting and in fact gave an alibi.

Basis of the Criminality

[23] The basis of the criminality in the agreed statement of facts was as follows:[3]

> "The accused formed a common intention with Francesco Surace to prosecute the unlawful purpose of causing serious harm to Raymond George Wensley and/or Isaac Scott Wensley. The Crown cannot adequately rebut the suggestion that the unlawful common purpose was formed in the mind of the accused at the time only when he approached the scene in the maroon station wagon at which time he saw the confrontation between his armed brother and the complainants.
>
> It was a probable consequence of that common intention that someone might be harmed with an intention to do grievous bodily harm.
>
> At the time of the execution of the common intention Francesco Surace with intent to do grievous bodily harm to Isaac Scott Wensley, shot Isaac Scott Wensley to the head and Raymond George Wensley to the groin and body area causing each the grievous bodily harm described."

Crown's Submissions at Sentence

[24] At sentence, the Crown argued that the applicant's involvement extended to the use of actual violence on Raymond Wensley while armed. The damage caused was a laceration to the top of his head. The Crown accepted that the adoption of any common plan came late but it was nonetheless an adoption of a plan that could have had severe consequences for the victims. The Crown relied on the decision of *R v Warne*,[4] where a seven year sentence had been imposed. The Crown prosecutor conceded that the facts were not entirely comparable, but the Court of Appeal had given consideration to a number of other decisions in relation to a malicious act with intent. It was noted that Mr Warne was also a party to the malicious act with intent, but that he was younger and had a worse criminal history. It was also acknowledged that there was a great deal more planning involved in *Warne*, but that the injuries were less grave and involved only one complainant. The Crown submitted that an appropriate penalty would be in the order of six to seven years. The learned sentencing judge at that point stated that in that case, five months could not be declared and that the sentence imposed was really about seven and a half years where there was only one victim.

[25] The Crown prosecutor stated that no application was made for a serious violent offence declaration given that the applicant was not the actual shooter. The applicant had good references and a supportive and close family. He had an older brother with an intellectual disability who was cared for by his mother. After the death of his father he took an active role in supporting both his mother and his intellectually disabled brother. The applicant's counsel at sentence stated that there

---

3 Exhibit 3 ARB p 49.

4 [2015] QCA 9 ('*Warne*').

had been a long and difficult relationship with his brother, the co-accused, given his brother's drug use and mental health issues. The applicant had a good employment history and worked in the plastering industry and had been involved in that industry for a significant period of time. He had good references and was married with two sons aged eight and ten. He was also involved with the local community and was heavily involved in his son's soccer club as well as his local church.

[26] Counsel for the applicant noted at sentence that the matter concluded after there were negotiations with the Crown in relation to pleas to the alternatives. The applicant's counsel made it clear that there had not been an earlier plea given the criminal liability being attributed to the applicant was different to the one that was ultimately negotiated. The basis of his responsibility was only negotiated prior to the plea to Counts 1, 3 and 5. The sentencing judge did not accept that such a late plea was reflective of remorse.

[27] Counsel for the applicant also submitted that the significant difference with the decision of *Warne* was that there was no premeditation or planning and the applicant himself did not discharge the weapon. The sentencing judge however did not accept there had been no premeditation. The following exchange occurred:

> "MS THOMPSON: "…there was no premeditation or planning. He himself didn't discharge the weapon. And he doesn't have - - -
>
> HIS HONOUR: I'm just wondering how you can say there's no premeditation. He came back.
>
> MS THOMPSON: There's - - -
>
> HIS HONOUR: He came back with a bar. He jumped out and he hit the man. I find it difficult to believe there's no premeditation in those circumstances.
>
> MS THOMPSON: My submission is this, and this is the – how the plea's been accepted – that the intention – **the Crown can't disprove the fact that the intention was formed when he arrived back at the scene.** The car that had been overturned was in a very short distance away from where the confrontation occurred. The settling- - -
>
> HIS HONOUR: So he just happens to have a steel bar on his car, does he?
>
> MS THOMPSON: Sorry?
>
> HIS HONOUR: Just happens to have a steel bar on his car, does he?
>
> MS THOMPSON: The bar was in the car.
>
> HIS HONOUR: That's where this premeditation comes in. It's find it – I find it hard to believe. Most people don't carry steel bars in their car.
>
> MS THOMPSON: **There's certainly nothing to suggest that there was any meeting or communication between the two of them**. And in my submission, your Honour - - -

