SUPREME COURT OF QUEENSLAND

CITATION:	*R v Prasser; R v Ainsworth & Ors; ex parte A-G (Qld); R v Bennett* [2003] QCA 468
PARTIES:	**R** **v** **PRASSER, Glen Phillip** (applicant) **R** **v** **AINSWORTH, Justin Alastair** **BENNETT, Perry James** **DAVIS, Joel Edward** **KIRKBY, Shane Timothy** **PRASSER, Glen Phillip** **RICHARDS, Christopher Damien** **SEMYRAHA, Adrian James** **UTTENBOSCH, Shane Anthony** (respondents) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant) **R** **v** **BENNETT, Perry James** (applicant)
FILE NO/S:	CA No 200 of 2003 CA Nos 215-222 of 2003 CA No 262 of 2003 SC No 484 of 2002 SC No 158 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application Sentence Appeal by A-G (Qld) Application for Extension (Sentence)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	8 October 2003

JUDGES: Davies JA, Jones and McMurdo JJ
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS:

1. **Attorney-General's appeal against sentence in CA Nos 215-222 of 2003 dismissed**
2. **Application for leave to appeal against sentence in CA No 200 of 2003 refused**
3. **Application for extension of time within which to apply for leave to appeal against sentence in CA No 262 of 2003 refused**

CATCHWORDS: CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AGAINST SENTENCE - APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER - where Attorney - General's appeal against sentences imposed in respect of an assault by several of the respondents on another prisoner - whether sentences imposed for offences of violence committed against members of the general community provide a proper comparison for like offences committed in prison - whether sentencing judge gave undue weight to the criminal history and prison behaviour of the complainant - whether appeal should be allowed

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSONS - where applications for leave to appeal against sentence - where applicants did not demonstrate error by sentencing judge – where applications dismissed

Byron v Earley (1992) 64 A Crim R 140, distinguished
R v Age [1999] QCA 64; CA No 437 of 1998, 15 March 1999, cited
R v Lawrence [2002] QCA 526; CA No 131 of 2002, 2 December 2002, cited
R v Nagy [2003] QCA 175; CA No 24 of 2003, 9 April 2003, considered
R v Southee (1993) 70 A Crim R 282, cited

COUNSEL: R G Martin for the appellant in CA Nos 215-222 of 2003 and for the respondent in CA Nos 200 and 262 of 2003
P J Davis for the respondent in CA No 215 of 2003
Applicant in CA No 262 of 2003 and respondent in CA No 262 of 2003 appeared on his own behalf
M J Byrne QC for the respondent in CA No 217 of 2003
J R Hunter for the respondent in CA No 218 of 2003
A J Glynn SC for the respondent in CA No 219 of 2003 and for the applicant in CA No 200 of 2003
A J Rafter for the respondent in CA No 220 of 2003

A W Moynihan for the respondent in CA No 221 of 2003
C Chowdhury for the respondent in CA No 222 of 2003

SOLICITORS: Director of Public Prosecutions (Qld) for the appellant in CA Nos 215-222 of 2003 and for the respondent in CA No 200 and 262 of 2003
Russo Lawyers for the applicant in CA No 215 of 2003
Applicant in CA No 262 of 2003 and respondent in CA No 216 of 2003 appeared on his own behalf
Legal Aid Queensland for the respondent in CA Nos 217 - 222 of 2003 and for the applicant in CA No 200 of 2003

[1] **DAVIES JA:** I agree with the reasons for judgment of McMurdo J and with the orders he proposes.

[2] **JONES J:** I agree with the reasons for judgment of McMurdo J and with the orders he proposes.

[3] **McMURDO J:** The principal question in these cases is whether sentences for offences of violence committed against members of the general community provide any useful standard of comparison for offences of violence within prisons. The Attorney-General contends that they do not, and that offences by prisoners require penalties higher than any range indicated by cases such as this court's recent decision in *R v Nagy* [2004] 1 Qd. R. 63.

The Facts

[4] On 13 March 2001, each of the respondents was an inmate of unit 2B of The Sir David Longlands Correctional Centre and had an extensive criminal history, including offences of serious violence. One of them, Mr Prasser, had been assaulted by another inmate, Mr Ilic, on the previous day, giving Mr Prasser a torn ear and a black eye. On 13 March, the respondents, except for Mr Bennett, attacked Mr Ilic as he sat in the unit dining room whilst the prison officer overseeing the unit was momentarily absent.

