SUPREME COURT OF QUEENSLAND

CITATION:	*R v Collins* [2005] QCA 172
PARTIES:	**R** **v** **COLLINS, Gilbert James** (appellant)
FILE NO/S:	CA No 388 of 2004 DC No 216 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Kingaroy
DELIVERED ON:	27 May 2005
DELIVERED AT:	Brisbane
HEARING DATE:	20 May 2005
JUDGES:	McMurdo P, Keane JA and Mullins J Judgment of the Court
ORDER:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE EVIDENCE CIRCUMSTANTIAL – where appellant convicted after trial of grievous bodily harm – where complainant de facto partner – where prosecution case circumstantial – where both appellant and complainant had been drinking and arguing on night offence occurred – where complainant could not recall how received injuries due to intoxication – where complainant gave evidence that regularly bashed by appellant when he was drunk – where evidence of yelling, screaming and sounds consistent with punching – where complainant's injuries observed following day – where complainant's blood found on appellant's shoes – where blood found in bedroom where complainant and appellant slept – where medical evidence indicated explanations for complainant's injuries other than a blow to the head were unlikely – where inconsistencies in prosecution witness's recollection of appellant's statements – where inconsistencies explored by defence counsel and referred to in summing up – where

defence case fairly summarised by trial judge – whether verdict of jury unreasonable or insupportable – whether appeal should be allowed

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGANST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – GENERALLY – where applicant convicted after trial of doing grievous bodily harm – where sentenced to four years imprisonment suspended after two years with an operational period of five years – where sentenced to lesser concurrent terms of imprisonment after pleas of guilty to one count of wilful damage and three counts of assault occasioning bodily harm – where sentence imposed for grievous bodily harm intended to reflect applicant's criminality for all offences – where aged between 32 and 34 at time of offences – where general history of violence towards others and previous violence towards complainant – where two offences committed in breach of domestic violence orders – where four offences committed whilst on bail – where no indication of remorse or insight into offending – where served 10 months of pre-trial custody that could not be declared as time served under s 161 *Penalties and Sentences Act* 1992 (Qld) – where trial judge indicated reduced sentence imposed to take account of pre-trial custody – whether sentence manifestly excessive

M v The Queen (1994) 181 CLR 487, applied
R v Creagh [1995] QCA 286; CA No 100 of 1995, CA No 160 of 1995, 29 May 1995, applied
R v Hoogsaad [2001] QCA 27; CA No 277 of 2000, 9 February 2001, considered
R v Swayn [1998] QCA 171; CA No 58 of 1998, 8 May 1998, considered

COUNSEL: The appellant appeared on his own behalf
M Byrne for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **THE COURT**: The appellant was convicted by a jury in the District Court at Kingaroy on 13 October 2004 of one count of doing grievous bodily harm. The offence was alleged to have been committed on or about 2 August 2002 at Cherbourg. At the end of the trial the appellant pleaded guilty to other less serious offences. In respect of the offence of grievous bodily harm, he was sentenced to imprisonment for four years suspended after serving two years with an operational period of five years. This sentence was to be served concurrently with lesser sentences imposed for the other offences.

[2] The prosecution case in relation to the count of grievous bodily harm was that during the night of 1 August 2002, or the morning of 2 August 2002, the appellant beat his then partner, Miriam Murray, so severely that she suffered a life-threatening subdural haematoma. She was not taken to hospital for treatment until 3 August 2002. Happily, on the material before the primary court, Ms Murray seems to have made a reasonable recovery from her injuries.

[3] The appellant, who is self-represented in this appeal, contends that the jury's verdict was unsafe and unsatisfactory in that it was unreasonable and cannot be supported by the evidence. The appellant also seeks leave to appeal against his sentence on the ground that it is manifestly excessive.

The appeal against conviction

[4] There was no direct evidence of the blow or blows which caused the injury suffered by Ms Murray. The prosecution case was a circumstantial one, alleging that one or more assaults occurred on or about 2 August 2002, and that these assaults, either individually or in combination, caused the grievous bodily harm suffered by the complainant. It is necessary to review the prosecution evidence which, considered in its totality, can be said to be strong. Although not admitted, it was not in serious contention that Ms Murray suffered grievous bodily harm; the real issue was whether the appellant inflicted injuries causing grievous bodily harm on or about 2 August 2002.

