SUPREME COURT OF QUEENSLAND

CITATION:	*R v Barry* [2004] QCA 105
PARTIES:	**R** **v** **BARRY, Raymond Levick** (applicant)
FILE NO/S:	CA No 66 of 2004 DC No 564 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for setting aside notice of abandonment. Appeal against Sentence
ORIGINATING COURT:	District Court at Southport
DELIVERED EX TEMPORE ON:	8 April 2004
DELIVERED AT:	Brisbane
HEARING DATE:	8 April 2004
JUDGES:	Davies JA, Williams JA, Holmes J Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDER:	**1. Imputed application for setting aside the notice of abandonment allowed.** **2. Application for leave to appeal against sentence reinstated.** **3. Application for leave to appeal against sentence dismissed.**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION PRACTICE AND PROCEDURE – JUDGEMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – PARITY – CO-OFFENDERS – GENERAL PRINCIPLES – where applicant and co-offender pleaded guilty to grievous bodily harm – where co-offender was the aggressor and leader in the attack – where co-offender had previous convictions for assault and was on probation for one at the time of the offence – where applicant did not cause the grievous bodily harm and had a minor criminal history – whether the sentence imposed was manifestly excessive – whether the sentence imposed properly reflected the respective levels of criminality in conduct as between the applicant and his co-offender

	Criminal Code (Qld), s 320 *Criminal Practice Rules*, r 69
	R v Bennett and Bennett [1998] QCA 393; CA No 443 and CA No 229 of 1998, 26 February 1999, considered *R v Craske* [2002] QCA 49; CA No 11 of 2002, 1 March 2002, considered *R v Cuff, ex parte A-G* [2001] QCA 351; [2001] ACL Rep 130 QLD 229, considered *R v Dodd* [1998] QCA 323; CA No 241 of 1998, 17 September 1998, considered *R v Elkington* CA No 33 of 1998, 27 February 1998, considered *R v Harvey* [2003] QCA 286; CA No 112 of 2003, 10 July 2003, considered *Tabe v R* [1983] 2 Qd R 60, applied
COUNSEL:	G Maguire for the applicant M J Copley for the respondent
SOLICITORS:	Ryan & Bosscher (Southport) for the applicant Department of Public Prosecutions (Queensland) for the respondent

HOLMES J: The application as before us is framed as one for an extension of time within which to appeal, in circumstances in which the applicant's original application for leave to appeal against sentence was abandoned.

It seems to me that it is better regarded as an application to have the abandonment set aside and the application for leave to be reinstated under rule 69 of the Criminal Practice Rules. Nothing really turns on that.

The applicant pleaded guilty on 28th of January 2004 to one count of grievous bodily harm and was sentenced to two years imprisonment suspended after six months for an operational period of three years. On the 3rd of February 2004, his

solicitors at sentence filed an application for leave to appeal, and he sought legal aid. But just prior to the date on which the appeal was to be heard, he was advised that Legal Aid Queensland would not proceed with the appeal on his behalf.

Feeling unable to conduct the appeal himself, he filed a notice of abandonment, not knowing that his parents had meanwhile advised his lawyers that they would privately fund the appeal.

Applying the principles set out in *Queen v Tabe* [1983] 2 Qd R 60, it seems to me that the abandonment was not the result of a deliberate and informed decision and that the case is a proper one to allow the application and reinstate the application for leave to appeal.

Turning to the merits of the latter application, the offence occurred in these circumstances. On Melbourne Cup day 2002, the applicant and his co-offender, Jai Bradney, spent the afternoon drinking at the Gold Coast Hotel and had got into some trouble with the hotel management. The complainant, Mr Daley, was a 42 year old man who worked as a chef at the hotel. He arrived to start work at about 4.45 and was getting out of his car in the hotel car park, when Bradney approached him, abused him, and, it seems, for no better reason than that he was an employee of the hotel, punched him in the nose. There was then something of a grapple between the two, and both ended on the ground.

While the complainant was on the ground, the applicant kicked him twice in the back, as he said, to make him let go of Bradney. That worked. Bradney got up and started kicking the complainant in the head, face and body.

The applicant's submissions on sentence did not suggest he was not present for those events. But, on his account, he at some point said, "Come on. Let's go." and walked off. Bradney seems to have given up the assault and left with him.

Later in the police interview, the applicant admitted being present at the assault, but, at that time, denied involvement.

It was accepted at the sentencing proceedings that the complainant did nothing to provoke the assault. He suffered a broken nose, a cut over his left eyebrow which required stitches, some grazing to his knees and lower back. Longer term, he was left with a permanent deformity to his nose, he developed tinnitus, sleeping problems and some anxiety, and his ability to work was impaired.

The applicant is 22 and was 21 at the time the offence was committed. His only previous offence is possessing a dangerous drug for which he was fined in the Magistrates Court on the 4th of May 1999.

The learned sentencing Judge observed in his sentencing remarks that this was a cowardly attack in company, for which

nothing but imprisonment would suffice as a penalty. He also remarked that the applicant had no significant prior criminal history, that the conduct was uncharacteristic and that he seemed to have learnt from the offence and changed his drinking habits.

The penalty imposed was intended, the learned sentencing Judge said, to reflect the difference in criminality between the applicant and Bradney. Bradney had previous convictions for assault, for one of which he was on probation at the time of these events. The learned sentencing Judge proceeded on the basis that he was the aggressor and leader. He was sentenced to three years imprisonment for this offence, cumulative on three years imposed for other offences of assault occasioning bodily harm, dangerous operation of a motor vehicle and going armed in public. He was given a recommendation for eligibility for parole after two years.

Mr Maguire, for the applicant, argues that the sentence imposed by the learned sentencing Judge was manifestly excessive and did not properly reflect the respective levels of criminality in conduct as between the applicant and Bradney. He said, in his written submissions, that an appropriate sentence would have been wholly suspended or alternatively an intensive correction order for 12 months. He makes this point: that the applicant was only a party to the offence and that the situation would have been different if he were the actual aggressor who had caused grievous bodily harm.

A number of authorities were referred to by both applicant and respondent. They were *R v Rodney Brett Cuff, ex parte Attorney-General of Queensland* [2001] QCA 351; *R v David William Elkington*, (CA No 33 of 1998, 27th of February 1998); and *R v George Edward Bennett and Lindsay James Bennett*, (CA Nos 443 and 449 of 1998, 26th of February 1999); *R v O'Grady, ex parte Attorney-General* [2003] QCA 137; *R v Dodd,* (CA No 241 of 1998); *R v Craske* [2002] QCA 49; and *R v Harvey* [2003] QCA 286.

An examination of all those authorities convinces me that, although the alternative sentences contended for by the applicant might properly have been imposed, this sentence was within the range, although, most certainly, at the high end.

The infliction of grievous bodily harm on the victim was committed in company with Bradney for whose acts, once Bradney was able to get up and recommence his assault, the applicant must take responsibility, as well as for the kicks he administered. It was entirely unprovoked and it caused significant and permanent harm to its victim. It also seems to me that the sentence is not so out of proportion with that imposed on Bradney as to give rise to any justifiable sense of grievance.

I would allow the imputed application for setting aside the notice of abandonment, reinstate the application for leave to appeal and dismiss that application.

DAVIES JA: I agree.

WILLIAMS JA: I agree.

DAVIES JA: The orders are as indicated by Justice Holmes.