SUPREME COURT OF QUEENSLAND

CITATION:	*R v Maguire* [2004] QCA 22
PARTIES:	**R** **v** **MAGUIRE, Brian Kevin** (applicant/appellant)
FILE NO/S:	CA No 358 of 2003 DC No 186 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Maryborough
DELIVERED EX TEMPORE ON:	11 February 2004
DELIVERED AT:	Brisbane
HEARING DATE:	11 February 2004
JUDGES:	de Jersey CJ, Davies JA, Mackenzie J Judgment of the Court
ORDER:	**Extend time as necessary in relation to the application for leave to appeal against sentence, that is until the date of lodgement 4 November 2003, and adjourn the hearing of the application for leave to appeal against sentence to a date to be fixed.**
CATCHWORDS:	JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where appellant did grievous bodily harm – where appellant suffered adverse neurological consequences – where appellant had substantial prior criminal history – whether suspension rather than recommendation should be imposed
COUNSEL:	A J Moynihan (as amicus curiae) for the appellant P F Rutledge for the respondent
SOLICITORS:	The appellant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

THE CHIEF JUSTICE: On the 18th of September 2003 the applicant pleaded guilty in the District Court at Maryborough to five offences, doing grievous bodily harm, wilful damage, assault occasioning bodily harm, assault occasioning bodily harm while armed and possession of a knife and another for breach of the Bail Act. For doing grievous bodily harm, the most serious of the offences, he was sentenced to five and a half years' imprisonment with a recommendation for consideration of post-prison community based release after two years.

On the 4th of November 2003 he filed an application for an extension of time within which to seek leave to appeal against sentence. His explanation for the lateness of the application which was to the order of about three weeks is that although he lodged the application within the prison, within the requisite 28 day term, it was not forwarded by the prison authorities to the Court. In fact it was rejected within the prison system, as Mr Moynihan who appeared amicus curiae this morning has confirmed.

The approach taken by Mr Moynihan this morning has been that were time extended he would seek to place before the Court expert medical evidence dealing with the neurological consequences to the applicant of a beating inflicting upon him by way of retaliation for his commission of the offence.

The circumstances of that offence of doing grievous bodily harm were that as the applicant was walking home with his children the complainant, who was intoxicated, apparently took exception to the applicant's children looking at him, walked across the road and hit the applicant in the face throwing punches. The applicant then drew a knife - a substantial knife with a folding blade, and stabbed the complainant in the neck.

The complainant was very seriously injured. He suffered a 3 to 4 centimetre transverse cut to the left side of the neck and required intubation, ventilation and surgery. The part of the pharynx which opens into the larynx was completely severed and the larynx and a nerve were partially severed. He required a temporary tracheotomy. He experienced difficulty swallowing, his voice was affected and his ability to play the didgeridoo was impaired. So it was a serious instance of doing grievous bodily harm even allowing for the complainant's provocation.

The learned sentencing Judge accepted that the penalty to be visited upon the applicant was affected by the circumstance that friends of the complainant subsequently retaliated in a serious way such that the applicant suffered substantial facial injuries leading to a period of intensive care.

Mr Moynihan wishes to adduce evidence subsequently obtained from a medical specialist which may show that the applicant suffered adverse consequences neurologically which would, for example, hinder his capacity to complete courses at the prison necessary for favourable treatment of his recommendation for parole after two years. It is in that context that Mr Moynihan raised the possibility, for example, of adjustment of the sentence to say a head term of five years imprisonment with, rather than a recommendation, a suspension of the term after two years to avoid any such problem.

It must be acknowledged that the applicant at the time of sentence bore the burden of a substantial relevant prior criminal history including a prior conviction in 1993 for assault occasioning bodily harm and related offences. He had been imprisoned before. At the time of committing this offence of doing grievous bodily harm he was indeed subject to a suspended sentence for doing wilful damage and other offences imposed in January 2003. He committed this offence on the 6th of March 2003 so that his past criminal history is extremely relevant.

On the other hand it may be that the neurological evidence to which I have referred is a feature not available to the learned sentencing Judge which may, in what I have previously

termed this curious case, warrant some such adjustment of the sentence as I have indicated so that the learned sentencing Judge's expectation as to release might be fulfilled. It may in short be that had the sentencing Judge been aware of that sort of neurological position he would have been persuaded to impose a suspension rather than making a recommendation.

In all these circumstances it does seem to me to be a case where time should be extended and these issues properly ventilated upon the hearing of an application and it is of some significance that Mr Rutledge who appears for the Crown today has not opposed our taking that course. I would accordingly extend time as necessary in relation to the application for leave to appeal against sentence, that is until the date of lodgement 4th November 2003, and adjourn the hearing of the application for leave to appeal against sentence to a date to be fixed.

DAVIES JA: I agree.

MACKENZIE J: I agree.

THE CHIEF JUSTICE: Those are the orders.