# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v Burnham; R v McPartland* [2004] QCA 101 |
| PARTIES: | **R**<br>**v**<br>**BURNHAM, Kylie Mary**<br>(appellant/applicant)<br><br>**R**<br>**v**<br>**McPARTLAND, Brian Michael**<br>(appellant/applicant) |
| FILE NO/S: | CA No 351 of 2003<br>CA No 364 of 2003<br>DC No 369 of 2003 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeals against Conviction & Sentence |
| ORIGINATING COURT: | District Court at Maroochydore |
| DELIVERED ON: | 8 April 2004 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 25 March 2004 |
| JUDGES: | McPherson and Williams JJA and Philippides J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. In CA No 351 of 2003**<br>**(a) Appeal against convictions dismissed**<br>**(b) Leave to appeal against sentence granted and appeal allowed to the extent of adding to the sentences imposed at first instance an order that the sentences be suspended after serving 18 months with an operational period of four years**<br>**2. In CA No 364 of 2003**<br>**(a) Appeal against convictions dismissed**<br>**(b) Application for leave to appeal against sentence dismissed** |
| CATCHWORDS: | CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – INFORMATION, INDICTMENT OR PRESENTMENT – JOINDER – OF COUNTS – APART FROM STATUTE – PARTICULAR CASES – where appellants convicted of two counts of robbery in company with personal violence and one count of attempted robbery in company with personal violence – where appellant |

McPartland also convicted of rape – where first count occurred on earlier date to other two – where some similar circumstances in both robberies – where counts were joined – where strong evidence against appellants on first count – whether there was such a striking similarity between the offences as to make the evidence as to each admissible and relevant to the others

CRIMINAL LAW – EVIDENCE – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS – IDENTIFICATION EVIDENCE – TESTIMONY AS TO BELIEF IN IDENTITY – where identification evidence from complainants on later two counts was insufficient alone to identify appellants as the offenders – whether jury verdicts unsafe and unsatisfactory

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where appellant McPartland sentenced to 10 years imprisonment – where appellant Burnham sentenced to four years imprisonment – where McPartland had extensive criminal history and committed offences three weeks after being released from prison on earlier convictions – where Burnham had no prior criminal history but participated in the violence of the robberies – whether sentences imposed were manifestly excessive

*Hoch v R* (1988) 165 CLR 292, cited
*Pfennig v R* (1995) 182 CLR 461, cited
*R v O'Keefe* [2000] 1 Qd R 564; [1999] QCA 50; CA No 332 of 1998, 5 March 1999, cited
*Sutton v R* (1984) 152 CLR 528, cited

COUNSEL: K M McGinness for the appellants/applicants
D L Meredith for the respondent

SOLICITORS: Legal Aid Queensland for the appellants/applicants
Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA:** I agree with the reasons of Williams JA, which I have had the advantage of reading. The appeals against conviction should be dismissed. McPartland's application for leave to appeal against sentence in no 364 of 2003 should also be dismissed. That of Burnham in no 351 of 2003 should be granted to the extent proposed in para 1(ii) of para 49 of his Honour's reasons.

[2] **WILLIAMS JA:** After a trial in the District Court at Maroochydore the appellants were convicted on 10 October 2003 of the following offences:-

Burnham

(i) Robbery in company with personal violence on 2 October 2001 (complainant Talip);
(ii) Robbery in company with personal violence on 16 October 2001 (complainant N);
(iii) Attempted robbery in company with personal violence on 16 October 2001 (complainant O'Brien).

McPartland

(i) Robbery in company with personal violence on 2 October 2001 (complainant Talip);
(ii) Robbery in company with personal violence on 16 October 2001 (complainant N);
(iii) Attempted robbery in company with personal violence on 16 October 2001 (complainant O'Brien);
(iv) Rape on 16 October 2001 (complainant N).

[3] The sentences imposed on Burnham for the three counts were two years imprisonment, four years imprisonment, and three years imprisonment respectively; the sentences to be served concurrently. No recommendation with respect to early release was made.

[4] McPartland was sentenced on the four counts to five years imprisonment, 10 years imprisonment, seven years imprisonment and 10 years imprisonment respectively; the sentences to be served concurrently. The sentences of 10 years imprisonment automatically carried a declaration that he was convicted of a serious violent offence.

[5] Each appellant has appealed against conviction, and each has sought leave to appeal against sentence.

