SUPREME COURT OF QUEENSLAND

CITATION:	*R v Miller* [2003] QCA 404
PARTIES:	**R** **v** **MILLER, Mark William** (applicant)
FILE NO/S:	CA No 205 of 2003 DC No 39 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	12 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	15 August 2003
JUDGES:	Williams JA, Muir and Holmes JJ 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 – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – OTHER MATTERS – where applicant pleaded guilty – where motive in issue for sentencing – where sentencing judge more readily drew inference because of the failure of the applicant to testify – where little weight given to out-of-court self-serving explanation – whether sentencing judge can draw an inference because of the failure to testify – whether out-of-court self-serving explanation is admissible – whether sentencing judge erred in placing little weight on out-of-court self-serving explanation – whether sentence was manifestly excessive *Evidence Act* 1977 (Qld), s 132C *Azzopardi v R* (2001) 205 CLR 50, considered *Dyers v R* (2002) 76 ALJR 1552, considered *Kingswell v R* (1985) 159 CLR 264, considered *R v Burnham & McLean* [1999] QCA 99; CA Nos 398 and 400 of 1998, 25 March 1999, considered *R v Kazakoff; ex parte A-G (Qld)* [1998] QCA 459; CA No 236 of 1998, 27 August 1998, considered

R v Morrison [1999] 1 Qd R 397; [1998] QCA 162; CA No 391 of 1997, 26 June 1998, considered
R v O'Grady; ex parte A-G (Qld) [2003] QCA 137; CA No 35 of 2003, 28 March 2003, distinguished
R v Robinson [1994] QCA 224; CA No 109 of 1994, 22 June 1994, distinguished
R v Ryan [1998] QCA 120; CA No 466 of 1997, 5 June 1998, distinguished
RPS v R (2000) 199 CLR 620, considered
Weissensteiner v R (1993) 178 CLR 217, considered

COUNSEL: S J Hamlyn-Harris for the applicant
M D Nicolson for the respondent

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

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Holmes J wherein all relevant facts are set out.

[2] In my view it is important to remember that the fact finding process on sentence was invoked because counsel for the applicant contended that his client should be sentenced on the basis that he did not know his victim was a police officer. The offence occurred in a hotel in Atherton, a relatively small country town in North Queensland. The complainant Ellacott gave evidence that he had been stationed in Atherton for "just over three years" when the incident in question occurred. He also gave evidence that whilst he did not actually know the applicant prior to the date of the incident he had "seen him around" the small town. Further, as is mentioned by Holmes J, he had arrested the person Wallace who was with the applicant on the night in question about two years earlier.

[3] Given that this was an issue raised on sentence, and for the reasons given by Holmes J the presumption of innocence was not relevant, one would ordinarily have expected the applicant to give evidence in support of his contention that he was not aware at the time that Ellacott was a police officer. In the absence of such evidence an ordinary person would more readily draw the inference that in the circumstances established by the evidence led the applicant knew the person he assaulted was a police officer.

[4] I agree with the analysis of the authorities made by Holmes J, and with her conclusion that the sentence imposed was not manifestly excessive.

[5] The application for leave to appeal against sentence should be refused.

[6] **MUIR J:** I agree with the reasons of Holmes J and with the order she proposes.

[7] **HOLMES J:** The applicant seeks leave to appeal against a sentence of two and half years imprisonment imposed on him on one count of assault occasioning bodily harm. He pleaded guilty to that count, and to two further counts involving offences of sexual assault and assault occasioning bodily harm committed on an earlier occasion. On each of the last two counts he was sentenced to six months imprisonment, to be served concurrently with each other, but cumulatively on the

sentence for the assault occasioning bodily harm in company. Pre-sentence custody of 207 days was declared as time served in respect of all sentences.

[8] The applicant was 20 years of age at the time of the offences. He had a previous criminal history of relatively modest proportions, which included seven offences of the nature of breaking and entering, in respect of which the most significant penalty imposed was a term of one month's imprisonment suspended for two years, and another offence recorded as "serious assault – assault/resist/obstruct police officer" for which he was sentenced to two months imprisonment suspended for two years. He had only been sentenced to actual imprisonment once, for a period of one month, on a wilful damage charge coupled with two charges of being found in a dwelling house without lawful excuse. The offences of indecent assault and assault occasioning bodily harm were committed during a social occasion at the home of a family known to him, when, apparently intoxicated, he placed his hands inside the clothing of the teenage daughter of the house, and head-butted her father, breaking a tooth, when he remonstrated with him.

