SUPREME COURT OF QUEENSLAND

CITATION:	*R v Irving* [2004] QCA 305
PARTIES:	**R** **v** **IRVING, Luke Nathan** (applicant)
FILE NO/S:	CA No 246 of 2004 DC No 188 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave to appeal against sentence
ORIGINATING COURT:	District Court at Townsville
DELIVERED EX TEMPORE ON:	20 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	20 August 2004
JUDGES:	McPherson JA, Jerrard JA, Dutney J Separate reasons for judgment of each member of the Court, McPherson JA and Dutney J concurring as to the order made, Jerrard JA dissenting
ORDER:	**Application dismissed**
CATCHWORDS:	CRIMINAL LAW - OFFENCES AGAINST THE PERSON – ASSAULT – SENTENCING – where applicant sentenced to six months imprisonment, notwithstanding his youth and lack of similar prior convictions, for assaulting two men because he believed them to be homosexual – whether sentence manifestly excessive
COUNSEL:	A W Moynihan for the applicant M J Copley for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Qld) for the respondent

McPHERSON JA: With his co-offender, the applicant for leave to appeal against sentence here, pleaded guilty in the District Court at Townsville to three counts consisting of assault occasioning bodily harm, wilful damage to property and

common assault. Under s 92(1)(b) of the *Penalties and Sentences Act* he was sentenced to serve six months' imprisonment before being released on probation for two years.

Both the first complainant aged 28 and the second complainant aged 23 are tradesmen, the former being a cabinet-maker and the latter an electrician. They were complete strangers to the applicant and the co-offender. At about 7.30 on 26 July 2003, the complainants, who had been working on a unit in suburban Townsville, were going round to advise other occupiers of units in the block that the work would be continuing next day. Their vehicle or vehicles were parked in the parking area of the block of units.

As they were packing their tools in the car in readiness for leaving, the applicant approached the two men and began making derogatory comments, calling them "poofters" and the like. The first complainant noticed liquid dripping from the car and asked the applicant if he had urinated on it. An argument developed between them and when the second complainant tried to leave in his vehicle, the applicant spat on it and began kicking the front and back door panels causing damage, which later cost over $1,000 to repair.

The second complainant got out of his car and tried to stop the applicant from kicking it. The applicant then kicked him in the hip and when the second complainant grabbed his leg to restrain him, they both fell to the ground with the applicant on top. The applicant sat on the second complainant's chest

and proceeded to punch him. The second complainant ended up face down and the applicant punched him on the back of the head and banged his face repeatedly on the concrete. While doing so, he was saying over and over, "I'm going to kill you, you dirty poofter. I'm going to kill you faggot." When the first complainant ran to his aid, the co-offender intervened and struck the first complainant on the jaw, and then on the back of the head rendering him unconscious.

The assault on the second complainant came to an end only when neighbours arrived and pulled the applicant away from the second complainant. Both complainants sustained bruising. The second complainant specifically suffered lacerations to the face and lips, bruising about the left and right eyes, bruising and swelling to the face, left ear, neck, right shoulder, hip and back of head, as well as grazing to the forehead, left side of the face, upper chest and both shoulders.

When he attended Dr Ferguson for examination on 28 July 2003, he was still hoarse from having been kicked in the throat and was suffering from tinnitus of the left ear. Earlier at the hospital he had been diagnosed as having paresthesia of the right hand and lower arm from nerve compression at the neck. Rotation was restricted and abduction was limited to 110 degrees. His nose was fractured and had to be reset by surgical procedure.

As a result of his experience and in this event, the second complainant has suffered post-traumatic stress disorder. The psychotherapist who attended him on August or September 2003 described him as a man of slight build who appeared polite but forthright. He had a pre-history of major depression which had returned to him as a result of the battering he received. He was suffering insomnia and nightmares and was unable to perform his work properly as a self-employed electrician. He had become afraid to venture out into the dark alone and he fears large crowds of strangers. He was unable to afford the psychotherapeutic treatment that was considered necessary to stabilise his life. He was constantly ill, not eating well and had lost a considerable amount of weight, as well as the money he had lost from the diminution in his ability to work.

This essentially inoffensive man was attacked for no better reason than that the applicant believed him to be a homosexual. The applicant apparently thought he had detected one of the two men giving him an inappropriate smile of some kind. Of course, that motive for what he did can only aggravate the offence, which the Crown prosecutor described in the complainants' words as a "hate" crime.

The notion that certain vulnerable classes of people maybe physically attacked because of their colour, race, religion, gender preferences or otherwise is one that society, or the Courts that serve it, cannot possibly afford to tolerate. It savours of a form of vigilante mentality, which it is our duty

to suppress, so far as that can be done by appropriate punishment.

In arriving at the sentence imposed, his Honour rightly took into account that the assault on the second complainant had what he described as a "homophobic content". On behalf of the applicant, it was submitted that the sentence, including as it does, a period of imprisonment, was unduly harsh for an offender who was only 18 years old in July 2003 and 19 at sentencing.

The applicant is a labourer, unemployed at the time, who had no previous convictions as an adult that were considered to be relevant. He is said to be remorseful for what he has done and claimed to be affected by alcohol at the time. He admitted the offences, although not perhaps at first in full detail, and he pleaded guilty to an ex officio indictment. He provided several personal references that lay stress on his general inclination to assist others by acts of kindness. For example, helping friends to move house, or helping a lady with her groceries, and so on. Plainly, however, any such tendency to generosity in his personal life and attitude to others, is liable to be overcome by his prejudices against certain other classes of person.

None of the mitigating factors which I have mentioned can however displace the fact that this was a severe, violent and protracted assault, quite unprovoked and committed in a public street at night or in the evening, that has inevitably had

severe consequences, both for the psychological and financial wellbeing of the principal victim.

It is a mistake to suppose that the applicant's youth clothes him some form of immunity from a sentence imposing a term in prison in a case of this kind. It is true that for young persons, such a sentence remains, in principle, a penalty of last resort, but, as the President pointed out in *R v Ryan ex parte Attorney General* (CA 187 of 2000), the application of that principle is in the case of offences of violence causing physical harm to a person, expressly qualified by the provisions of s9(3) of the *Penalties and Sentences Act*.

The statutory predecessor of section 92(1)(b) of the *Penalties and Sentences Act* under which this sentence was formulated, was s 17(1)(b) of the *Offenders Probation and Parole Act* 1980. Together they have consistently been regarded as providing one method of dealing with young offenders in a way that attempts to balance the need for rehabilitation against the seriousness of the offence or offences committed.

His Honour, in his reasons, showed that he appreciated all the relevant factors at issue in sentencing the applicant. In my opinion, he was not in error in exercising this discretion in the way he did. Even for a first offender of the age of the applicant, the sentence of imprisonment for a short period followed by probation was, in my opinion, not excessive to the character and seriousness of the offending.

The application I consider should be dismissed.

JERRARD JA: I respectfully agree with the presiding Judge, that the applicant's expressed motive for seriously and savagely assaulting two other people, means that a denunciatory sentence was warranted and necessary. However, for my part, I consider that the applicant's youth and evident immaturity means any term of imprisonment should be as short as possible, consistent with that need for denunciation.

I consider a sentence of three months' imprisonment followed by probation would have been sufficient and that a term of six months, twice as long, is therefore sufficiently excessive to warrant interference. For my part, I would amend the sentence in the manner I have described.

DUTNEY J: I agree with the order proposed by Justice McPherson for the reasons he has given.

McPHERSON JA: The order is that the application for leave to appeal is dismissed.