The evidence

[5] Ms Murray's injury had only recently been inflicted when she was hospitalized on 3 August 2002. Dr Anderson, a neurosurgical registrar, gave evidence to the effect that injuries such as those suffered by Ms Murray invariably come from a blow or some other sort of force to the head and that, in the present case, the indications were that the external force was applied to the right temple region. It was unlikely that she could have had those injuries for a long time and survived. The injuries could have been hours or perhaps days old. The CT scan in relation to which Dr Anderson gave evidence was taken at 11.04 pm on 3 August 2002. The blood in the haematoma was recent. A person sustaining such an injury would be expected to be rendered unconscious immediately. It is usual in such cases for the patient not to recall the incident causing the injury.

[6] In cross-examination it was suggested to Dr Anderson that the injuries were explicable by the possibility of Ms Murray, while drunk and being carried, falling onto a cement surface. Dr Anderson conceded that it was almost impossible to determine how injuries occurred from looking at scans and even seeing the patient in the emergency department but he said:

> "This lady had a significant amount of force applied to her head and I think a fall on the face is probably an unlikely one, but I would not be able to exclude that".

[7] Other medical evidence showed that Ms Murray was menstruating and a considerable amount of menstrual blood was found on her underpants and board shorts when she was taken to hospital.

[8] Ms Murray gave evidence that although she could not recall how she came to receive her injuries, she was in a de facto relationship with the appellant in which she was regularly bashed when he was drunk.

[9] The following evidence showed that Ms Murray was with the appellant when her injuries were suffered, and that incidents occurred during the night and morning of 1-2 August 2002 from which the inference could be drawn that the appellant assaulted Ms Murray on at least two occasions.

[10] In July 2002, Ms Murray and the appellant approached the manager of the Cherbourg Rehabilitation Centre to be admitted for treatment for their addiction problems. During the course of their admission, they got on well until 31 July 2002. On that day they were seen by the witnesses Lee and Dalton at the rehabilitation centre, sober and displaying no sign of animosity.

[11] Marjorie Fisher, who was a cousin of the appellant, gave evidence that when Ms Murray and the appellant came out of the rehabilitation centre on Thursday, 1 August 2002, they went to her place. They began drinking and this continued into the evening. Ms Murray and the appellant commenced to argue. Between 10.30 and 11.00 pm, when Ms Murray and the appellant went to the back of the house to use the toilet, Ms Fisher heard Ms Murray screaming although she did not see anything occur between them. Later she went down to the bottom of the steps which led to the toilet and saw both Ms Murray and the appellant asleep at the bottom of the steps. She told them to get up but they did not respond.

[12] Later that evening Ms Fisher saw Ms Murray and the appellant at the front of the house. Ms Fisher said the appellant was carrying Ms Murray towards the steps "and then she sort of fell on the ground". The ground surface was cement. Ms Murray was lying on the ground and he was trying to pull her up by the hair. Ms Fisher told the appellant to carry Ms Murray into a bedroom in her house. She noticed no injuries to Ms Murray at that stage. The appellant put Ms Murray to bed and stayed in the room with her. Ms Fisher then left.

[13] The next morning, 2 August 2002, Ms Fisher spoke to the appellant. He told her "that he flogged [the complainant] again because she pissed on the bed". Ms Fisher left the house and did not return until 3 August 2002 at 9.00 or 9.30 am. On this occasion she sat on the back of the lounge speaking to the appellant. Ms Murray was present, but she was lying on the couch with the appellant. Ms Murray was immobile. Her eyes were puffed up and darker than they had been on the evening on 1 August. She was shown photos depicting blood on the sheets in the room where Ms Murray had been put to bed on the night of 1 August 2002. She could not recall any blood on the sheets prior to that time.

[14] Ms Fisher conceded in cross-examination that she was drunk that night. She said that Ms Murray and the appellant were also quite drunk. She agreed that she had not mentioned the conversation with the appellant in which he admitted "flogging" Ms Murray in her earlier statements to the police. Her account of that conversation in the statement which she gave to the police was that Ms Murray was still asleep and the appellant was getting out of bed when he said something like "I just got into her because she pissed the bed".

[15] Ms Fisher's son, Rodney, was called by the prosecution but after he proved uncooperative the prosecution successfully brought an application for a declaration that he was adverse or hostile. The prosecutor then cross-examined him about a statement he gave police on 6 August 2002 about events before Ms Murray went to hospital on 3 August 2002. In that statement he said he heard a noise like

somebody getting punched. It was a thudding noise; it was not a noise like somebody banging on the wall. He heard Ms Murray screaming, "stop, stop" and the sound of Ms Murray and the appellant fighting. He heard the punching sounds a second time about 20 minutes later.