[6] Each appellant challenges the joinder of the offences involving N and O'Brien with the earlier offence involving Talip. Each also contends that the identification evidence from N and O'Brien was inadequate and unreliable; it was asserted that such identification evidence was so unreliable that it ought to have been excluded. The prosecution case did not rely solely on that identification evidence; it was put forward as part of a circumstantial case against each appellant with respect to the events of 16 October. It was then submitted on appeal that the verdicts considered in the light of all the evidence were unsafe and unsatisfactory. It was also submitted that Burnham's conviction for the offence involving Talip was unsafe and unsatisfactory and could not be supported having regard to the evidence.

[7] The prosecution case with respect to the robbery of Talip was a particularly strong one. Talip gave evidence that he was befriended inside the Rolling Rock Nightclub at Noosa by the two appellants and a man named Clarke (who absconded prior to trial). It was not disputed that Burnham was the girlfriend of Clarke. Evidence from security staff at the nightclub, and the images recorded by the surveillance camera at the entrance to the nightclub, confirmed that the four persons left together. Security staff and Talip identified each of the appellants as being the persons shown in the video, and that evidence was not challenged. McPartland was evicted from the premises and that drew the attention of security people to the

group. Talip's evidence was that the three persons accompanied him towards the taxi rank but when they reached the "Lions Park" he was assaulted by way of punches and kicks from McPartland and Clarke. A wallet containing money, a watch and a mobile phone were stolen. Talip was a tourist holidaying at Noosa from Canberra.

[8] Talip's evidence was that immediately prior to the attack he had been walking through the park with Burnham and Clarke, talking with them, and McPartland was "just walking a little bit behind me". His evidence was that it was McPartland who initially grabbed him in a choke hold, but then Clarke began punching him in the stomach. He received a number of kicks and punches from both men in the course of the incident. His bumbag was pulled off his body and its contents were taken by his assailants. Under cross-examination he agreed that Burnham did not actually assault him (in the sense of make physical contact with him) at all in the course of the incident. His evidence was that she was present close by throughout the whole of the incident.

[9] In the course of the summing-up the learned trial judge instructed the jury that a person who aids someone to commit an offence, knowing at the time that they are giving that assistance can be convicted of the offence. He then said: "The prosecution says you'll find [Burnham] guilty because she was there, she was aiding by her presence, and that's a matter for you".

[10] On the evening of 15 October 2001 N, a 21 year old Swedish tourist, went to the Rolling Rock Nightclub accompanied by her 20 year old companion Hamish O'Brien. They stayed there until the early hours of the morning of 16 October. On leaving the nightclub they walked along Hastings Street towards Halse Lodge where N was staying. In evidence N said that as they were walking up the road "we met this guy or he was coming towards us and started talking to us". That other male appeared to be drunk and indicated that he was looking for some place to stay the night. O'Brien suggested to him that he try one of the Backpacker Hostels and he and N continued walking. They were aware that the other man was then following them. When they got near to the entrance to Halse Lodge the other person again approached them and asked whether he could stay in N's room; she replied "No". That other male person then yelled out in a reasonably loud voice and N saw another male person and a female coming towards them. The male person who had initially approached N and O'Brien then held N while the female punched her to the face, head and side. That male person then threw N to the ground, placed his hands around her throat, placed his hand under her dress, squeezed her breast, and then inserted one or two fingers into her vagina. That male person then took N's bag which contained money, her driver's license, and an ATM card.

[11] Whilst the attack on N was taking place the second male attacked O'Brien who sustained injuries to his face and his body. His wallet was taken but later discarded by the offenders as it contained no money. Another person came on the scene and the three offenders ran away together.

[12] There was evidence, not challenged, that the two appellants and Clarke were at the nightclub on the evening 15 – 16 October. They are shown by the surveillance camera arriving and leaving together. Again the attention of security people was directed to the appellant McPartland because he was evicted. Because of alleged inaccuracy in the timing mechanism associated with the surveillance camera it was

submitted that one could not be certain as to the length of time between each group leaving the nightclub, but it was open to the jury to conclude that it was not great.

[13] At the trial there was no serious challenge to the evidence of N and O'Brien, nor to the other evidence tending to suggest that an attack along the lines deposed to by those two witnesses had occurred. The issue for the jury was identification; was it the two appellants (and Clarke) who committed the offences.