[9] The offence giving rise to this application for leave was the assault by the applicant and his co-accused, Jonathan Wallace, of an off-duty police officer at a hotel in Atherton. The applicant was sentenced on the basis that he and Wallace had assaulted the complainant because he was a serving police officer. The chief issue raised on the application for leave to appeal is whether it was open to the learned sentencing judge to find that the applicant knew the complainant was a police officer at the time of the assault. The applicant's counsel maintained that the sentence was manifestly excessive whether or not the finding stood; but his argument clearly was far stronger if that finding were not open on the evidence.

[10] Because the motive for the assault was in issue, the Crown called evidence on the sentence. The complainant, Andrew Ellacott, gave evidence that he had been drinking with some others in the Grand Hotel at Atherton on the evening in question, and saw the applicant and Wallace nearby in a pool room. He knew the applicant by sight but had never had any dealings with him. He had arrested Wallace about two years earlier. There had been no conversation while he was at the hotel between him, or those in the group with him, and the applicant and Wallace. He went to the toilet and on coming out of the cubicle was assaulted by the two men, one of whom said "This will teach you cunts for picking on black fellas." He was punched half a dozen times and kicked in the head and body. The assault continued over two or three minutes as he tried to fight his way out of the toilet area. On reaching the outside door he was pulled back and punched and kicked again in the head. It was put to Ellacott that shortly prior to going to the toilet he had made a remark toward the people in the pool-playing area which included the words "black cunts"; he denied that. After he managed to break free, another police officer who had been in the group with him tried to arrest the applicant, and there was a scuffle. Eventually the applicant and Wallace were arrested.

[11] Penny Lambourne, a former girlfriend of the applicant, gave evidence that she was at the hotel and saw the applicant in the pool-playing area. She told him that he should behave himself, because there was a police officer in the hotel, but declined to tell him who it was. However, after the incident she had informed the applicant that the men he had been fighting were police officers. He told her he did not know that, and that a racial slur was the reason for the altercation.

[12] Peter Howard, a Senior Sergeant of Police was at the watch house when the applicant was charged. He said that the applicant during the charging process said that Ellacott deserved it, that he would do it again and that it was his job to sort out coppers.

[13] Neither the applicant nor his co-accused gave evidence. The position put for the applicant was that he had no recollection of the events on the night in question because of his state of intoxication.

[14] The learned sentencing judge found that there had been no racial slur; that the applicant and his co-accused knew Ellacott was a police officer; and that that was the reason for which they assaulted him. In reaching those conclusions he said of them:

> "They have chosen not to give evidence. That of course, is their right and I draw no adverse inference against them by reason of their failure to give evidence, but in the absence of any evidence from them about these matters, in my view, I am entitled to be somewhat bold in drawing inferences which are available on the evidence. This is not to say that I am entitled to speculate, but where there is evidence supporting an inference in the absence of any evidence from the prisoners to the contrary, if I am satisfied that the inference should be drawn, I am entitled to draw it."

[15] This was an error, counsel for the applicant, Mr Hamlyn-Harris, submitted. Because, he said, it would not have been permissible for the learned sentencing judge to instruct a jury that it could more readily reach a conclusion of guilt by reason of the applicant's failure to give evidence, correspondingly, in determining factual disputes on sentence, the learned sentencing judge was not entitled to use the applicant's failure to give evidence as reinforcing a finding adverse to him. He was bound to approach any circumstance which amounted to an aggravation of the offence in the same way in which the jury would approach its finding on a formal circumstance of aggravation charged in the indictment, of the kind under consideration in *Kingswell v R*[1]. The question of whether the applicant knew that the complainant was a police officer was not an issue on which failing to offer an explanation at sentence fell within the "rare and exceptional" class of cases referred to in *Azzopardi v R*[2] as warranting comment. And in the present case, Mr Hamlyn-Harris argued, the applicant had given an explanation, to Ms Lambourne.