[16] Two of Ms Fisher's daughters and a friend of one of her daughters also gave evidence. Because of their age, their evidence-in-chief was tendered in the form of statements. One daughter, Irene Jacobs, aged 13 at the time and almost 15 at trial, said that she was present on the Thursday night when the appellant and Ms Murray went to the toilet at the back of the house. She said that this occurred after a fight over alcohol. She said that Ms Murray came out of the toilet while she (Irene) was in the kitchen and that the appellant and Ms Murray started arguing and went back into the toilet. Irene said she could hear the appellant yelling at Ms Murray and could hear her crying. Irene said she heard banging noises so she climbed up onto a cupboard to try to see into the toilet. She heard the appellant say "Get up get up, I'll pull you by the hair soon". Irene could not see anything but could still hear the appellant yelling at Ms Murray. Irene was also present when Ms Murray was brought into the house by the appellant. At this time she saw blood on the appellant's shoes. Ms Murray was not completely unconscious at this point because she yelled abuse at Ms Fisher. Irene said that, on the morning of 2 August 2002, she saw blood in the room where Ms Murray and the appellant had slept the night as well as elsewhere in the house. Later that afternoon she saw that Ms Murray had vomited and noted the injuries to her face and head.

[17] In the course of cross-examination Irene confirmed that the noise which she had described in her evidence was "like people hitting people". She rejected the suggestion that the appellant had suffered an injured nose.

[18] Sophia Jacobs and Patricia Whiley each gave evidence confirming that Ms Murray was unconscious on 2 and 3 August 2002. They also saw blood and, in the case of Sophia, the facial and head injuries suffered by Ms Murray.

[19] Carmel Murray gave evidence that on 3 August 2002 she was able to see that Ms Murray had blood on her face and in her hair.

[20] Scientific evidence indicated that Ms Murray's blood was found on one of the appellant's shoes.

Was the guilty verdict unreasonable?

[21] The appellant, in his articulate oral submissions, contended that no weight could be put on the evidence of the Cherbourg witnesses because of the unsatisfactory, inconsistent nature of their evidence. He made particular reference to the evidence of Ms Fisher and her son, Rodney.

[22] The changes to Ms Fisher's evidence set out earlier in these reasons were investigated by defence counsel in cross-examination and highlighted by the learned trial judge in his summing up for the jury. It was a question for the jury what they made of the difference between Ms Fisher's statement to police in which she said the appellant said of Ms Murray "I just got into her …" and Ms Fisher's evidence in chief that he admitted "flogging" Ms Murray. In any case, Ms Fisher did not give evidence of any deliberate assaults on Ms Murray by the appellant. The more significant evidence as to the assaults came from her son, Rodney Fisher, and her daughter, Irene Jacobs. Rodney Fisher's reluctance to give evidence for the

prosecution was obvious to the jury. He nevertheless agreed that he truthfully told police he heard sounds consistent with the appellant twice assaulting Ms Murray in the relevant time frame. The fact that he was a reluctant witness did not mean the jury could not accept his account given to police. Rodney Fisher's evidence was given some support by the evidence of Irene Jacobs as to what she observed. The jury were entitled to accept that evidence.

[23] In summary, the evidence was that Ms Murray's brain injury, which was diagnosed on 3 August 2002, was relatively fresh. Ms Murray had not been injured prior to the evening of 1 August 2002. During that night and the morning of 2 August 2002 she was with the appellant. She was seen to be injured on the morning of 2 August 2002. There was evidence of a number of indicators of violence from the appellant to Ms Murray on at least two occasions. All this evidence was uncontradicted. There was no evidence that any other person acted violently to the complainant. There was no evidence of self-defence. The evidence of Ms Murray falling while being carried by the appellant was not that she fell on her head.