[14] The prosecution justified the joinder of the charges on the basis that there was such a striking similarity between the offence which occurred on 2 October and that which occurred on 16 October as to make the evidence as to each admissible and relevant when considering the other. That contention was based on propositions derived from *Pfennig v The Queen* (1995) 182 CLR 461 especially at 481-2 and 488, *Sutton v The Queen* (1984) 152 CLR 528, *Hoch v The Queen* (1988) 165 CLR 292 and *R v O'Keefe* [2000] 1 Qd R 564 especially at 571 and 573-4. In the course of the summing-up the learned trial judge referred to nine similarities which the jury could have regard to in considering whether they were satisfied "there is such a strong pattern of conduct on each occasion that is so strikingly similar that as a matter of common sense and if you were, as it were, to stand back and look at it objectively, the only reasonable inference is that the similarities are so striking as to show that these defendants have put their signature upon the acts and to lead you to conclude that they must be the persons responsible for both sets of acts". The nine circumstances were as follows:

(i) Both sets of offences involved robberies of vulnerable, young tourists who were unfamiliar with the geography of the place and who attended the same nightclub;

(ii) The three offenders all attended the nightclub and left the nightclub together on each occasion;

(iii) McPartland had been ejected from the club on both occasions;

(iv) The robberies occurred in the same general location in the early hours of a Tuesday morning exactly two weeks apart;

(v) That the three offenders were strangers to the complainants, although they had introduced themselves to Talip at the nightclub on a first name basis;

(vi) In each case the motive behind the offences was to steal money;

(vii) The offences occurred exactly two weeks apart in the early hours of the morning in the vicinity of the nightclub that was known to attract crowds of young people;

(viii) That in each case McPartland initiated contact with the complainants and initiated physical violence, with the other two offenders then participating;

(ix) Talip identified the three offenders responsible for attacking him on 2 October from video footage … and also identified the three offenders who attacked him as being the same three people shown on the video footage leaving the nightclub on the 16th October shortly … before the attack on N and O'Brien.

[15] The learned trial judge also directed the jury to consider the dissimilarities put forward by counsel for the accused persons. There was no evidence of contact in

the nightclub between the offenders and the complainants N and O'Brien; the assaults were different in nature and in particular there was the sexual attack on N; the robberies varied in as much as what was said to the complainants on each occasion; and the attacks occurred in different places, one in Lions Park and the other near the entrance of Halse Lodge.

[16] The summing-up was not challenged in any way on the hearing of the appeal. The jury were properly instructed as to their approach to using the evidence with respect to one incident when considering the other. There was ample evidence on which the jury could be satisfied that there were such striking similarities between the offences as to entitle them to use the evidence in the way suggested.

[17] As already noted the prosecution advanced a circumstantial case with respect to the offences of 16 October. For reasons which will be expanded upon presently the identification evidence with respect to the attack on N and O'Brien was not sufficient of itself to justify the convictions. But there was some evidence tending to identify each of the appellants as being involved in the attack. The prosecution case was that when that identification evidence was put with the other evidence the case against the appellants was overwhelming.

[18] There was unchallenged evidence that on 2 October the appellants (with Clarke) left the nightclub with Talip and there was an overwhelming case that he was attacked and robbed by those persons. There was then unchallenged evidence that the two appellants (and Clarke) were at the nightclub on the night of 15 – 16 October during the period N and O'Brien were also there and that the two appellants and Clarke left together. The fact that the three persons involved in the attack on Talip were in a proximate relationship with N and O'Brien at about the time of the attack is probative of them being the attackers, particularly when there is some evidence from the complainants identifying them as the attackers. As it was put by counsel for the respondent on the hearing of the appeal: "When taken as a whole, all of the evidence including the descriptions of the assailants given by the complainants and their admitted weak identification of the two appellants as the offenders, together with the evidence of the appellants' presence in the nightclub in question a short time before these incidents, was reasonably capable of excluding all innocent hypotheses".

[19] It is now necessary to look at the evidence from the complainants N and O'Brien as to descriptions of their assailants and their identification of the appellants.

