SUPREME COURT OF QUEENSLAND

CITATION:	*R v Berryman* [2005] QCA 471
PARTIES:	**R** **v** **BERRYMAN, Joshua James** (applicant)
FILE NO/S:	CA No 282 of 2005 DC No 6 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Stanthorpe
DELIVERED ON:	16 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	6 December 2005
JUDGES:	Williams JA, Helman and Chesterman JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – where applicant pleaded guilty to doing grievous bodily harm – sentenced to three years' imprisonment suspended after serving 12 months – applicant smashed an unbroken glass into the complainant's face – complainant suffered significant scarring – whether the sentence imposed was manifestly excessive – comparison with similar cases *Criminal Code Act* 1899 (Qld), s 1, s 320, s 323, s 668F(2) *R v Bryan; ex parte A-G (Qld)* [2003] QCA 018; (2003) 137 A Crim R 489, considered *R v Harvey* [2003] QCA 286; CA No 112 of 2003, 10 July 2003, considered *R v Hays; ex parte A-G (Qld)* [1999] QCA 443; CA No 271 of 1999, 29 October 1999, considered *R v Jasser* [2004] QCA 014; CA No 277 of 2003, 9 February 2004, considered

R v Kent [2004] QCA 83; CA No 61 of 2004, 23 March 2004, considered
R v Orreal [2002] QCA 547; CA No 296 of 2002, 19 December 2002, considered
R v Rehavi [1999] 2 Qd R 640, considered
R v Toohey [2001] QCA 149; CA No 351 of 2000, 19 April 2001, considered
R v Tupou; *ex parte A-G* [2005] QCA 179; CA No 88 of 2005, 31 May 2005, considered
R v Weare [2002] QCA 183; CA No 54 of 2002, 31 May 2002, considered

COUNSEL: A W Moynihan for the applicant
M R Byrne for the respondent

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

[1] **WILLIAMS JA**: The applicant pleaded guilty on 12 October 2005 to one count of doing grievous bodily harm and was sentenced to three years' imprisonment suspended after serving 12 months with an operational period of three years. He seeks leave to appeal against that sentence on the ground that it is manifestly excessive. The incident in question occurred on 20 March 2005 in a hotel in Stanthorpe. Both the complainant and the applicant had been drinking there for some time until the relevant events occurred in the early hours of the Sunday morning.

[2] The complainant (aged 23) was with some companions and there was apparently some friendly jostling among them. The applicant (aged 24 at the time) had been drinking since playing football on the Saturday afternoon and his counsel told the sentencing judge that he "had consumed at least a carton of beer by the time this incident occurred". The complainant and applicant did not know each other prior to the incident.

[3] It is not entirely clear why the applicant approached the complainant and his group, but there is no evidence that there was anything done by the complainant or anyone in his group to provoke what happened. There were independent witnesses who saw the applicant lunge at the complainant with an extended arm whilst he was holding a whole glass. The glass broke on contact with the complainant's face. There is no doubt in the light of statements from those witnesses that the applicant without any provocation smashed an unbroken glass into the complainant's face. Immediately thereafter the applicant punched the complainant two or three times until others separated them.

[4] The complainant was taken to the local hospital where it was noted he had a number of severe lacerations to his face, one of which was very close to the eye. One laceration was 10 centimetres long "with only a small amount of tissue left open between the open cavity of the laceration and the oral cavity". The nature of the lacerations was such that medical staff in Stanthorpe decided that the complainant should be taken to Brisbane for plastic surgery. He was there treated by Dr Lanigan, a plastic surgeon. The sentencing judge was told that the "lacerations were

very extensive and deep. Blood vessels were damaged, causing a degree of blood loss possibly up to 500 millilitres, but the damaged blood vessels were not major blood vessels and bleeding would have ceased of its own accord". The doctor was amazed that there was no damage to facial nerves. By 20 June 2005 facial movement was virtually normal, but the complainant would be left with significant permanent scarring.

[5] The learned sentencing judge viewed the scarring to the complainant's face, and this Court was able to view the photograph, Exhibit 1, which was taken when the lacerations were still healing.