> HIS HONOUR: Well, what a remarkable coincidence that he comes with a bar and the other one comes with a gun. That what – osmosis is how we got to that stage, is it?
>
> MS THOMPSON: No. The – **they didn't arrive together. There had been that interaction and that previous meeting with what's being called the second incident over the car. The complainants themselves were armed, and there had been some violence towards at least the driver's side window of the car. And my submission is this. There is no premeditation or planning in relation to what was about to transpire. Obviously, he accepts his responsibility for it, and it's on the basis of that extent – of that section 8 liability.**
>
> There's – through the decision of Warne, there's both similarities and differences, as quite often there is. In relation to Warne himself, there is in that case clear planning. He had an extensive criminal history. He was in breach of previous court orders and had – that offence was committed six to seven days after he had been placed on parole. I accept there's only one complainant, but those features, in my submission, aggravated the sentence in relation to Mr Warne…"[5]

[28] Counsel for the applicant submitted that a sentence in the order of six years would be appropriate.

[29] In the course of his sentencing remarks the learned sentencing judge stated the basis of the sentence in the following terms:

> "You are to be sentenced on the basis that you and your brother formed a common intention to prosecute an unlawful purpose, namely, causing serious harm to Raymond Wensley and/or Isaac Wensley. **You are to be sentenced on the basis that that unlawful common purpose may well have been formed when you arrived at the scene in question.**
>
> **Accordingly, you are to be sentenced on the basis there was no significant pre-meditation, although, as I have noticed, you did arrive with an iron bar in the car.** You are also to be sentenced on the basis it was a probable consequence of that common intention that someone might be harmed, with an intention to do grievous bodily harm, and it is at the time of the execution of that common purpose that your brother, with intent to do grievous bodily harm, firstly shot Isaac Wensley to the face and then shot Raymond Wensley in the groin and body area, causing each of them the grievous bodily harm that I have referred to in my earlier reasons.
>
> In short, you are to be sentenced on the basis that, in respect of the serious counts of grievous bodily harm with intent, you did not actually inflict physical injuries, but they occurred in circumstances where they were part of a common purpose and it was a probable

---

5 ARB p 33 l 24 – p 34 l 25 (my emphasis).

> consequence of that common purpose that they would suffer grievous bodily harm with intent to do grievous bodily harm."[6]

The Applicant's Argument

[30] It is not appropriate to set out the applicant's arguments that were based on the new evidence that has not been received by the court which was not before the sentencing judge. The applicant acknowledges that there had been an agreed statement of facts which was relied upon at the sentencing hearing and he entered his guilty plea on the basis that the statement made it clear there was no premeditation. The applicant also emphasises the points made by his counsel on the sentencing that when he arrived at the scene, the complainants were armed and he had experienced violence earlier that day from Mr Raymond Wensley who used the pick handle to strike the driver's side window of his vehicle.

[31] The applicant argues that the sentencing judge did not take into account the true nature of his criminal responsibility and accordingly the sentence imposed was manifestly excessive.

Has the Sentencing Discretion Miscarried?

[32] In my view the learned sentencing judge did not correctly assess the applicant's true role in the events that afternoon. I consider that the sentencing discretion miscarried when the sentencing judge sentenced the applicant on the basis that there had been "no significant premeditation" when the agreed statement of facts stated that the unlawful common purpose may well have been formed only when the applicant arrived at the scene. When the learned sentencing judge stated that the applicant was to be sentenced on the basis that there was "no significant premeditation" he necessarily reached a conclusion that there had been some premeditation. The following comment was also made at the commencement of the sentencing remarks:[7]

> "Your offending is serious. On 26 December 2016, an incident occurred at Pimpama. It primarily, and initially, involved your brother. I am told you have had a somewhat distant relationship with him because he has had mental health and drug issues. That does not quite explain why it is you arrived, a bit like on a horseback, in a motor vehicle, and took the steps you did on that day in question."

[33] In my view the statements, conclusions and comments highlighted above indicate that the sentencing judge proceeded to sentence on the basis that:

(i) there had been some preconceived plan between the brothers for the applicant to attend at the scene and assist Francesco; and

(ii) there was some premeditation at least to the extent that the applicant had armed himself with the iron bar to provide that assistance.

[34] As counsel for the applicant at sentence tried to emphasise, while it was accepted that the iron bar was in the applicant's car, there was no evidence in the agreed statement of facts that the applicant had obtained the iron bar for the purpose of going to the scene or had gone to the scene at the request of his brother Francesco or

---

6 ARB p 38 ll 11-30 (my emphasis).
7 ARB p 37 ll 23-27.

to assist him. In my view there was no basis for the conclusion that there was "no significant premeditation" in light of the agreed statement of facts. There was no evidence of any premeditation or planning at all. The common unlawful purpose was formed just moments before the applicant got out of his car at the scene. The sentencing judge's conclusion in this regard was clearly an error.