[20] O'Brien did not see either the person who attacked him or any female present. He witnessed N being assaulted by the male person who had spoken to them shortly before, and then was apparently hit from behind and knocked to the ground. Later on that day, 16 October, the police showed him video footage taken by the surveillance camera outside the nightclub. He said that "the guy in the white T-shirt" talking to the bouncers and leaving the nightclub reminded him of the male person who had spoken to he and N and then began assaulting N. On 18 October the police showed him a photo-board containing 12 photographs in black and white. O'Brien was unable to identify any person thereon; in his evidence he said it "was just in black and white and I'm horrible with photos as it is. But I – I just couldn't make a sound judgment on those photographs". Subsequently on 26 October he was shown the same photo-board but this time with the photographs in colour. His consideration of that photo-board was video taped and the video was before the

jury. That material indicates that initially he thought the male assailant may have been depicted in photo No 1 but then he said he thought it may have been the person shown in photo No 5. It was common ground that McPartland was depicted in photo No 5. In the course of his evidence O'Brien said that the male assailant was slightly shorter than himself (he was 6ft 3in), wearing a white T-shirt and aged in mid-twenties. He also referred to that person having shoulder length hair and being somewhat heavier than himself.

[21] N gave Constable Suffolk a description of her male attacker on the morning of 16 October. According to Suffolk she said the male person who attacked her was "very tall, approximately 25 to 30 years, white shirt, blue/black stripe, the word 'Rip Curl' . . . Light brown hair on top, shoulder length or less, muscly build." Whilst in the witness box she gave a description of the male attacker, and under cross-examination one discrepancy between that and what she told the police was put to her. The following is a summary of N's identification evidence of the appellant McPartland as it went to the jury.

[22] On 16 October police showed N the video taken by the surveillance camera outside the nightclub. She said that the "one in the white T-shirt looks like" the male who attacked her. She said in evidence that the hair depicted on that man was of the same length as the man who attacked her. It appears that her identification was to a significant extent based on the way that person "moves and walks". On 18 October she was shown a photo-board containing 12 black and white photographs of males. She was not able to identify any of those persons as her attacker. Then on 24 October she was shown the same photo-board but this time with colour photographs. Her identification was recorded by video and that was in evidence before the jury. In the course of perusing the photo-board she was recorded as saying words to the effect "I'm not really sure" before saying "I believe it's No 5". She wrote on the photo-board "It could have been No 5". The appellant McPartland was No 5 on that photo-board.

[23] In evidence before the jury she described the male who attacked her as "tall . . . big and looked quite muscular." She put his age at between 25 and 30 and speaking of his hair said it was "coming down a bit on his neck so he had quite long hair" she referred to it as having a "bleached" look. She said the male was wearing "a white T-shirt with a stripe over the chest" and the words "Rip Curl" and long pants.

[24] Under cross-examination she agreed that she was not sure about the colour of the pants and that she initially told the police that she did not know what shoes the assailant was wearing. According to her evidence when she saw the video showing the man in the white shirt: "I just felt that, 'Oh, now I remember, I recognise those shoes'." She also said under cross-examination that on viewing the video tape: "I believe that these three people are the ones who attacked me, but it's very hard to say like, exactly – it is just the way they look that's – they look like those who attacked me."

[25] Also N mentioned to the police she thought the man may have had a scar on his arm but was not very clear about that. The photographs showed a scar on McPartland's arm.

[26] The foregoing is a brief summary of N's evidence relevant to the identification of the appellant McPartland. As one would expect she was very extensively cross-

examined about all aspects of her identification evidence, and it is not possible to record all of that fully in a judgment. There were discrepancies, there were uncertainties, the lighting was not ideal for the making of identification, the whole episode was very traumatic, and the assailants were complete strangers to her. All of those matters were fully canvassed during the trial.

[27] Finally there is the identification evidence by N of the female who assaulted her. The initial description given to Suffolk was: "female, 24 years, medium build, light brown, hair tied back in pony tail wearing trousers/pants, long sleeved top." In evidence in chief she said that the female assailant was "the same size as me" with "dark hair" which was "tied up in a pony tail". She was wearing a long sleeved jumper. On 18 October N was shown a photo-board containing 12 black and white photographs of females. Again her evaluation of that photo-board was video recorded and that was before the jury. At one stage she said the assailant looked a little bit like No 6 but then she said she thought it was No 5. She wrote on the photo-board: "I believe it's No 5". That was the photograph of the appellant Burnham. She was cross-examined about that identification but maintained her belief that it was the person depicted in photograph No 5.