[5] As the sentencing judge found, their assault was not spontaneous but was pre-arranged. The attack started as soon as the prison officer was absent. A rope was put around Mr Ilic's neck to restrain him and Mr Ilic was then punched and kneed in the head. The respondents attacked Mr Ilic with fists, knees and feet, and with homemade weapons including the rope, a shiv and plastic tennis racquets. When the officer in charge returned to find Mr Ilic being assaulted, his order to stop was ignored and he called for assistance from other officers. He saw Mr Ilic's head being lifted and kneed against the concrete cement block floor as Mr Ilic fell to the floor where he was kicked and his head was stomped on. When other prison officers arrived, they were for some time prevented from entering the dining room by some of the respondents holding the doors to the room, whilst others continued the assault on Mr Ilic. When the prison officers were able to enter the room, the respondents retreated to their cells as ordered by the officers. Before doing so however, some, including the respondent Mr Bennett, urgently attempted to destroy evidence. There was a deal of Mr Ilic's blood in the room, which was the subject of

some cleaning and mopping, and clothes were washed or were set alight on the stove. Four minutes passed from the officer's first seeing the assault and when Mr Ilic, who was still conscious, was removed from the room.

[6] Mr Ilic suffered cuts and bruising. He had two small stab wounds in his upper back near the neck, one of which was 5 cm. deep, but neither of which required stitching. He had lacerations to the face which did not require stitches, suborbital haemorrhages and bleeding within the eyes and bruising to his face. He had a significant scalp cut and a rope mark on his neck. There was no deep injury or fracture and he spent only a weekend in hospital and was released with a recommendation for dressing of the two knife wounds and analgesia. The sentencing judge found that the relatively moderate injuries to Mr Ilic were by design and not good fortune, observing that "if there had been an intention to cause serious permanent harm, it seems probable, given (the respondents') numbers and know-how, that it could have been achieved". Her Honour found that their intention was to teach Mr Ilic a lesson by causing him considerable pain and discomfort, rather than to inflict any particular injury.

[7] They were initially charged with attempted murder, before the Crown accepted pleas to charges of assault occasioning bodily harm (with circumstances of aggravation) against the respondents, with the exception of Mr Bennett, from whom the Crown accepted a plea to being an accessory after the fact to the assault. The respondents Ainsworth, Bennett, Davis, Kirkby and Uttenbosch pleaded guilty on 16 May 2003, and the respondents Prasser, Richards and Semyraha a few days later.

The Sentences Imposed

[8] Each of Ainsworth, Davis, Kirkby and Uttenbosch was sentenced to three years imprisonment. The respondents Prasser and Richards were sentenced to 18 months imprisonment, and Bennett to nine months. Each sentence was ordered to be served cumulatively with the prisoner's existing term as required by s 156A of the *Penalties and Sentences Act* 1992. The respondent Semyraha was sentenced to two years imprisonment, which was concurrent with his existing term because he is serving a life sentence for murder. The sentencing judge made recommendations for post-prison community based release to the effect that each respondent should serve one half of the term imposed, with the exceptions that Uttenbosch should serve one year of his sentence of three years and Semyraha be eligible for release on the date on which he could be released on his life sentence (29 March 2014).

The Attorney-General's Appeal

[9] The Attorney-General appeals against each respondent's head sentence. He does not challenge the relativity of one sentence against any other, but submits that each is well below what should be regarded as the appropriate range. He submits that those who received three year terms should have been sentenced within a range of six to eight years, those who were sentenced to 18 months warranted a range of three to four years, and the respondent Mr Bennett warranted 12 to 18 months.

[10] The principal argument for the Attorney is that the sentencing judge was wrong to regard sentences for this offence when committed outside prison as providing any useful yardstick. The offence of assault occasioning bodily harm, committed in prison, is said to require a much heavier penalty than is indicated by sentences for

that offence in other cases. So in the present case, it is submitted that the sentencing judge should have disregarded cases such as this court's recent decision in *Nagy*.