[35] Furthermore in an exchange with the Crown prosecutor in relation to the decision of *Warne*, the sentencing judge formed the view that the sentence of seven years which was imposed was in effect a sentence of seven and a half years as the judge there had reduced the head sentence by five months as there was a period of 10 months in custody which could not be declared. What had actually occurred was that the sentencing judge had reduced the period of parole eligibility by five months as follows:[8]

> "However, I take into account, as I said I would, the fact that you have been in custody for a further 10 months in the circumstances I earlier described. I'm not going to give you full credit for that. I'm going to reduce what would be a further 18 months that you'd be required to be in prison until eligible for parole by reducing it by a further five months."

[36] Accordingly the sentencing judge also proceeded to impose the sentence on the applicant on an incorrect basis. I consider therefore that the sentencing discretion has also miscarried in this regard.

[37] This Court must re-exercise the discretion given both those errors.

[38] As previously noted the Crown prosecutor argued for a sentence in the order of six to seven years and defence counsel for a sentence of six years. The Crown relied in particular on the decision of *Warne* noting that it involved a malicious act with intent where the applicant had not been the shooter. In that decision as already noted, a head sentence of seven years was imposed. As the Crown prosecutor made clear, that decision involved a number of distinguishing features but did involve a discussion of a number of other decisions relating to malicious acts with intent with the applicant arguing that an analysis of the comparable decisions (those of *R v Laing*,[9] *R v Granato*,[10] *R v Marks; Ex parte Attorney-General of Queensland*[11] and *R v W*[12]) supported a lower range of sentence than that imposed. Significantly, in my view, all of those decisions except *R v W* involved violent home invasions in company while armed with weapons. In my view that is a significant distinguishing factor. As Morrison JA (with whom Gotterson JA and McMeekin J agreed) noted in *Warne*:[13]

> "There are distinguishing features between *W* and the applicant's case, which make *W* unhelpful. It was not a home invasion committed in company, and whilst armed with a gun. *Home invasion cases, where the offenders are armed, have been recognised as calling for stronger sentences from the court*. Further, the appeal

---

8 [2015] QCA 9 at 13, [55].
9 [2008] QCA 317.
10 [2006] QCA 25.
11 [2002] QCA 34.
12 [2004] QCA 124.
13 At 10, [42] (my emphasis, citations omitted).

turned on a point concerning the parity principle, which makes the finding unhelpful."

[39] Furthermore, whilst I accept that the decision of *Warne* involved only one complainant, it would seem to me that the offending was far worse despite the fact the offender was youthful, as the discussion of the circumstances of the offending makes clear. It was held:[14]

> "[29] In my view the applicant's contention that too much weight was placed on the fact that a gun was used, cannot be accepted. This was a planned serious home invasion, committed in company and whilst one of the co-offenders was armed with a loaded gun. Not only was the gun taken there, it was discharged, at the express request of the applicant. There was evidence supporting the learned sentencing judge's acceptance that the taking of the gun was planned. The hearing proceeded on the basis that the applicant was going to get the bullets in exchange for drugs. In the hour before the offences occurred the applicant texted that Gonsalves "is getting it today" and "were hunting him down now guna put led in him". Then after the event the applicant texted Porter telling her that he had helped to get "dickhead of ya back", and "i told u i was guna even before i got out i keep my word …". That message was clearly indicating that he had told Porter even before he was released from prison that he was (somehow) going to get Gonsalves off Porter's back.
>
> [30] Further, not only was the gun taken to the home invasion, it was discharged at the request of the applicant. When that happened none of the participants, particularly the applicant, were in danger. The applicant had actually invaded the home, but then retreated outside the rear door. True it is that that was in the face of Gonsalves arming himself with a knife, but once the applicant was out of the door Gonsalves tried to shut the door, with himself inside. Notwithstanding that fact, the applicant urged that Cutts shoot Gonsalves, which he did. As the learned sentencing judge referred to it, it was an indiscriminate shot, intended to hit Gonsalves. The indiscriminate nature of the shot does not, in my view, lessen its seriousness. For all that the applicant and Cutts knew, the bullet could have killed Gonsalves, or hit someone else."