[6] The complainant was hospitalized in Brisbane until 23 March 2005. He said that after initial treatment his face was swollen and he was unable to open his left eye. He was in quite severe pain during his period in hospital. He was given morphine to ease the pain. For a period he could not fully shut his left eye. His left lip drooped for a couple of months but that improved. He refers to significant scarring to the left side of his face, a scar under his left eye and a nick out of his left nostril. He is still receiving medical treatment. The facial scarring has caused the complainant to become depressed; it has affected his social life. He still experiences aching and numbness to the left side of his face.

[7] It was accepted that there was a timely plea of guilty and that the applicant was remorseful. The applicant had no prior convictions at the time the offence was committed, but while on bail awaiting sentence he assaulted and did bodily harm to his wife. That offence was committed on 25 June 2005; he was placed on two years' probation without a conviction being recorded for those offences. A number of references testifying to the appellant's good character were placed before the court, and he had a good work history. By the time the applicant stood for sentence he had undertaken an anger management course.

[8] The injuries sustained by the complainant were not life threatening, but because of the "serious disfigurement" the injury was caught by the definition of grievous bodily harm in s 1 of the *Criminal Code* 1899 (Qld). The maximum penalty for such an offence is 14 years' imprisonment; s 320 of the *Criminal Code* 1899 (Qld).

[9] Mr Moynihan, who appeared for the applicant before this court, submitted that the case was an example of a typical "pub glassing", and that decisions of this Court established that the appropriate range for penalty was from 18 months' to two years' imprisonment. His contention was that in the circumstances of this case the head sentence of two years should be suspended after eight months. In support of that submission he referred to *R v Toohey* [2001] QCA 149, *R v Kent* [2004] QCA 83, *R v Jasser* [2004] QCA 14 and *R v Orreal* [2002] QCA 547. The first thing to be noted about those four cases is that in each instance the offence for which the offender was being punished was unlawful wounding which carries a maximum penalty of seven years' imprisonment; s 323 of the *Criminal Code* 1899 (Qld). Obviously the criminal law regards the offence of doing grievous bodily harm as more serious than the offence of unlawful wounding.

[10] Because a number of cases involving what has been called "pub glassing" have resulted in convictions for unlawful wounding it is necessary to analyse the cases referred to by counsel for the applicant.

[11] In *Toohey* the offender was sentenced to two years' imprisonment after pleading guilty to unlawful wounding. After smashing a 10 ounce glass the offender approached the complainant and swung the broken glass at him. The complainant raised his left arm to protect himself and received four deep cuts to his upper left arm which required numerous stitches. In his judgment, Thomas JA said:

> "Counsel for the applicant submitted that the appropriate range for this type of offence is 12 to 18 months imprisonment citing *The Queen v. Hays, ex parte Attorney-General* [1999] QCA 443. I do not think that so broad a submission is justified. The review of cases in that matter canvasses (at paragraph 16) a number of previous decisions and observes that all of those particular decisions have resulted in sentences of between 1 and 3 years' imprisonment. But the Court then went on to express the view that the circumstances in Hays' case revealed a lesser degree of criminality… .
> …
> In my experience a range of 18 months to two years is quite common in cases that were referred to by Mr Martin on behalf of the Crown as "pub glassings". It is also my experience that more serious sentences are imposed when further aggravating features exist, and lesser sentences are imposed when either less serious circumstances exist or further circumstances of mitigation are shown."

McPherson JA agreed with Thomas JA adding: "Specifically, I would add that my experience of sentences in matters of this kind accords with his." Each of those judges dismissed the application for leave to appeal against the sentence. Holmes J dissented, and would have reduced the sentence because in her view the sentencing judge failed to give proper weight to a number of mitigating circumstances, including the applicant's youth and his lack of any history of violence. But in her reasons she said:

> "Having reviewed the authorities I have come to the conclusion that a sentence of imprisonment of two years must be considered relatively severe in a case such as this, in which the injury was not a disfiguring facial injury (as is often the case)."

[12] The applicant in *Kent* was sentenced to 18 months' imprisonment suspended after three months, with an operational period of three years, after pleading guilty to the offence of unlawful wounding. In that case the complainant had punched the applicant with full force on the nose with her closed fist. The applicant immediately went after her and, it was held, deliberately struck her in the face with a glass. The glass broke on impact and cut her on the face, but she suffered no serious injury. This Court did not interfere with the sentence.