[11] In *Nagy*, the applicant for leave had pleaded guilty to several offences, including one count of assault occasioning bodily harm in company in December 2001 and two counts of assault occasioning bodily harm whilst armed and in company in February 2002. He was sentenced in the District Court to five years imprisonment on each of the assault counts, as well as lesser sentences for certain other offences, and all of these sentences were to be served concurrently, with a recommendation for post-prison community based release after serving two years. He applied for leave to appeal against his head sentence of five years on each of the assault counts, on grounds which included a submission that the sentence was outside the established range. He was aged 19 at the time of these offences. In October 2001, he had been sentenced to four months imprisonment and three years probation for a number of offences committed as a juvenile. He had been released from custody for only four days before the first of these assaults, which was an attack by a gang of five men, including Nagy, and one woman upon a young man who was simply waiting for a train at a suburban station. The complainant was viciously hit and kneed whilst being held by others in the gang, and was repeatedly kicked after he fell to the ground. He suffered a bruised forehead, a cut on the left elbow, a broken nose, a fractured jaw and grazed knees and elbows. He had some loss of consciousness and amnesia. Nagy was still subject to a probation order on 11 February 2002 when he committed the further assaults. On this occasion, he and a number of others assaulted a train driver and a train guard, as a result of the guard having told the group to alight from the train because of their bad behaviour. The two complainants were surrounded by approximately nine persons, bottles and rocks were thrown at them, some of the rocks being as large as a man's fist. One of the complainants, a man aged 43, suffered concussion, facial bruising and cuts, severe bruising to the left upper arm, pain in his lower back which persisted for weeks and trauma which caused him to be off work. The other, a man aged 42, suffered a bruised chest, swelling to the left side of the head, lumps on his head and pain to his jaw, arms and legs, and a stress disorder.

[12] The principal judgment was given by Williams JA, with whom Muir J relevantly agreed. His Honour concluded in relation to the first of these assaults that a sentence of two years would be towards the top of the appropriate range, moderated to reflect the applicant's youth and plea of guilty but recognising the circumstances that the assault was in company and that it occurred but four days after the applicant's release from prison and whilst he was still on probation. In his Honour's view, a sentence of five years was not supportable as the appropriate sentence for this first assault, looked at in isolation, and he inferred that the sentencing judge had inflated the sentence because of the perceived overall criminality of the applicant's conduct taking into account the assaults in February 2002. His Honour concluded that there should be a sentence of three years on the February counts, but to be served cumulatively with the two year sentence for the first count. The February offences were regarded as more serious, partly because they were directed at persons who were obliged by their employment to confront the applicant and his companions for their behaviour on the train.

[13] In the present case, the sentencing judge paid particular attention to *Nagy*, no doubt because it is such a recent decision of this court in respect of the offence of assault occasioning bodily harm with the aggravated circumstance of the assault being in

company. For the Attorney-General however, it was submitted that *Nagy* and other such cases are of no assistance in the sentencing of prisoners who commit this offence. The bases for this distinction are said to be the need for a heavier deterrent to promote discipline in prisons and the fact that "the prisoners were for the most part already in prison being punished for violence". These matters are said to justify quite a different range by the application of what it was submitted should be an "aggressive" approach to sentencing. It is undoubtedly the case that despite the strict disciplinary and supervisory regimes within prisons, there is a particular potential for violence by prisoners against other prisoners or those working in prisons, which is partly explained by the temperament and behavioural norms of many who go to prison. The circumstances of the present case are not novel, and the need to protect each and every prisoner, no matter how serious his or her own criminal history or prison behaviour, from acts of violence by other prisoners, should be duly recognised in sentences which are imposed for offences such as these cases. A sentencing judge is required to appreciate the high importance of deterring prison violence such as this, whether or not it involves anything which the offender would see as justification. The sentencing judge here did recognise these matters, saying that:

> "I need hardly say that attempts by prisoners to take the law into their own hands are not to be tolerated and require deterrent punishment."

The fact that these offences were committed by prisoners upon another and then defenceless prisoner was obviously an important consideration in the balancing of all relevant considerations in the exercise of the sentencing discretion. Of course there are differences between this case and for example *Nagy*, but there are also many relevant considerations which are common. The Attorney's submission would require a firewall to be put in place between offences of violence in prison and offences of violence of an apparently similar kind committed against people in the general community. No authority, from this State or elsewhere, was cited for that approach; instead, it was submitted that this decision should become its authority. In *R v Byron and Earley* (1992) 64 A Crim R 140, King CJ (with whom Cox and Matheson JJ agreed) said that because crimes committed in prison against a fellow prisoner are notoriously difficult to prove, courts must impose "severe and deterrent penalties in the cases that can be proved". That proposition is not in question but the Attorney's submission involves quite a different point.