[16] Secondly, Mr Hamlyn-Harris submitted, the principle derived from *Weissensteiner v R*[3], as explained in *Azzopardi,* that failure to provide an explanation may be of evidentiary significance in certain circumstances, carried a corollary, that where an explanation was given, it was admissible. He relied on this passage from the judgment of Gaudron and McHugh JJ in *Weissensteiner*:

> "In the context of the right to silence, it is important to bear in mind that it is the failure to provide an "explanation or answer… as might be expected if the truth were consistent with innocence" which is of evidentiary significance and not the failure to give evidence as such.

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1 (1985) 159 CLR 264 at 280.
2 (2001) 205 CLR 50 at 75.
3 (1993) 178 CLR 217.

> In many cases, an explanation can be offered without the giving of evidence: it may, for example, be advanced when the person concerned is first confronted with the facts or it may be advanced in the course of the trial without evidence from the accused."[4]

[17] Thus, Mr Hamlyn-Harris said, the evidence of Ms Lambourne to the effect that the applicant said he did not know the complainant was a police officer should not have been disregarded. Applying Section 132C of the *Evidence Act* 1977, which gave effect to the *Briginshaw* principle, a high degree of satisfaction was required before an inference could be drawn that the applicant knew the complainant to be a police officer. That satisfaction could not be achieved here.

[18] The majority in *Weissensteiner* (Mason CJ, Deane and Dawson JJ, and, in a separate judgment, Brennan and Toohey JJ) focused their reasoning squarely on failure by an accused to give evidence, concluding that a jury was entitled more readily to draw inferences against an accused who did not give evidence of facts within his knowledge. It is plain that they regarded the limitations on the use to be made of such a failure to give evidence as the product of the presumption of innocence and the onus on the prosecution to prove guilt beyond reasonable doubt.

[19] In their minority judgment, Gaudron and McHugh JJ, on the other hand, emphasised as of significance the failure to explain in circumstances where an innocent person might be expected to do so, rather than the absence of evidence at trial. The presumption of innocence and the prosecution's burden of proof precluded an adverse inference being drawn from mere silence but those factors had no bearing on the situation where a failure to explain could itself amount to evidence. And it was possible that an explanation could be offered without the giving of evidence; for example, in the form of an account given when the accused was first confronted with the facts. If the jury did not accept the explanation offered as a reasonable possibility, it constituted no explanation at all.[5]

[20] The propositions in *Weissensteiner* were again considered by the High Court in *RPS v R*[6]. The trial judge had directed that the appellant's election not to give evidence in contradiction of a complaint of sexual assault could be taken into account in various ways by the jury as giving greater weight to the prosecution evidence, and that, if it were reasonable to expect some denial or contradiction, they were entitled to conclude that the appellant's evidence would not have assisted him. The majority in the High Court (Gaudron A-CJ, Gummow, Kirby and Hayne JJ) considered that those directions contravened s 20(2) of the *Evidence Act* 1995 (NSW), which places limitations on comment about the failure to give evidence. But independent of that provision, they should not have been given, having regard to the lack of significance of the failure to give evidence inherent in the nature of the criminal trial, which was "an accusatorial process in which the prosecution bears the onus of proving the guilt of the accused beyond reasonable doubt."[7] A distinction was to be drawn between a civil trial, in which there was often "a reasonable expectation that a party would give

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4 at 245.
5 at 246.
6 (2000) 199 CLR 620.
7 at 630.

or call relevant evidence", leading rationally to a *Jones v Dunkel*[8] inference, and a criminal trial, where the accused was not bound to give evidence and the prosecution was required to prove its case beyond reasonable doubt. Because there were many reasons why an accused might not wish to give evidence – he might consider that the prosecution evidence did not prove the admission of each of the offences beyond reasonable doubt; he might not be able to contradict each charge "with the same degree of force" and might not wish to expose himself to examination in respect of all counts - there was no safe conclusion which could be reached about failure to give evidence.

