SUPREME COURT OF QUEENSLAND

CITATION:	*R v Maguire* [2004] QCA 55
PARTIES:	**R** **v** **MAGUIRE, Brian Kevin** (applicant)
FILE NO/S:	CA No 358 of 2003 DC No 186 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maryborough
DELIVERED EX TEMPORE ON:	8 March 2004
DELIVERED AT:	Brisbane
HEARING DATE:	8 March 2004
JUDGES:	Davies and Jerrard JJA and McMurdo J Separate reasons for judgment for each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal is dismissed**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – FACTUAL BASIS FOR SENTENCE – GENERALLY – where applicant sentenced in relation to one count of grievous bodily harm, two counts of assault, one count of wilful damage, two counts of summary charges and one count of failure to appear in breach of *Bail Act* 1980 (Qld) – where head sentence is five and half years – where sentencing judge accounted for mitigating factors – where applicant seeks leave to admit further evidence – whether the sentence is manifestly excessive *R v Bryan, ex parte the A-G* [2003] QCA 18; CA No 410 of 2002, 5 February 2003, considered *R v Wiggins* [2003] QCA 367; CA No 134 of 2003, 27 August 2003, considered
COUNSEL:	A J Moynihan for the applicant D A Holliday for the respondent

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

McMURDO J: On 18 September 2003, the applicant was sentenced in relation to one count of grievous bodily harm, two counts of assault occasioning bodily harm, one of wilful damage and two summary charges, one of possession of a knife in a public place and one of a failure to appear in breach of the *Bail Act* 1980. The wilful damage occurred on 13 January 2003, the assaults occasioning bodily harm on 11 February 2003 and the grievous bodily harm, which involved the knife, occurred on 6 March 2003.

Upon the grievous bodily harm count, the applicant was sentenced to a term of five and a half years imprisonment with a recommendation for post-prison community based release after two years. Upon the assaults occasioning bodily harm, he was sentenced to terms of 12 and 18 months imprisonment. He was sentenced to one month imprisonment for the wilful damage, six months for the possession of the knife and two months for breach of the *Bail Act*. All of the sentences were ordered to be served concurrently other than the two months for the bail offence which must be served cumulatively. He was declared to have spent 104 days in pre-sentence custody.

He applies for leave to appeal against the sentence for the grievous bodily harm, submitting that the head sentence should be reduced from five and a half years to five years and that

it should be suspended after two years in lieu of the recommendation that he be released after that time.

Before discussing the circumstances of the grievous bodily harm count, it is necessary to say something of the assaults committed on 11 February 2003. The applicant then assaulted his wife and 11 year old daughter when they returned home after a social outing. The assaults were unprovoked and can be explained only by the applicant's intoxication. He struck both of them numerous blows to the head and body, knocking them off their feet. While the child was down, he kicked her. Each suffered bruising to the head and the body.

The grievous bodily harm took place in the course of an incident outside a hotel as the applicant, his wife and five children left those premises. The complainant, the 17 year old male, was walking on the other side of the street from the applicant when the complainant crossed the street, approached the applicant and accused the applicant's daughter of staring at him. The complainant was intoxicated. The applicant's first response was to apologise, but the complainant proceeded to push the applicant in the chest and throw punches at him.

The applicant grabbed the complainant around the neck before stabbing him in the neck with the applicant's knife. This was a folding knife which required two hands to open it. The complainant began to walk away but then collapsed. The applicant and his family went back inside the hotel where he was seen to be holding the knife and heard to say words to the

effect, "I stabbed a coon in the neck. Who gives a shit? They're probably all coming to get me". The applicant also said, "Call the police".

Before the police arrived, a group of male associates of the complainant entered the hotel and assaulted the applicant causing him significant injury.

Without medical treatment, the complainant would have died as a result of the stabbing. The knife severed some of the portions of the larynx and nerves to the throat resulting in permanent impairment of this young man's ability to speak, as well as giving him difficulty when eating. There are further aspects of his life affected by his injuries. He required incubation, ventilation and surgery.