[28] As already noted police showed N the video taken outside the nightclub and she was asked in evidence in chief whether on seeing that she was able to identify the female. She responded by saying that from her face and body build the person shown in the video looked the same but that when she was seen later "she had put her hair up". The female depicted in the relevant part of the video does not have her hair in a pony tail. The complainant also said in evidence in chief that she could remember the female was wearing pants but could not recall the colour. Under cross-examination N agreed that the woman depicted in the video was wearing light coloured pants and a sleeveless light coloured top. She was cross-examined about those discrepancies but maintained that the video showed the woman who attacked her. She was also cross-examined on the basis that she informed the police officer that the second male person was wearing a jumper similar to that asserted to be worn by the girl.

[29] All of those matters were again the subject of detailed cross-examination which it is not necessary to set out here.

[30] Clearly the identification evidence from N and O'Brien was insufficient alone to identify the appellants as the assailants. If that was the only evidence implicating them then it would have to be said that the jury verdict was not reasonably open on the evidence. But that does not mean that the evidence as to identification was inadmissible. It was evidence tending to identify the appellants and was therefore probative. The jury had before it evidence on which it could conclude that aspects of the descriptions given by N and O'Brien fitted each appellant. On top of that is the tentative identification of each appellant. It was however incumbent upon the learned trial judge in his summing up to give appropriate warnings to the jury about relying on and using such evidence of identification. The directions in that regard were lengthy, and were not the subject of attack on the hearing of the appeal.

[31] Given the similarities between the offence committed on 2 October and that committed on 16 October, and given the overwhelming evidence that it was the appellants (and Clarke) who committed the offence on 2 October, the probative

effect of the identification evidence given by N and O'Brien was such as to make the jury verdicts ones which were open on the evidence.

[32] Having considered all of the evidence and the summing up I am not persuaded that the jury verdicts with respect to the offences committed on 16 October were unsafe and unsatisfactory.

[33] It remains to consider the submission that the conviction of Burnham for the robbery committed on 2 October was unsafe and unsatisfactory. It is true, as already noted, that the evidence does not establish that Burnham made any physical contact with the complainant; nor does it establish that she took any of his property. The learned trial judge adequately summed up on the question of aiding the commission of an offence. As was said in the summing up, by her presence she was aiding the commission of the offence. The complainant Talip found himself confronted by three people and that of itself made it more difficult for him to defend himself and his possessions. There is no evidence suggesting that in any way Burnham disassociated herself from the attack and her presence made it more likely that the attackers would succeed in robbing the victim. The situation was made more threatening by the presence of three assailants.

[34] There is one further matter which is of importance when it comes to considering the position of Burnham with respect to the offences on both dates. Apparently Burnham became aware that police officers were interested in speaking to certain persons who had been at the Rolling Rock nightclub on the evening of 15 – 16 October. In consequence she prepared a statement dated 23 October 2004 and voluntarily gave it to the police. It became exhibit 28 at the trial. In that statement she says that she remembers going to the Rolling Rock nightclub on Monday, 15 October 2001 at about 10.00pm. She went with her boyfriend Stephen Clarke. The statement relevantly goes on:

> "While Stephen and I were walking up the stairs I noticed a male person, aged about 25 years, who was wearing dark jeans and I think a light top in front of us on the steps. I only know this man by the name of 'Fitzi'. As we were all walking up the steps he spoke to Stephen and said words similar to 'How are you going' by this time we got to the top of the steps and 'Fitzi' paused and the three of us walked to the entrance and inside the night club where we all paid our entry fee and then walked into the night club. Stephen and I then went and got a table and sat down. Fitzi did not come to our table. I did notice him on the dance floor during the evening however Stephen or I did not speak to him in the Night Club. . . .
>
> Sometime between 12.30a.m and 1a.m. Stephen and I left the Rolling Rock together. When we walked outside I again saw 'Fitzi' and I saw that he was arguing with the bouncers".

[35] In broad terms the statement goes on to say that after they left the nightclub the person Fitzi spoke to another male person and she and Clarke walked off.

[36] The prosecution put to the jury that the statement contained deliberate lies which evidenced consciousness of guilt. The video evidence showed that they arrived together, and there was other evidence (for example, the witness Cammack) that they sat together talking in the Horseshoe Lounge. There was, of course, no

mention in the statement of the three of them being in each other's company at the nightclub on 2 October. Given all of that the prosecution contention was that Burnham was deliberately deceitful in trying to distance herself and Clarke from McPartland. The learned trial judge dealt with that at some length in his summing up. There was no challenge by counsel for the appellant Burnham to the summing up in so far as it left to the jury the question whether the statement contained deliberate lies which evidenced a consciousness of guilt.