[21] In general terms, directions to the jury about how they could reason towards a verdict of guilt led to difficulties, and were better avoided. In a similar vein, in *Dyers v R*[9] Gaudron and Hayne JJ pointed out that if the judge told the jury how to find the facts which would found a verdict of guilt, he commented on those facts in a way which ran "obvious risks of detracting from the jury's role as the tribunal of fact."[10]

[22] In *Azzopardi*, the High Court qualified what was said in *Weissensteiner*. Gaudron, Gummow, Kirby and Hayne JJ who, with Callinan J, formed the majority, began their considerations with a statement of the "principles which inform the development of the law in this area"[11], which were that the criminal trial was an accusatorial process in which the prosecution bore the burden of proving the accusation beyond reasonable doubt, and that, unlike a defendant in a civil proceeding, an accused could not be expected to give evidence at a criminal trial. Issues of what might be said to the jury about the failure to give evidence were to be considered against the background of the common law right of an accused person not to be required to incriminate himself. The simple failure by an accused to contradict the direct evidence of witnesses was not sufficient to warrant a *Weissensteiner* type direction; rather, comment, as opposed to direction, was justified only if there were additional facts peculiarly within the knowledge of the accused which would explain or contradict the inference which the prosecution sought to have the jury draw. Such cases were "rare and exceptional."[12]

[23] Gleeson CJ and McHugh J, in separate dissenting judgments, considered that the view of the majority in *Weissensteiner*, that the failure to explain or contradict evidence could lead to a more ready acceptance of it, or of inferences to be drawn from it, should be adhered to. Gleeson CJ pointed out that in deciding what guidance to give on such issues a trial judge had to have regard to general principles concerning the onus of proof, the presumption of innocence and the evaluation of evidence. The constraints those general principles imposed went beyond trial by jury, applying equally to the reasoning processes of judges and magistrates sitting without a jury, and appellate courts.

[24] In considering whether the approach to fact-finding on sentence should be governed by what was said in *Weissensteiner, RPS* and *Azzopardi,* it is important to identify some of the bases for the conclusions reached in those cases. The common thread in the reasoning in the three cases is that the presumption of innocence underlies the

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8 (1959) 101 CLR 298.
9 (2002) 210 C.L.R. 285.
10 at 294.
11 at 64.
12 at 75.

consideration of what may be drawn from a failure to give evidence. The consequent difference in expectation as to the giving of evidence as between civil and criminal trials is important. An allied, and more practically-based consideration is that, because of the many reasons which may lie behind a decision not to give evidence at trial, inferences should be drawn from such decisions very sparingly indeed.

[25] It is noteworthy, but not surprising, that Gleeson CJ, in expressing concern that the limits set in *Azzopardi* on trial judges' comments, and, by inference on jury reasoning processes, might apply in circumstances other than jury trials, did not allude to the sentencing process. It is self-evident that there is at that stage no longer any presumption of innocence which might be infringed by an expectation that the accused will give evidence. It is true that he has a right to maintain his silence and that he cannot be compelled to give evidence on sentence; but those entitlements are not infringed by the drawing of an inference in favour of the prosecution case if he does not do so. The forensic considerations which might weigh against taking the stand, on which emphasis was placed by the majority in *RPS* and *Azzopardi*, are no longer applicable, or at least not to the same degree. It is no longer a case of waiting for the Crown to establish guilt beyond reasonable doubt; nor are there concerns that the accused, although in a position to rebut one charge, may find himself in difficulty on others.

[26] At the stage at which fact-finding on the sentence occurs, the situation, at least in Queensland, is more akin to that in a civil trial than that in the criminal trial which may have preceded it. The fact-finder is, of course, a judge, not a jury. Although the prosecution still carries an onus, it is, by virtue of s 132C of the *Evidence Act* 1977, to satisfy the sentencing judge on the balance of probabilities, with allowance for the *Briginshaw* standard by requiring a variation of the degree of satisfaction according to the consequences. In those circumstances the distinction drawn by the majority in *RPS*[13] and *Azzopardi*[14] between criminal and civil trials is no longer valid. Nor, where a judge is himself or herself the fact-finder, is there any risk of detracting from the jury's role as tribunal of fact, of the kind identified in *Dyers* and *Azzopardi*.

[27] Because of these distinctions, I do not think that the constraints on comment and approach imposed by the *Weissensteiner* line of authority have any application to fact-finding on sentence. There is nothing, in my view, which would constrain a sentencing judge from proceeding, as common sense dictates, more readily to accept prosecution evidence or draw inferences invited by the prosecution in the absence of contradictory evidence.