[14] Nor is the approach said to be indicated at all by a comparison between sentences imposed for prison violence in other cases and sentences for offences outside prisons. Indeed, the Attorney's submission also criticised the sentences imposed in this court in some other cases of prison violence, including *R v Southee* (1993) 70 A Crim R 282; *R v Age* [1999] QCA 64; and *R v Lawrence* [2002] QCA 526.

[15] The relevance of the offence being committed by a prisoner is uncontroversial but its particular impact upon the sentencing of an offender will vary from case to case according to the impact of the other facts and circumstances of each case. But I do not regard this offence when committed by a prisoner as being so unlike any assault on a citizen in the general community as to make irrelevant an identified range of appropriate penalties in that broader context. I am not persuaded that the need to deter, or any other relevant purpose of sentencing, can be served only by the creation of a distinct and higher range as the appellant argues.

[16] Another ground of the Attorney's appeal is that the sentencing judge gave undue weight to the criminal history and prison behaviour of the complainant, including the complainant's assault on the respondent Prasser. Her Honour summarised his criminal history and violent behaviour as a prisoner in terms which brought a submission for the Attorney that there was a "demonising" of the complainant which had resulted in these sentences being manifestly inadequate. After making it clear, in the passage cited above, that prison violence was not to be tolerated and would require deterrent punishment, her Honour added:

> "But it is relevant that this offence was not the product of sheer mindless viciousness, as seems to have been the case in *Nagy* and some other street violence cases."

Ultimately, Mr Martin for the Attorney accepted the relevance of that matter, but added that it was only marginally relevant. Plainly it is relevant: if, for example, this attack had been upon a prisoner in retaliation of his making a complaint or his informing prison authorities of other offences, it would be regarded as yet more serious. Again, had it been committed upon a prison officer, then heavier sentences would be warranted. It is wrong then to regard the present case as being what the Attorney's written argument described as the worst imaginable "of its type". There is an apparent concern by the Attorney that her Honour's sentencing remarks, in their summary of the complainant's background and behaviour, might be perceived as an approach which endorses violent self-help within the prison community. They should not be so understood. Her Honour has merely observed that the complainant's circumstances and conduct were relevant matters, without treating them as disproportionately mitigating.

[17] Each of these sentences (with the exception of the respondent Semyraha who is serving a life sentence) has added a substantial period to the time that the respondent will be in custody. Having regard to the various considerations which the sentencing judge was required to balance, including what her Honour found was the respondents' relevant intention, these sentences are within an appropriate range.

[18] In my view the Attorney-General's appeal demonstrates no error by the sentencing judge and it should in each case be dismissed.

Mr Prasser's Application

[19] Mr Prasser applies for leave to appeal against his sentence on the basis that her Honour allegedly erred in not reducing his sentence having regard to other consequences for him as a result of this offence. He was eligible for release in May 2001, some two months after this offence was committed. He not only lost that opportunity but in the two years from this offence until he was sentenced, he was detained within the maximum security unit because of what he argues is an incorrect report that he had incited other prisoners to commit this attack upon Mr Ilic. Her Honour considered that submission, but did not think that she was in a position to reach a conclusion as to whether his detention in that unit was justified in all of the circumstances potentially relevant to that matter. No error in her Honour's consideration of the issue is demonstrated. It is not plain that his detention in that way was unjustified and it was open to her Honour to conclude as she did. Mr Prasser's application for leave to appeal should be dismissed.

Mr Bennett's Application

[20] Mr Bennett's conduct as an accessory after the fact was in the acts of destruction of evidence as earlier described. He appeared in person to argue the limited role he had in the exercise of destroying evidence. There is nothing in what he said which was not said by his counsel below as to the facts of his involvement, and there is no demonstrated error by the sentencing judge in assessing the extent of his involvement or the appropriate penalty for it. His application should be dismissed.

Orders

[21] Each of the Attorney-General's appeals, and the applications by Mr Prasser and Mr Bennett for leave to appeal, is dismissed.