[24] Thus there was evidence from which the jury could infer that Ms Murray had suffered her injuries at the hands of the appellant during the night of 1 August or the morning of 2 August 2002. The learned judge fairly summarised the defence case for the jury, specifically referring to the possibility emphasised by defence counsel that the head injury occurred when Ms Murray fell in the front yard before she was put to bed in Ms Fisher's home. His Honour also clearly instructed the jury that they could only convict the appellant if they were satisfied beyond reasonable doubt that the only rational inference to be drawn from the evidence was that the appellant inflicted the injuries resulting in Ms Murray's grievous bodily harm. There was no evidence that Ms Murray had actually suffered a fall on her head in a way that might explain her injuries. The fall of which there was evidence could not have led the jury to entertain a reasonable doubt as to whether the appellant had caused Ms Murray's head injuries. There was no reason at all to doubt who caused Ms Murray's injuries. There were no rational hypotheses consistent with the appellant's innocence. The jury's verdict of guilty indicates they were satisfied beyond reasonable doubt that Ms Murray did not suffer grievous bodily harm from a fall before she was put to bed in Ms Fisher's home. The review undertaken of the whole of the evidence in these reasons makes it abundantly clear that the jury verdict of guilty was well open: *M v The Queen.*[1] The contention that the verdict of the jury was unreasonable or without a sufficient basis in the evidence must be rejected.

[25] The appeal against conviction should be dismissed.

Sentence

[26] The applicant contends that the sentence imposed for the offence of grievous bodily harm (four years imprisonment suspended after two years with an operational period of five years) was manifestly excessive when considering his pre-sentence custody which could not be declared as time served under s 161 *Penalties and Sentences Act* 1992 (Qld) ("the Act").

[27] Apart from the offence of grievous bodily harm, the offences in relation to which the applicant was sentenced were one count of wilful damage on 8 August 2000, one count of assault occasioning bodily harm on 11 August 2000, one count of

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1 (1994) 181 CLR 487, 493-5.

assault occasioning bodily harm on 21 September 2001 and one count of an assault occasioning bodily harm on 14 February 2003. The transcript of the sentencing process makes it plain that the sentence imposed for grievous bodily harm was intended to reflect the applicant's criminality for all the offences to which he had pleaded guilty. These offences demonstrated a history of violence towards his then partner, Ms Murray, and others.

[28] The offence of wilful damage was committed on 8 August 2000 when he punched a hole in the fibro wall of a house belonging to the Department of Housing. All remaining offences occurred whilst on bail.

[29] The offence of assault occasioning bodily harm occurred on 11 August 2000 while the complainant, Mr Brown, was drinking with a group of others including the applicant. Mr Brown accidentally hit an empty tin which struck one of the applicant's companions in the mouth. The applicant punched and kicked Mr Brown, including kicks to the head while Mr Brown was on the ground.

[30] The offence of assault occasioning bodily harm on 21 September 2001 was another offence committed on the applicant's then partner, Ms Murray, also the complainant in the grievous bodily harm offence. At that time there was a domestic violence order in place against the applicant. After meeting in the street, Ms Murray and the applicant went to a house where an argument commenced. Ms Murray took their daughter and put her out of harm's way. The applicant then punched Ms Murray in the head and swung her by the clothes into the refrigerator. She fell to the floor and the applicant continued to hit her in the head with his fists. He grabbed her by the hair and dragged her outside. She started to cry. He told her to "shut up" and grabbed her by the throat and threatened to break her neck. A nearby community police officer intervened.

[31] The most serious offence, that of grievous bodily harm on 2 August 2002, was also committed in breach of a domestic violence order. This is a matter of concern. The applicant acted in disregard of Ms Murray's welfare in failing to take steps to seek help for her so that a substantial period of time passed before she was taken to hospital, although this may have been because he was too intoxicated to exercise sound judgment. It is also a disturbing feature that the applicant has shown no indication of remorse for the life-threatening assault on his partner and the mother of at least one of his children. Even if he has no memory of inflicting the injuries because of his intoxication, with sober hindsight he ought to be shocked at the life-threatening injuries to Ms Murray that only he could have caused. These circumstances do not support an optimistic view of the prospects for rehabilitation if the applicant continues to abuse alcohol. Rather, they suggest that the consideration of deterrence is strong, both in the particular interests of the safety of the complainant and, more generally, in the interests of the community.

[32] The offence of assault occasioning bodily harm on 14 February 2003 occurred when the applicant inflicted on the complainant, a man named Nixon, a number of blows. Mr Nixon fell to the ground and the applicant commenced to kick him. The applicant eventually ceased the assault and Mr Nixon walked away.

[33] The applicant was born on 24 February 1968. He is 37 years of age at the present time. He was between 32 and 34 years of age at the time of the offences for which he was sentenced. The sentencing judge acknowledged that the applicant when

sober was a quite different person than his intoxicated alter ego. He is a member of the Cherbourg community where his father is a respected pastor. The applicant has nine children from three different mothers and all children reside with their mothers. The learned sentencing judge noted that the applicant had served 10 months of pre-trial custody which could not be the subject of a declaration under the Act, but indicated that he had reduced the sentence imposed to take that period into account. There was a full hand up committal in relation to the count of grievous bodily harm, which, as the learned sentencing judge acknowledged, may have suggested that a plea of guilty was in contemplation by the appellant. Whatever may have been contemplated, the applicant proceeded to trial and so was not entitled to any discount on his sentence by reason of a plea of guilty in respect of the grievous bodily harm charge.