[28] The learned sentencing judge in the present case had before him these pieces of evidence: the words said to the complainant, "This will teach you cunts for picking on black fellas"; the fact that Wallace had previously been arrested by the complainant; the fact that Ms Lambourne had told the applicant there were police officers in the hotel; and the evidence that the applicant had later said "It's my job to sort out coppers". An inference clearly was available from those pieces of evidence that the applicant knew that the complainant was a police officer and for that reason assaulted him. That inference could more comfortably be drawn in the absence of contradictory evidence. I do not think that his Honour was saying any

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13 at 632.

14 at 65.

more than that in the passage with which issue is taken. It is no more than ordinary common sense. That reasoning process was a permissible one.

[29] The second point that Mr Hamlyn-Harris raises is that the statements by the accused to Ms Lambourne should have been admitted and acted upon by the learned sentencing judge. He makes his case more broadly than he needs, suggesting that out of court explanatory statements should be admissible at large. He relies for that proposition on the statements by Gaudron and McHugh JJ in their minority judgment in *Weissensteiner*, which include a comment to the effect that it is for the jury to decide whether the explanation presents a reasonable possibility; which suggests that such an explanation must also be admissible.

[30] Out-of-court exculpatory statements may be admitted if they are intertwined with inculpatory statements so as to make it unfair that they not be received as evidence;[15] or as part of the history necessary to the understanding of other evidence[16]. The fact of a previously given explanation (as opposed to its content) may be relevant in establishing that a *Weissensteiner* direction should not be given.[17] But the proposition that a purely self-serving hearsay statement should be admissible as evidence is, as indeed Mr Hamlyn-Harris accepted, counter to authority. The reason for not admitting such statements is all too obvious. It would be rather odd if an accused by giving a selective exculpatory account to a witness of choice could thus ensure its presentation to a jury without any risk of its being tested.

[31] But it is not necessary to explore the issue further, since strict rules of admissibility do not apply on sentence. Section 15 of the *Penalties and Sentences Act* 1992 permits a court in imposing sentence to receive any information it considers appropriate to enable it to impose the proper sentence. In *R v Morrison*[18] Pincus JA and Fryberg J referred to that provision, and to s 14(1) of the *Criminal Offence Victims Act* 1995 (which enables the prosecutor to inform the court of the harm to a victim) to observe that "the law does not require that the sentencing court necessarily be constrained by any of the rules of evidence, in receiving information". The statements attributed by Ms Lambourne to the applicant were before the Court; they were recounted in her evidence. It was not necessary that they be strictly admissible for regard to be had to them. The real problem was one of the weight which could be given to them, as self-serving hearsay.

[32] The learned sentencing judge here, while expressing doubts as to the admissibility of the statements attributed by Ms Lambourne to the applicant, did not exclude them, noting that they had not been objected to. He accepted that the words had been said, but described them, correctly, as "out of court self-serving statements". It is clear that he regarded them as having little weight. I am not persuaded that he was wrong in that approach. I consider he was entitled to find, as he did, that the applicant knew that the complainant was a police officer.

[33] Finally, Mr Hamlyn-Harris argued that, even if the learned sentencing judge's finding was correct, the sentence was manifestly excessive. He referred to *R v*

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15 *R v Cox* [1986] 2 Qd R 55; see also *R v Soma* (2003) 212 C.L.R. 299 at 309.
16 *R v Chevathen and Dorrick* (2001) 122 A Crim R 441.
17 *R v Ryan* [2002] QCA 92.
18 [1999] 1 Qd R 397 at 404.

Robinson[19], *R v Ryan*[20] and *R v O'Grady; ex parte Attorney–General*[21]. In *Ryan* the applicant sought leave to appeal against two sentences of nine months imprisonment for two separate offences of assault occasioning bodily harm, to be served cumulatively upon each other and also on a sentence of 12 months imprisonment, which had been suspended, and was now required to be served. The facts are not apparent from the judgment, but it is clear that the court on appeal took into account the fact that the applicant had already spent 298 days in pre-sentence custody on the suspended sentence, which was nonetheless activated in full; and that there were other errors in the sentencing process which entitled the court to set it aside and sentence afresh, coming to the conclusion that the whole of the suspended sentence should not be served and it should not be served cumulatively on the assault sentences. Because of those features, I do not think it assists as a comparable matter.

