SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kemble* [2003] QCA 190
PARTIES:	**R** **v** **KEMBLE, Leon Andrew** (applicant)
FILE NO/S:	CA No 57 of 2003 DC No 224 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maryborough
DELIVERED EX TEMPORE ON:	8 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	8 May 2003
JUDGES:	McMurdo P, Williams JA and Holmes 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 refused**
CATCHWORDS:	CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – where applicant pleaded not guilty to assault occasioning bodily harm – where applicant convicted and sentenced to 18 months imprisonment, suspended after serving 6 months with an operational period of 3 years – where co-offender pleaded guilty, convicted and sentenced to lesser sentence – where co-offender had significant criminal history – whether sentence was manifestly excessive in all the circumstances *Lowe v The Queen* (1984) 154 CLR 606, considered
COUNSEL:	B Devereaux for the applicant M J Copley for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: The applicant pleaded not guilty to one count of assault occasioning bodily harm in company. He was convicted after a two day trial and sentenced to 18 months imprisonment, suspended after serving six months with an operational period of three years. He applies for leave to appeal against that sentence claiming that it was manifestly excessive in the circumstances.

The primary judge found that the applicant was not involved in the physical attack upon the victim and assumed only a secondary role to his co-offender, Scott Ashley Duncan. Duncan pleaded guilty on the 22nd of January 2003 and was sentenced to 18 months imprisonment suspended after four months with an operational period of three years. It was further ordered that an exhibit be placed in an envelope and sealed to be opened only on the order of the Judge.

The applicant's only contention is that as Duncan has a worse criminal history and was the principal offender a justifiable sense of grievance arises out of the heavier penalty imposed on this applicant who had mitigating personal circumstances.

Duncan was 18 years old at the time of the offence and 19 at sentence. He had a significant criminal history commencing in 1997 in the Childrens Court with minor drug offences for which he was cautioned. In 1998, he was found guilty of assault occasioning bodily harm and entering premises and committing an indictable offence and placed on 18 months

juvenile probation. The next day he was ordered to perform 20 hours community service for minor property offences. In November that year he was convicted in the Maryborough District Court of two charges of entering premises and committing an indictable offence and break and sentenced to 18 months probation. In July 1999 he was convicted of stealing, threatening violence and wilful damage together with a number of relatively minor matters in the Childrens Court, including obstruct police, assault police and discharging a weapon on private land. He was sentenced to two years probation with conditional counselling. In 1999 he was sentenced in the Maryborough Childrens Court to 30 hours detention for stealing. In February 2000 he was sentenced to six months detention to be served by way of an immediate release order and 120 hours community service for dangerous operation of a motor vehicle, entering premises and committing an indictable offence and break and stealing. The next month he was sentenced to three months detention with an immediate release order for receiving. He was convicted of further offences contravening a direction, wilful damage, possession of a dangerous drug and breach of bail in July 2001 and September 2002 for which he was fined.

These convictions were largely committed by him as a juvenile.

In sentencing Duncan the learned sentencing Judge noted Duncan's significant criminal history and correctly observed that most of it did not relate to offences of violence. His Honour described the offences as a drunken act of thuggery

which caused significant injuries to the victim and has had a continuing impact on his life. His Honour took into account Duncan's youth and his attempts at rehabilitation, including attending Alcoholics Anonymous. His Honour noted the early plea of guilty which in itself warranted a reduction of the sentence from two years to 18 months imprisonment. In addition, his Honour observed Duncan's remorse in indicating his guilt to the police. It seems that material placed before his Honour indicated that Duncan would give evidence for the prosecution in this applicant's trial.

