SUPREME COURT OF QUEENSLAND

CITATION:	*R v Weare* [2002] QCA 183
PARTIES:	**R** **v** **WEARE, Arsun Daniel** (applicant)
FILE NO/S:	CA No 54 of 2002 DC No 588 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	31 May 2002
DELIVERED AT:	Townsville
HEARING DATE:	29 May 2002
JUDGES:	Williams JA, Cullinane and Jones JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made.
ORDER:	**1. Grant the application and allow the appeal;** **2. Vary the sentence imposed by the learned sentencing judge by ordering that the imprisonment be suspended after 12 months;** **3. Fix an operational period of three and a half years.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – OTHER OFFENCES AGAINST THE PERSON – ACTS INTENDED TO CAUSE OR CAUSING DANGER TO LIFE OR BODILY HARM – SENTENCING – where applicant pleaded guilty to unlawfully doing grievous bodily harm and received a sentence of three and a half years imprisonment with no recommendation for early release – where victim was struck from behind with the branch of a tree causing serious damage to the victim's eye – whether sentence manifestly excessive – term of imprisonment allowed to stand but ordered that it be suspended after 12 months with an operational period of 3 ½ years *Amituanai v R* (1995) 78 A Crim R 588, considered *R v Biersteker* [1995] QCA 266; CA No 134 of 1995, 18 May 1995, considered

R v Milnarek , unreported, Court of Appeal, Qld, 27 August 1992, considered
R v Wright [1998] QCA 184, CA No 131 of 1998, 16 June 1998, considered

COUNSEL: A W Moynihan for the applicant
L J Clare for the respondent

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

[1] **WILLIAMS JA:** I agree with the reasons for judgment of Cullinane J and with the orders proposed.

[2] **CULLINANE J:** The Applicant seeks leave to appeal against a sentence of three and a half years imprisonment imposed by the District Court at Townsville on 12 February 2002 for an offence of unlawfully doing grievous bodily harm. The applicant pleaded guilty to the offence which was committed on or about 5 June 2001 at Home Hill. There was no recommendation for eligibility for early release.

[3] The applicant was born on 22 October 1981 and was thus 19 at the time of the offence.

[4] He has some previous convictions but these do not include any offence of violence. His convictions are for street offences and drug offences.

[5] The complainant, a 32 year old man, was at a hotel in Home Hill on the evening of 15th June. In the course of the evening there had been something of an exchange between a group of people inside the hotel and a group of people outside. The applicant was with the group outside and it seems the complainant was with those in the group inside .

[6] Later in the evening the applicant left the hotel and commenced to walk home with a friend. It seems there was some type of altercation between one or more members of each of the two groups but it is not suggested that the complainant was in any way involved. Indeed counsel for the applicant made it clear that the applicant did not contend that anything in the conduct of the complainant on that evening could be regarded as provocative. The group with which the applicant was associated ran off.

[7] The complainant and his companion parted company and the complainant continued on his way home. He heard someone call out "Let's have this fella here" and he saw three persons running towards him, one of them carrying what he believed was a knife. He attempted to protect himself by holding his hands up and then turned to run, and as he did so, he felt a blow to the right side of his head causing him to immediately lose vision in his right eye. He had in fact been struck from behind by the applicant with the branch of a tree.

[8] The complainant went home and was taken to the Ayr Hospital from where he was transferred the next day to the Townsville General Hospital. On examination at the Townsville General Hospital he had perception of light in the right eye and was taken to an operating theatre where it was found that he had a rupture of the right globe and other serious damage. This was repaired but post-operatively his vision did not improve and he later developed a total retinal detachment. There is a medical report which was before the learned sentencing judge which expresses the opinion that it was not expected that the complainant would regain significant useful vision in the eye and the contents of the victim impact statement would seem to bear out there has been no real improvement.

[9] The applicant has had to travel to Brisbane on three occasions for the purposes of treatment.

[10] In his statement he says that he now feels angry and depressed and avoids socialising. He suffers insomnia and nightmares. He was unable to work for some months and the injury he sustained has resulted in substantial expense to him.

[11] The applicant freely admitted the assault when questioned by police. The applicant acknowledged that he struck the complainant from behind using "nearly" as much force as he could. He acknowledged that at the time he did not feel threatened by the complainant in any way.

[12] The applicant had been drinking bourbon and described himself as being "a bit over half shot".

[13] It was acknowledged before the learned sentencing judge that the nature of the offence called for a term of imprisonment.