[37] Whilst that was primarily relevant to the offences of 16 October it would have also impacted the jury's consideration of the role played by Burnham in the robbery of 2 October.

[38] Having considered the summing up and the evidence I am not persuaded that the verdict of the jury that Burnham was guilty of count 1 was unsafe and unsatisfactory.

[39] The appeals against conviction should be dismissed. I turn now to the applications for leave to appeal against sentence.

[40] McPartland has an appalling criminal history. He is a relatively young man, aged 24 at the time of the offences and 26 when he stood for sentence. On my count based on his criminal history he has committed and been convicted of some 62 offences which would broadly fall into category of acts of dishonesty. In addition he has two drug-related convictions. He was dealt with in the District Court on 6 October 1998 on numerous property-related offences and then sentenced to a series of terms of imprisonment; it is sufficient to say that the head sentence was four years imprisonment with a recommendation that he be considered for parole after serving 12 months. In fact he was released from that term of imprisonment on 12 September 2001 only some three weeks before the first of the subject offences; thus he was on parole when these offences were committed.

[41] In support of McPartland's application for leave to appeal against sentence it was pointed out that none of his previous convictions were for offences involving violence. Essentially the submission was that the head sentence of 10 years was manifestly excessive and that the appropriate range was seven to eight years.

[42] Against that it has to be said that these offences involved considerable violence on young people. The rape (inserting his fingers into N's vagina) was an act of gratuitous and malicious violence. It appears to have had no sexual connotation but was a gratuitous insult to a victim who had already been subdued by violence. The learned sentencing judge noted that the assault had had significant consequences for N. The community demands that those who form groups to carry out violent assaults on people lawfully using the streets at night receive significant punishment; that is particularly so when young vulnerable people (such as tourists unfamiliar with the locality) are targeted. The appellant has shown no remorse whatsoever.

[43] Given the repetitive nature of the serious assaults, the degree of gratuitous violence involved and McPartland's criminal history, a sentence of 10 years imprisonment for the robbery offence committed on N and her rape was well within range.

[44] In the circumstances McPartland's application for leave to appeal against sentence should be refused.

[45] Burnham is a young woman, aged 20 at the time of the offences and 22 when sentenced, who had no prior criminal history. A lot was said by her counsel on sentence about her relationship with Clarke, and the learned sentencing judge concluded that it was probable "that but for that relationship you would not be standing there". But as he pointed out she chose to continue that relationship even after the events giving rise to these charges. Indeed she fell pregnant to Clarke subsequently and has now a child of that relationship. It should also be noted that Clarke brought to the relationship two children of his from a former relationship, and when he absconded he left those two children with Burnham.

[46] The learned sentencing judge, correctly in my view, concluded that Burnham had not shown any remorse. He said in relation to her: "Your attacks were remorseless and so you have continued to show not one shred of concern for the victims of your crime." She was sentenced on the basis that she was "party to such a vicious assault on a defenceless young woman who was being held by a large male". The evidence was she used a clenched fist to punch N on numerous occasions to the face, head and side.

[47] Given the degree of violence involved in the attack on N, and in particular the role played by Burnham herself, a head sentence of four years imprisonment was within range. However, her age, her prior good character and the fact that she was involved because of her relationship with Clarke, call for some amelioration of that head sentence. Without that the sentence of four years imprisonment was manifestly excessive.

[48] To give effect to the mitigating circumstances in the case of the Burnham there should be added to the sentence an order that the sentence be suspended after serving 18 months with an operational period of four years.

[49] The orders of the court should therefore be:

(1) CA No 351 of 2003

(i) Appeal against convictions dismissed;

(ii) Grant leave to appeal against sentence, allow the appeal to the extent of adding to the sentences imposed at first instance an order that the sentences be suspended after serving 18 months with an operational period of four years.

(2) CA No 364 of 2003

(i) Appeal against convictions dismissed;

(ii) Application for leave to appeal against sentence dismissed.

[50] **PHILIPPIDES J:** I agree with the reasons for judgment of Williams JA and with the orders proposed.