[34] At the hearing in relation to sentence, both counsel for the prosecution and counsel for the applicant did not differ substantially in their submissions as to the appropriate sentence. The prosecutor suggested that the starting point for the grievous bodily harm charge was five years and a cumulative term of about six to 12 months for the other offences with the total thus obtained being reduced to between four and four and a half years to reflect the pre-sentence custody unable to be declared under the Act as time served. Counsel for the applicant suggested a sentence of four years imprisonment suspended after two years. It was also common ground that about 10 months was the period of pre-sentence custody unable to be declared under the Act and that during some additional periods of custody the applicant had been serving a sentence or sentences for a summary offence or offences.

[35] The applicant in his oral submissions in this Court at first claimed that he had spent 15, not 10, months in pre-sentence custody, but when referred to the transcript of the sentencing proceeding he appeared to accept that a 10 month remand period accurately reflects that some of the 15 month period of custody was spent serving a sentence or sentences. In any case, he has not demonstrated that the judge acted on any wrong factual basis in this respect.

[36] Reference to decisions of this Court suggests that a sentence of about five years imprisonment was within the appropriate range for an offence of this type of grievous bodily harm, even without any further penalty for the applicant's other offending. In *R v Creagh*,[2] Pincus JA (with whom Fitzgerald P and McPherson JA agreed) described a submission, that a sentence of five years imprisonment imposed after a trial for injuries amounting to grievous bodily harm similar to those inflicted on Ms Murray was outside the appropriate range, as "plainly wrong".[3] *Creagh* was also a case of a husband inflicting grievous bodily harm on his wife. There is no reason to regard this case as less serious in terms of the criminality of the applicant's conduct than Creagh's conduct. Further, in *R v Swayn*[4] where the offence was admittedly attended with deliberate and prolonged violence, a sentence of five years imprisonment with no recommendation for parole was also upheld by reason of the perceived need for deterrence. Although *Swayn*, unlike *Creagh*, did not involve the

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2 [1995] QCA 286; CA No 100 of 1995, CA No 160 of 1995, 29 May 1995.

3 See *R v Creagh* [1995] QCA 286; CA No 100 of 1995, CA No 160 of 1995, 29 May 1995 at p 7; see also *R v Hoogsaad* [2001] QCA 27; CA No 277 of 2000, 9 February 2001 and *R v Swayn* [1998] QCA 171; CA No 58 of 1998, 8 May 1998.

4 [1998] QCA 171; CA No 59 of 1998, 8 May 1998.

infliction of significant violence on a domestic partner, the infliction of such violence in the domestic sphere is equally as serious as if it were inflicted publicly. It need hardly be said that members of Indigenous communities, like Ms Murray, are as entitled to the protection of the rule of law as are those in the wider community.

[37] The applicant has a history of general violence towards others, and of previous violence towards Ms Murray, even when domestic violence orders were in place. A disturbing feature of this case is, as it was in *Creagh*, the absence of any real indication of remorse or insight on the applicant's part for the life-threatening assault of 2 August 2002. In truth, it is difficult to see how the learned sentencing judge could have properly imposed a less severe sentence. The prospects of the applicant's rehabilitation were not such as to warrant a more lenient approach. The sentence imposed on the grievous bodily harm, even when considered in isolation, was by no means excessive. The sentence was, however, a global sentence taking into account all the offending behaviour. In those circumstances, the sentence imposed was at the lower end of the appropriate range.

[38] The applicant, in making his submissions in this Court, showed that he is capable and articulate. As the sentencing judge acknowledged, he is a different person when sober. If, when he is released from custody, he is able to stay sober he may develop his obvious leadership skills and become a good father to his nine children and a responsible and respected member of the Cherbourg community. If he does not, his previous history suggests that he is likely to commit offences during the operational period of the suspended sentence and not only be at risk of serving the balance of the four year term of imprisonment but also an additional term of imprisonment. The choice is one only he can make.

[39] The application for leave to appeal against sentence should be refused.

ORDERS:

Appeal against conviction dismissed.

Application for leave to appeal against sentence refused.