SUPREME COURT OF QUEENSLAND

CITATION:	*R v Timoti* [2003] QCA 96
PARTIES:	**R** **v** **TIMOTI, Mekuri** (applicant)
FILE NO/S:	CA No 401 of 2002 DC No 3092 of 2002 DC No 3089 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	11 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	11 March 2003
JUDGES:	de Jersey CJ, McPherson JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – MISCELLANEOUS MATTERS – OFFENCE COMMITTED WHILE ON BAIL – where applicant pleaded guilty to one count of robbery with personal violence and one count of grievous bodily harm – where applicant committed second offence while on bail for the first offence – where applicant sentenced to four years imprisonment on each count suspended after 15 months for an operational period of four years to be served concurrently –whether trial judge took into account the applicant's guilty plea – whether the trial judge took into account the fact the second offence was committed while the applicant was on bail for the first *Corrective Services Act* 2000 (Qld), s 135(2)(e) *Penalties and Sentences Act* 1992 (Qld), s 161, s 13, s 157(2) *R v Bryan;, ex parte A-G (Qld)* (2003) QCA 18; CA No 410 of 2002, 5 February 2003, applied *R v Corrigan* [1994] 2 Qd R 415, applied *R v Richards* [1981] 2 NSWLR 464, applied
COUNSEL:	M J Griffin SC for the applicant M J Copley for the respondent

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

ATKINSON J: The applicant, Mekuri Timoti, was sentenced in the District Court on 14 November 2002 after pleading guilty to one count of robbery with personal violence and one count of grievous bodily harm. He was sentenced to four years' imprisonment on each count, suspended after 15 months, for an operational period of four years. Each sentence was to be served concurrently.

The circumstances of each offence show relatively brief, but extreme violence by the accused against each complainant.

The circumstances of the first offence were that the applicant arrived in a motor vehicle with two other men at a bottle shop at a Calamvale hotel. The 19 year old complainant was employed at the hotel as a bottle shop attendant in the drive-through section. He was alone when the applicant and his two companions arrived at about 9 p.m. on 17 October 2001. The applicant entered the cold room with the complainant and punched the complainant once in the head with his fist. The complainant fell to the ground unconscious and the applicant fled back to the vehicle, taking a $10 cask of wine with him. His companions ran back to the vehicle and they drove off.

Security camera footage recorded the vehicle's presence. On 4 November 2001, police spoke to the registered owner, who admitted his presence at the scene and he nominated the

applicant as the attacker. This person claimed the plan was only to do a snatch and grab. On 18 November 2001, the applicant admitted in a recorded interview that he had punched the complainant in the face or chest. The applicant was released on bail.

The complainant was admitted to hospital and suffered a non displaced fracture of the jaw and a significant head injury. He suffered a loss of memory for events preceding and subsequent to the assault and has no memory of the assault. The treating specialist described the head injury as severe.

The impact upon the victim of this crime has been serious. At first he could recall nothing of the month preceding the assault. More than a year after the assault, he still suffered short term memory confusion, frequent headaches, an aching jaw and a loss of the sense of smell. The complainant had to resign from the position at the hotel because he could not cope with working there. He felt frightened if he went out at night. He has had to leave the Tourism and Hospitality Industry for which he had undertaken training.

The second offence occurred whilst the applicant was on bail for the first offence. He attended a private party at Eight Mile Plains with another man. The applicant was what is commonly referred to as a gatecrasher at that party.

He walked up to the 17 year old complainant and punched him once in the face with such force that those standing 20 metres

away heard a loud smack. The applicant ran to the car. His companion stole the complainant's telephone when the complainant was lying on the ground unconscious. This is another example of the applicant punching a young man and rendering him unconscious with that punch. When spoken to by the police, the applicant said he punched the complainant because he "pissed him off".

He was arrested on 11 April 2002 and remanded in custody from then until his sentence, a period of 217 days. Such period could not be declared as time spent in custody under Section 161 of the *Penalties and Sentences Act* because he was in breach of the bail he had been granted in respect of the first offence.

The complainant in that case was grievously injured. A CT scan revealed a right base of skull fracture, which in turn caused hearing loss to the right ear. The complainant was discharged from hospital after two days but developed right sided facial weakness for which he had to take steriod medication. By 25 March 2002, he returned to school and work, but still suffered headaches, ringing in the ears, facial drop, post concussional syndrome and hearing loss.

By 7 November 2002, his hearing was still deficient and another year to 18 months would have to elapse before it could be established whether the hearing loss was permanent. The medical opinion was that the hearing loss was likely to be permanent. This also had a devastating impact on this

complainant. According to the information given to the prosecutor by the complainant's father, his personality had changed. He was now short tempered and aggressive. He was frustrated by his inability to hear. He and his family had suffered much stress. He would not now be able to pass a medical to join the armed forces or the police service.

The applicant was 23 years old at the time of the offences, having been born on 19 September 1978. He had no criminal history. The learned sentencing Judge referred to the significant physical injuries and impact on the future of each complainant. The robbery, the subject of the first count, was premeditated, and the grievous bodily harm, the subject of the second count, was committed whilst on bail. Both attacks were unprovoked and the applicant's violence was a serious threat to society. In the applicant's favour, he pleaded guilty, was remorseful and lacked a criminal history.