[40] I accept that in the present case serious injury was occasioned to the two complainants. The nature of the injury inflicted however is only one of a number of factors which need to be considered which the decision in *Warne* makes clear:[15]

> "[32] …
>
> Whilst the actual harm inflicted is a relevant consideration, it is only one consideration. That was the way it was treated here, with the *far more serious aspect being a home invasion*

---

14 Citations omitted.

15 At 10, [32].

> *in company, the presence of a weapon, the indiscriminate shooting of that weapon at the urging of the applicant, and the fact that grievous bodily harm was intended to be caused, and was*."[16]

[41] The other decisions that were considered in *Warne* included *Laing* where a head sentence of six and a half years was imposed on a 64 year old offender after trial. The offending there involved a break into a house where the offender was armed with a hammer. He then attacked an elderly, sleeping victim a number of times and inflicted very serious injuries. It was accepted that there had been a background of threats to the victim beforehand and there was a great deal of premeditation with no remorse. The court did not interfere with the sentence on appeal indicating that the sentence was moderate and within range, which they considered was between five and eight years.

[42] The decision of *Granato* was a home invasion by three men armed with various implements including a baseball bat, a wheel lock and a baton used by Mr Granato who was 33 years old with no criminal history. The injuries inflicted on a sleeping man included a skull fracture, a pneumothorax and lung contusions. A sentence of five years with a recommendation for release after 21 months was imposed.

[43] The other decision which was considered by the Court of Appeal in *Warne* was *Marks; Ex parte Attorney General of Queensland.* The relevant aspects of that decision, where an initial sentence of five years imprisonment after trial was set aside and a sentence of seven years imposed, were noted as follows:[17]

> "[43] The final case referred to was *R v Marks; ex parte Attorney-General of Queensland*. In that case the offenders were charged with attempted murder, or alternatively unlawful wounding with intent to do grievous bodily harm. They were acquitted of the attempted murder charge, and convicted on the other charge. The relevant offender was sentenced to five years imprisonment, which the Attorney-General contended was manifestly inadequate. The offender had learned that the victim engaged in a sexual relationship with the offender's girlfriend, about six weeks before the commission of the offence. On the night of the offence the offender and his brother went to the victim's house demanding that he open the door. He refused. The victim then heard the front glass door smash, at which he grabbed a steel bar and swung at the door when he saw a hand come through the broken glass. The victim saw someone running behind a wall, and then a gun pointed in his direction, at which he turned and ran. He was hit in the back by a bullet, and then hit by another bullet. He heard further shots being fired, and people laughing. He sought assistance from neighbours and was taken to hospital. He had sustained a pneumothorax and a haemothorax. He was admitted to intensive care and underwent surgery. He was in hospital for six days and suffered considerable pain. At the time he

---

16 My emphasis.

17 Citations omitted.

thought he was dying. Shrapnel from the bullets remain inside his body.

[44] The weapon in that case was a sawn off .22 calibre semi automatic self-loading rifle. Evidence revealed it had been discharged on at least seven occasions.

[45] The offender was about 30 years of age and had some criminal history, but only one offence directly of a violent nature. That had been an offence of robbery and recklessly causing serious injury, involving a savage attack on an air hostess. He was sentenced to two years imprisonment."

[44] I note that *Marks* involved a sentence after trial where the offending was not only premeditated but a weapon was discharged some seven times by the offender who had a history which included an offence of violence. In confirming the sentence of seven years imposed in *Warne*, Morrison JA referred to the decision in *Marks* as follows:

"[50] In my view *Marks* is of some assistance, though limited. It was a more serious case in that multiple shots were fired, causing more serious injuries. However, the charge was not that of grievous bodily harm, but unlawful wounding with intent to do grievous bodily harm. It involved premeditation and the use of a weapon during a home invasion. The offender was relatively young at the time of the offence, but did not have the benefit of a plea of guilty. Like the applicant, he had a relevant criminal history, but limited to one offence directly of a violent nature. More importantly, it was an Attorney-General's appeal. In such an appeal the substituted sentence will usually be moderated for that very reason. It is in that context that the substituted sentence of seven years should be seen. In my view that is why *Marks* lends some support for the sentence imposed on the applicant."