[34] In *R v Robinson* the court was considering an application for leave to appeal against an 18 month sentence on an assault occasioning bodily harm. The assault in that case involved a fracas between two groups drinking at a hotel, one of those groups consisting of police officers who had consumed a considerable amount of alcohol. The applicant insulted one of the police officers, and another in his group threw some of his drink at the officers. They then sought to arrest the applicant and a companion; at that point the applicant punched one of the officers. The applicant was 26, was employed, had no significant criminal history and had never previously been incarcerated. The Court of Appeal set aside the 18 month imprisonment and substituted one of imprisonment for nine months. It is a distinguishing feature of considerable importance, in my view, that the altercation there was spontaneous and did not involve a deliberate setting upon a single officer once he had separated from the group, as the present case does.

[35] In *R v O'Grady; ex parte Attorney-General*, the 28 year old respondent had been sentenced to 12 months imprisonment to be served by way of an intensive correction order on one count of assault occasioning bodily harm and one count of doing grievous bodily harm. The Attorney-General appealed that sentence. The respondent had no previous criminal history and was of generally good character with a good work history. He had already completed two months of the intensive correction order. Williams JA, with whose reasons Atkinson J agreed, accepted that requiring the respondent to spend a short period in actual custody after the lapse of time since the sentence could be counter productive to rehabilitation. The appropriate order was a sentence of two years imprisonment, wholly suspended for three years. The features of importance in that case – the good character of the respondent, his lack of previous convictions, the fact that he had partly completed his sentence, and that it was an Attorney-General's appeal – are, plainly enough, absent here.

[36] Mr Nicolson, for the respondent, relied on *R v Burnham and McLean*[22] and *R v Kazakoff, ex parte Attorney-General (Qld)*[23]. In *R v Burnham and McLean*, the applicants were convicted of assault occasioning bodily harm in company. An off duty police officer had responded to a call for assistance in respect of an assault at a park, and was assaulted by the applicants. He was punched and kicked while on the

[19] [1994] QCA 224; CA No 109 of 1994, 22 June 1994.
[20] [1998] QCA 120; CA No 466 of 1997, 5 June 1998.
[21] [2003] QCA 137; CA No 35 of 2003, 28 March 2003.
[22] [1999] QCA 99; CA Nos 398 and 400 of 1998, 25 March 1999.
[23] [1998] QCA 459; CA No 236 of 1998, 27 August 1998.

ground, sustaining a broken nose and nerve damage to his face. The applicants were in their thirties. Burnham had a relatively minor criminal history and McLean a more substantial one. Burnham received a sentence of five years imprisonment, McLean four years; those sentences were reduced on appeal to four years and three years respectively.

[37] In *Kazakoff*, the 17-year-old respondent had pleaded guilty on an ex-officio indictment to a charge of assault occasioning bodily harm while armed and in company. Police officers had attended a disturbance. One of them was assaulted by the respondent, who was amongst a group of males. He hit the complainant on the head with a piece of timber while others kicked him. The complainant suffered some degree of brain damage and a fractured nose. An Attorney-General's appeal against a sentence of two and a half years was allowed and a sentence of four years imprisonment with a recommendation for parole after 18 months was substituted.

[38] The complainant's injuries here were not as severe as those of the complainant in *Kazakoff*, and probably not quite as bad as those of the complainant in *Burnham and McLean.* He suffered numerous bruises and abrasions, but no fractures, and was left with a scar over one eyebrow, and a sore lump on his left cheek, as well as some anxiety and depression. The features of real concern in the case, on the facts as his Honour found them, are that the attack appears to have been calculated; that it involved two setting upon one, when the latter was vulnerable, alone and not expecting violence; that it was protracted; that there was no provocation for it, and that it was Ellacott's status as a police officer that seems to have been the primary motivation for it. The applicant, unlike the applicant in *Robinson* and the respondent in *O'Grady*, had not a good character such as might entitle him to any special consideration. Having said that, he was young, and his criminal history was not of grave proportions. The sentence of two and a half years was, taken in isolation, high; but taken as part of a total effective sentence of three years for all three offences, it was not outside the range indicated by the authorities.

[39] I would dismiss the application for leave to appeal against sentence.