The learned sentencing Judge applied the totality principle to sentence the applicant to a head sentence of four years to be served concurrently for each offence. Her Honour remarked that this was a modest sentence, as these were two very serious offences, remarks with which I respectfully agree.

Her Honour said that she then took into account that the usual tariff was that the sentence would be suspended after serving one-third of it, saying on her arithmetic, that meant about 2.7 years. 2.7 years is, in fact, two-thirds of four years being the period that would be suspended if the discount often

given for a guilty plea and other extenuating circumstances, applied in this case.

Her Honour then took into account, without making a formal declaration, that the applicant had spent seven months in gaol. Taking into account all the mitigating factors, her Honour then sentenced the applicant to four years imprisonment to be suspended after serving 15 months with an operational period of four years. She remarked that she had deliberately made the operational period long because she was extremely concerned about the applicant's potential for violence.

The ground of appeal is that the sentence is manifestly excessive. No complaint is made about the head sentence of four years. The effect of her Honour's order suspending the sentence after 15 months is what is complained of, as it is submitted that the applicant will effectively have served a total of 22 months prior to the suspension of his sentence. The applicant argues in the written submission that it may thus be seen that the effect of the Judge's order was in fact to have the prisoner serve almost half his total sentence, placing him in no different position to a prisoner who would, upon a sentence of four years being imposed, be entitled to post-prison community release, pursuant to the *Corrective Services Act*, after having served half of that sentence.

Section 13 of the *Penalties and Sentences Act 1992* requires a court, sentencing an offender who has pleaded guilty to an offence, to take the guilty plea into account, although the

court may, rather than must, reduce the sentence that would have been imposed had the offender not pleaded guilty. The guilty plea may be taken into account either by reducing the head sentence, or making an ameliorating accompanying order such as a recommendation for consideration for early release on a post-prison community based order (see *R v. Corrigan* [1994] 2 Qd R 415), or by suspending the sentence for some or all of the period of imprisonment imposed.

A recommendation for early eligibility for post-prison community release can only be made if the court imposes a term of imprisonment of more than two years on an offender: see *Penalties and Sentences Act 1992* s 157(2). If no such recommendation or suspension occurs, then the prisoner is eligible for parole halfway through the sentence imposed upon him or her: see *Corrective Services Act 2000*, s 135(2)(e).

In *R v. Bryan, ex Parte A-G (Qld)* (2003) QCA 18, the Court of Appeal emphasised the need to protect the community and that deterrence must be a major factor influencing sentencing in violent crimes. That was a case of an unprovoked attack in a public place but those factors apply equally to unprovoked attacks such as took place in the instant case; firstly, in the complainant's workplace, and secondly, at a party where the applicant was a gatecrasher. In this case, as in *Bryan*, the offender ran off leaving the complainant seriously injured after a brutal unprovoked attack on a complete stranger.

The need for deterrence is increased in this case by the fact that the applicant committed the offence of grievous bodily harm whilst on bail for robbery. As Chief Justice Street observed in *R v. Richards* [1981] 2 NSW LR 464 at 465:

> "The community must be protected as far as possible from further criminal activities by persons who take advantage of their liberty on bail to commit further crimes. The only means open to the criminal courts to seek to provide this protection is to pass severely deterrent sentences upon those who thus abuse their freedom on bail."

While it is not the case that normally cumulative sentences will be imposed upon persons who commit offences whilst on bail, the penalty imposed must reflect the fact that a further offence has been committed so that it does not appear that further offending whilst on bail does not increase the penalty for the offender. Chief Justice Street referred to this as:

> "It must be made abundantly plain that persons at large on bail cannot expect to commit further crimes 'for free'. On the contrary, they will receive salutary penalties for the very reason that they have abused their freedom on bail by taking the opportunity to commit further crimes."

That principle was applied by this court in *R v. Wilde, Ex parte A-G (Qld)* [2002] QCA 501 at [15] and [27].

In this case, the inability of the sentencing Judge to declare the seven months already spent in custody as time served under

the sentence occurred precisely because the applicant had committed a further offence whilst on bail for the first. It is appropriate therefore, and in keeping with the legislative scheme, that the time spent in custody prior to being sentenced in those circumstances not be treated as if a declaration had been made under s 161 that it was time already spent in custody under the sentence. In this case, the learned sentencing Judge reduced the period that the applicant would spend in custody in two ways; firstly, by ordering the sentence to be suspended rather than merely making a recommendation for early eligibility for release on post-prison community based release; and secondly, ordering the suspension of the sentence well before the 50 per cent of the sentence when the applicant would otherwise expect to receive post-prison community based release.

In all of the circumstances, I do not consider that the sentence imposed was manifestly excessive and I would refuse the application for leave to appeal.

THE CHIEF JUSTICE: I agree. It is almost absurd to contend that the sentences were manifestly excessive. On the contrary, they were very moderate, in my view, having regard to the gratuitous violence involved and the substantial adverse effect on the victims.

McPHERSON JA: I agree with what Justice Atkinson has said, as well as with what the Chief Justice has said.

THE CHIEF JUSTICE: The application is refused.
