SUPREME COURT OF QUEENSLAND

CITATION:	*R v AM* [2003] QCA 192
PARTIES:	**R** **v** **AM** (applicant)
FILE NO/S:	CA No 54 of 2003 CCQ No 353 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Children's Court at Brisbane
DELIVERED EX TEMPORE ON:	9 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	9 May 2003
JUDGES:	de Jersey CJ, Davies JA and Helman J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence dismissed.**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENCE – where applicant pleaded guilty to offence of grievous bodily harm – where applicant sentenced to two and a half years detention with an order that he be released after serving 50 per cent of sentence – where applicant showed remorse and had reasonably good prospects of rehabilitation – whether detention order and recording of conviction should have been ordered
COUNSEL:	K M McGinness for the applicant D A Holliday for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

THE CHIEF JUSTICE: I will invite Justice Davies to deliver the first judgment.

DAVIES JA: The applicant seeks leave to appeal against a sentence of two and a half years' detention, with an order that he be released after serving 50 per cent of that sentence, imposed in the Childrens Court on 31 January 2003.

A conviction was also recorded and the applicant seeks leave to appeal against this also. The conviction and sentence were imposed for an offence of grievous bodily harm committed on 10 January 2002.

At the time of commission of these offences, the applicant was 16 years of age. He was 17 when he was sentenced.

The offence consisted of the applicant stomping on, or kicking the head of an obviously drunken man lying on the roadway. The complainant had offered no threat to the applicant and, it seems, was plainly unable to do so.

The severity of the blow, whether a kick or a stomp, can be gathered to some extent from the seriousness of the complainant's injuries which included an undisplaced fracture of the left temple bone and contusions and swelling to the brain, resulting in a partial paralysis of the facial nerves which has permanently affected the left side of his face. He has also, in consequence suffered partial loss of hearing and tinnitus in his left ear, and some loss of taste and smell.

The applicant's unprovoked assault on the complainant arose from what appears to have been a minor altercation between the complainant and the applicant's male companion, who had pushed the complainant in the chest causing him to fall to the ground.

At the time of the commission of this offence, the applicant had no previous convictions. However he had committed two assaults occasioning bodily harm in company on 2 September 2000 and 5 November 2000, for which he was sentenced on 15 February 2002 to probation for two years and 200 hours community service. It appears that these sentences were imposed after material provided by the applicant which had been placed in a sealed envelope.

The principal argument by Mrs McGinness on the applicant's behalf was that, having regard to the principles of the *Juvenile Justice Act* 1992, in particular ss 4, 109 and 165, neither a detention order nor the recording of a conviction should have been ordered. In making this submission the appellant relies principally on a prompt plea of guilty by the applicant and his prospects of rehabilitation and his remorse as evidenced from a pre-sentence report, which commented on his performance of his probation under his earlier sentences.

It is true that, on the basis of the information and opinions expressed in the pre-sentence report, the applicant's prospects of rehabilitation appear reasonably good. On the other hand, this was an extremely serious example of unprovoked violence against a drunken and plainly defenceless prone man with very serious consequences.

It may be that this last factor alone would not have been sufficient to require the imposition of a custodial sentence, having regard in particular to s 109(2)(e) and s 165. However there is in addition, the commission in September and November 2000 of two other offences of assault occasioning bodily harm in company.

In those circumstances, in my opinion, the learned sentencing judge had no option but to impose a custodial sentence, and in my opinion he was right in view of the applicant's prospects of rehabilitation to order release after the applicant had served only 50 per cent of that term.

The serious circumstances of this offence and the existence of the earlier assaults to which I referred also in my opinion justified the recording of a conviction.

For those reasons in my opinion the application should be dismissed.

THE CHIEF JUSTICE: I agree.

HELMAN J: I agree.

THE CHIEF JUSTICE: The application is dismissed.