[14] The sentence of three years and six months is challenged as being manifestly excessive. It is said that His Honour erred either in adopting a starting point outside of the appropriate sentencing range before applying the necessary discounts or that His Honour, if he adopted a starting point within the appropriate range, failed to adequately allow for the factors to be taken into account in the applicant's favour.

[15] The factors which were relied upon by the applicant were:

(a) The applicant's youth;

(b) The co-operation by the applicant with the police when being interviewed;

(c) His criminal history which includes no prior offences of violence;

(d) The entry of an early plea of guilty.

[16] Although it was conceded by counsel who appeared for the applicant on sentence that the appropriate range would be some three to four years imprisonment prior to making allowance for those factors on which the applicant relies the applicant before this court contended that the appropriate range was some two to three years imprisonment. It was contended that there should be a recommendation for eligibility for early release.

[17] The respondent on the appeal contended that the range was some three to four years.

[18] In *Amituanai* (1995) 78 A.Crm.R. 588 the applicant was a 26 year old who was proficient in martial arts. He had no previous convictions. He was convicted of inflicting grievous bodily harm on a man who he did not previously know. Each were members of groups between whom some friction developed on the evening of the offence. The applicant was seen to kick the complainant in the head causing him to fall backwards. The complainant suffered serious brain damage with paralysis down one side of the body and impairment of memory and loss of the sense of smell and some impairment of vision. The applicant was sentenced to some three years imprisonment with a recommendation that he be eligible to be released after serving nine months.

[19] The application was dismissed. In the course of their joint judgment Thomas and White JJ reviewed a number of cases involving convictions for doing grievous bodily harm. Their Honours considered that some non-custodial sentences to which reference was made were unable to be reconciled with the balance of the decisions considered. They said at page 596:

[20] "*The mean average sentence in the last mentioned six cases is a little over two and a half years imprisonment with a recommendation for parole after a little over 12 months."*

[21] The cases referred to included *Milnarek* (unreported, Court of Appeal, Qld, 27.8.92) in which a man who punched another man a number of times while that person was being held and who then kicked him a number of times leaving him in a coma for some time and then with brain damage and impaired vision and impairment of his capacity to earn an income was sentenced to four years. This was held to be within the range.

[22] The respondent referred us to two cases. One, *Biersteker* (unreported Court of Appeal number 134 of 1995 18.5.95) in which the female applicant was convicted after trial of doing grievous bodily harm to another woman by thrusting a glass into her face causing serious damage to an eye resulting in substantial blindness in that eye. She was sentenced to imprisonment for three years. The applicant was 30 at the time and had no relevant previous convictions. Her application was refused. The respondent placed some reliance before us upon the judgement of the Court of Appeal in *Wright* (unreported Court of Appeal No. 131 of 1998 16.6.98). This was an application for an extension of time to appeal against a sentence of five years imprisonment with a recommendation for parole after two years. The applicant was convicted after trial. He assaulted the complainant by striking him in the eye with a glass which broke in the course of the assault. The complainant lost the eye.

[23] In the course of his judgment Demack J (with whom the other members of the court agreed) said at page 3:
"In addition, the sentence which was imposed seems to me to be within a proper range. The sentence was five years imprisonment with a recommendation for parole after two years. The actual blow with the glass had followed an earlier striking with the fist and consequently the crime was a very serious one.

Judge Wall in detailed sentencing remarks referred to the impact that the wound had had upon the victim. He referred extensively to the issues that have to be considered under the Penalties and Sentences Act by a sentencing Judge. He referred to decisions of this Court as setting a standard for sentencing for offences of this kind. It seems to me that the sentence that he has imposed is within proper range.

[24] Unfortunately no reference was made to any of the cases which are said to establish the range referred to. The case seems to be somewhat out of line with the sentences imposed in grievous bodily harm cases of this level of activity generally.

[25] The offence to which the applicant here pleaded guilty was undoubtedly a very serious one. It involved a cowardly attack whilst in company upon a man from behind. It involved the use of a weapon and the infliction of severe force resulting in very serious consequences to the complainant. Obviously deterrence looms large as a factor when imposing sentence in such a case.

[26] Nonetheless a consideration of the cases to which we have been referred leads me to conclude that the sentence imposed was excessive. Either a starting point outside the appropriate range was taken or insufficient allowance has been made when applying the necessary discounts. It would I think, be appropriate to allow the term to stand but to order that it be suspended after 12 months.

[27] The orders which I would propose are:

(a) Grant the application and allow the appeal.

(b) Vary the sentence imposed by the learned sentencing judge by ordering that the imprisonment be suspended after 12 months.

[28] I would fix an operational period of three and a half years.

[29] **JONES J:** I agree with the remarks of Cullinane J and with the orders he proposes.