[45] On the hearing of the present application counsel for the respondent also relied on the decision of *R v Singh*,[18] where a sentence of six years was imposed with a recommendation for release after two and a half years. There, Mr Singh had pleaded guilty to one count of unlawful wounding with intent to do grievous bodily harm in circumstances where there was a dispute between neighbours. The complainant went to Mr Singh's home to complain and Mr Singh pushed him in the chest. When the complainant picked up a chair, Mr Singh delivered one blow to the complainant's head with a machete causing a head laceration which required 17 stitches with the Court of Appeal noting that had the complainant not moved, he would have been killed. Counsel argued that in that case the offender had no relevant history and was 44 years of age. The Crown submits that the sentence imposed on the applicant will see him serve only six months more in custody before becoming eligible for parole than Mr Singh in circumstances where here there were two complainants, more serious injuries and the discharge of a firearm. Counsel for the respondent argues therefore that the eight year sentence imposed with parole eligibility after three years, while firm, is not unreasonable or plainly unjust.

---

18 [2006] QCA 71.

[46] A consideration of the appropriate sentence must involve a consideration of the serious injuries inflicted on the two complainants. It must also involve an objective assessment of the true nature of the applicant's culpability.

[47] The seriousness of the offending and very serious nature of the injuries were indeed recognised by the sentences imposed on Francesco Surace who pleaded guilty to the attempted murder of Isaac Wensley on the second day of trial and was sentenced to 10 years imprisonment with a serious violent offence declaration. In relation to Count 5, which was the charge of grievous bodily harm to Raymond Wensley with intent, he was sentenced to nine years imprisonment.

[48] The sentence to be imposed on the applicant on Counts 3 and 5 must reflect the true nature of his criminal responsibility as a party to his brother's offences. As the agreed statement of facts made clear, the applicant's true culpability was as follows:

(i) The applicant had earlier been in an altercation with Raymond Wensley where Wensley had been the aggressor;

(ii) The applicant arrived at the scene at a time when Raymond Wensley was armed with a pick handle and Isaac with a cricket bat;

(iii) Immediately on arrival the applicant got out of his vehicle with a metal bar which was in the car but which was not suggested to have been brought to the scene for the purpose of inflicting violence;

(iv) He was aware that Francesco was brandishing a sawn-off shotgun at the armed Wensleys;

(v) The applicant was focussed on Raymond Wensley as he ran towards him with the metal bar yelling and then striking him;

(vi) Francesco then discharged the weapon twice.

[49] Clearly then the applicant's plea to the charges was on the basis that, when he arrived at the scene where his brother was in confrontation with the Wensleys, he formed, with his brother, a common intention to cause serious harm to Raymond or Isaac Wensley and that it was a foreseeable consequence that grievous bodily harm, inflicted with intent, could occur.

[50] Whilst the precise nature of the grievous bodily harm to be inflicted may not have been known to the applicant, he pleaded on the basis that it was a foreseeable consequence that his brother could intentionally cause grievous bodily harm.

[51] It was accepted by the Crown that there was no premeditation or planning, as the Crown could not rebut the suggestion that the unlawful common purpose was formed in the applicant's mind only at the time he approached the scene.

[52] In my view the applicant was not in the same category as the defendants who were sentenced for home invasions which involved not only planning and premeditation but breaking into a victim's home while armed and in the company of others. None of those defendants received sentences of more than seven years.

[53] In my view the pleas to Counts 1, 3 and 5 by the applicant on the basis of the agreed statement of facts were timely pleas once the altered nature of the applicant's criminal liability was accepted by the Crown prosecutor. As counsel for the

applicant explained at the sentencing hearing, the pleas came once the basis of responsibility changed. I consider that his remorse and timely pleas of guilty should be appropriately reflected in the sentences imposed. His remorse was exhibited at the hearing when the applicant made it clear that he did not wish to put the complainants through another trial. The applicant was a mature man of 42 at the time of sentence who had a minor criminal history for possession of dangerous drugs in 2017 and offensive language in 1996. He had never been convicted of an offence of violence and had never been to prison. He had a good work history, was married and in a stable relationship with two children and had good references and a supportive family.

[54] Whilst I would not disturb the sentence on Count 1, I consider that the appropriate sentence in relation to each of Counts 3 and 5 is a sentence of six years imprisonment to be served concurrently with each other and the sentence imposed on Count 1. Given the applicant was otherwise of good character and the fact he had been on bail for a period of three years without any further offending or breaches of any sort, I would fix a parole eligibility date after two years on 8 September 2021.

Orders

1. The application for leave to adduce evidence is refused.
2. The application for leave to appeal against sentence is allowed.
3. Appeal against sentence is allowed on Count 3 and Count 5.
4. The sentence on Count 3 is varied by reducing the term of imprisonment to six years.
5. The sentence on Count 5 is varied by reducing the term of imprisonment to six years.
6. The date the appellant is eligible for parole is fixed at 8 September 2021.

[55] **RYAN J:** I agree with Lyons SJA.