The applicant was 20 at the time of the offence and 21 at sentence. He had some Court appearances over a matter of paying an incorrect rail fare which are of no significance, but on 16 October 2001 he was fined $200 with no conviction recorded for common assault. That offence occurred when the complainant approached the applicant and asked for a cigarette. The applicant told him to stay away from his younger brother. The complainant said he didn't want any trouble and began to leave. As he walked away the applicant hit him with a clenched fist to the face causing his nose to bleed. The applicant struck that complainant a further five times to the back of the head. The applicant said he committed the offence because the complainant had been harassing his brother.

The facts of the offence before this Court are as follows. The complainant attended a night club in Maryborough on 20 March 2002. He was verbally abused by a number of males

including Duncan, but not the applicant. There was a scuffle at that time. Later, after the complainant left the night club in the early of the morning he was attacked by a group of males including, at least Duncan, and perhaps, some others. Two others took turns to prevent another witness, Murphy, from going to the complainant's assistance. Duncan gave evidence against the applicant at the trial to the effect that after Duncan attacked the complainant, which included kicking him whilst he was defenceless on the footpath, the applicant also kicked him a number of times. The complainant suffered a broken nose, split ear, fractured jaw, fractured rib, a cut to his left arm and an injury to his lip. The prosecution case was that the applicant either directly assaulted the complainant with Duncan, or aided Duncan by holding back Murphy.

The learned sentencing Judge sentenced the applicant on the second basis and there is no complaint as to that finding.

The Prosecutor at sentence read from the complainant's victim impact statement as to the significant psychological effect this assault had had on him triggering a personality change and necessitating his moving to live and work in a different location.

The applicant and his partner have a 10 month old child and he has the support of his family. He was unemployed at the time of sentence.

The learned primary Judge sentenced the applicant on the basis that he aided Duncan by preventing Murphy from assisting the complainant. The seriousness of the offence warranted a sentence of two years' imprisonment, but Duncan's sentence was reduced to 18 months solely because of the plea of guilty. Other mitigating factors personal to Duncan warranted his suspension of that sentence after four months. His Honour carefully compared the relevant mitigating features in Duncan's case to those of the applicant, observing the applicant's lack of remorse. His Honour determined that the appropriate sentence for the applicant was one of 18 months' imprisonment suspended after six months.

In order to succeed in this application, the applicant must establish that the disparity between this sentence and that imposed on Duncan is manifestly excessive and unjust, calling for the intervention of an appellate court. See Lowe v. The Queen (1984) 154 CLR 606 at 609, 617 and 623 to 624.

The learned primary Judge correctly considered all relevant factors in imposing sentence on the applicant. There were proper grounds for distinguishing between the sentence imposed on the applicant and his co-offender. Whilst Duncan took a more aggressive role in the commission of the offence and had a more extensive criminal history, most of that criminal history did not involve offences of violence and was committed whilst he was a child. Duncan was two years younger than the applicant when he committed the offence.

Of particular significance is that Duncan pleaded guilty at the committal proceedings, demonstrated remorse and further cooperated with the prosecuting authorities in his willingness to give evidence against the applicant. The offence was serious and carries a maximum penalty of 10 years' imprisonment. The roles played by both Duncan and this offender, warranted a term of actual custody by way of general and individual deterrence, in all the circumstances.

A consideration of the competing factors relevant to the applicant and Duncan, does not establish that the difference between the sentences is manifestly excessive or unjust, warranting the intervention of this Court. I would refuse the application for leave to appeal against sentence.

WILLIAMS JA: Counsel for the applicant conceded that, looked at objectively and in isolation, the sentence imposed of 18 months' imprisonment suspended after serving six months for an operational period of three years was not manifestly excessive.

The issue raised by the application is that, given the sentence on the co-offender, Duncan, the applicant had a legitimate sense of grievance that he had to serve some two months longer in custody than Duncan, who was the principal offender.

As the reasons of the President indicate, there are factors justifying that discrepancy. I agree with all that has been said by the President and with the order proposed.

HOLMES J: I agree with the reasons of the President and those of Justice Williams and the order proposed.

THE PRESIDENT: That is the order of the Court.