The applicant has an extensive criminal history, having been previously imprisoned for offences of violence and dishonesty. In 1993 he was convicted and sentenced to a community based order for an assault occasioning bodily harm in company whilst armed when, whilst intoxicated, he hit a man with a piece of wood. He breached that order and was sentenced to a suspended term of imprisonment. He also breached that suspended term of imprisonment and in 1996 was ordered to serve the suspended term of six months. In 1999 he received terms of imprisonment for summary offences including dangerous conduct with a weapon involving his discharging a shotgun in a Brisbane suburb.

He was on a suspended term of imprisonment when he committed the matters for which he was sentenced including the offences of this appeal. This was a suspended term of one month imposed on 31 January 2003 for summary offences involving obstructing police and behaving in a threatening manner. He is now aged 36. Plainly, he has been an alcoholic for much of his life and this has been at least a substantial contributing factor to his offending. The present offence however cannot be explained simply on that basis.

The sentencing judge was referred to and discussed two decisions of this Court which concerned sentences for grievous bodily harm involving the use of a knife. They are *R v Bryan ex parte the Attorney-General* [2003] QCA 18 and *R v Wiggins* [2003] QCA 367, in which sentences of respectively six years and six years nine months, were imposed in this Court. The sentencing judge here correctly observed that each of these cases was more serious than the present one, because in this case the stabbing occurred in a fight in which the complainant was the original aggressor. That difference from *Bryan* or *Wiggins* is reflected in the lower head sentence in the present case. Whilst his Honour was correct to give affect to that distinguishing factor, it remained the case that this was a vicious, disproportionate reaction to the actions of an intoxicated complainant which has left the complainant permanently disabled and could have killed him.

The applicant sought leave to admit new evidence in the form of a report by a psychologist who assessed the applicant a

week after he was sentenced. According to that report, the applicant has suffered cognitive deficits which are consistent with what follows a traumatic brain injury which is a reference to the applicant's own injuries after the retaliatory beating he took in the hotel. As the report also mentions, they are symptoms also consistent with the applicant's long history of alcoholism.

The injuries suffered by the offender in retaliation for his offence can be taken into account as a mitigating factor. The sentencing judge recognised that and referred to the applicant's very significant facial injuries, including that he had already suffered quite significantly for his part in this particular offence.

The sentencing remarks show that his Honour did take those injuries into account, although he did not specifically refer to the effects of those injuries, and in particular the cognitive deficits.

He was referred to such matters however, by the applicant's counsel who told his Honour that since the attack the applicant had suffered problems with dizziness, headaches, memory and speech.

The particular relevance of this evidence is said to be that the applicant's cognitive difficulties will make it difficult for him to complete the requirements of certain courses which would support an early release.

Based on this evidence, if admitted, it is argued that the applicant will be at a disadvantage in obtaining post prison community based release, so that the appropriate course is to suspend his sentence after two years rather than to recommend that he be considered for release at that time and to bring about that result the applicant submits that the head sentence should be reduced to five years, as it must be for the sentence to be suspended.

The difficulty in this submission is that the applicant has previously had the benefit of suspended sentences on many occasions, and yet he has often offended whilst his sentence was suspended.

As his principal difficulty in managing his behaviour is his alcoholism, it is submitted against him that in these circumstances his Honour was correct in making a recommendation for early release, rather than suspending his sentence.

In my view, that submission has particular force. Given his unsuccessful history of suspended sentences, it is my view that had this proposed further evidence been before the sentencing judge, the sentence would have been no different.

The interests of justice do not require this evidence to be admitted. It cannot be said that the applicant has no real prospect of obtaining an early release from prison in

accordance with the sentencing judge's recommendation and in the present case there is good reason for that recommendation, rather than a partial suspension of his sentence.

In my view the application for leave to appeal should be dismissed.

DAVIES JA: I agree.

JERRARD JA: I agree.

DAVIES JA: The application is dismissed.