[13] The offender in *Jasser* was convicted after a trial of unlawful wounding and sentenced to 21 months' imprisonment. The glass in this offender's hand came into contact with the complainant's cheek in the vicinity of his eye, the glass breaking on contact. The report contained no more details about the injury. In dismissing the application for leave to appeal against sentence the Court stated that the sentence was "at the lower end of the range for offences of this kind" and also reflected particular circumstances in which the incident occurred.

[14] The offender in *Orreal* was charged with grievous bodily harm and alternatively with unlawful wounding. After a trial he was acquitted on the grievous bodily harm

charge, but convicted of wounding and sentenced to 18 months' imprisonment. In that case the offender struck the complainant on the face with a bottle causing lacerations around the eye. The injury was more likely to have been caused by a bottle that had been broken before impact. The sentence was challenged on the basis of the offender's personal circumstances and the fact that he had been subjected to insulting and aggressive conduct from the complainant. The Court noted that the "scarring sustained did not amount to serious disfigurement" but nevertheless caused the complainant embarrassment. In her reasons, Philippides J, with whom the other members of the Court agreed observed at [33]: "Nor, having regard to the comparable cases, which indicate a sentencing range of 18 months to two years imprisonment, am I able to accept that the sentence imposed in this case was manifestly excessive."

[15] In *R v Hays; ex parte Attorney-General* [1999] QCA 443, the Attorney-General appealed against a non-custodial sentence imposed on a 24 year old man who pleaded guilty to unlawful wounding. The offender struck the respondent in the region of the mouth with a glass. The complainant experienced considerable pain and was left with scarring which is "noticeable though not disfiguring". The sentencing judge had been influenced by the relative youth of the offender and the fact that he had virtually no criminal history. The Court of Appeal noted however the "seriousness and prevalence of offences of this kind" and, after reviewing numerous cases involving offences of this kind, concluded that the sentence imposed was manifestly inadequate. The Court expressed the view that the seriousness of the offence would ordinarily justify a term of imprisonment, but because the offender had already performed 58 hours of community service, and the Court was concerned with an Attorney's appeal, the sentence in fact imposed was 18 months' imprisonment wholly suspended for a period of 18 months.

[16] In my view those cases, correctly understood, do not establish a rigid range of 18 months' to two years' imprisonment for "pub glassings". As I have already observed, in each of those cases the offence was unlawful wounding. In *Toohey* the injury was to the complainant's arm and the complainant in *Kent* suffered no serious injury. The Court considered the sentence in *Jasser* to be at the "lower end of the range for offences of this kind". The circumstances in *Orreal* were distinguishable because of the provocative conduct of the complainant. Significantly, as Thomas JA observed in *Toohey*, the decisions on unlawful wounding indicate that sentences between one and three years' imprisonment have been imposed depending on the particular circumstances of each case. All his Honour then went on to say was that a sentence in the range 18 months to two years was quite common, although a more serious sentence could be imposed where "aggravating features exist".

[17] Here, there was an additional aggravating circumstance, namely "serious disfigurement", resulting in the charge being "doing grievous bodily harm". In consequence none of the decisions relied on by counsel for the applicant was strictly comparable. Counsel for the respondent referred the Court to sentences where the offence was doing grievous bodily harm.

[18] The first case he referred to was *R v Rehavi* [1999] 2 Qd R 640. There the offender was convicted after a trial of doing grievous bodily harm with intent. The offender smashed the top of a glass against the bar and then struck the complainant in the face with the broken glass. The complainant sustained a laceration to the left side of the face extending through the skin and muscle layers to the jaw bone, abrasions

over the left cheek, and bruising near the left eye. The injuries resulted in the complainant suffering numbness and dribbling from the corner of his mouth, each of which was likely to be permanent. For reasons which need not now be canvassed this Court quashed the conviction of doing grievous bodily harm with intent and, relying on s 668F(2) of the *Criminal Code* 1899 (Qld), substituted a verdict of guilty of doing grievous bodily harm. This Court then had to sentence the offender. Relevantly it said at 648: "Bearing in mind the seriousness of the attack and its consequences for the complainant, the appropriate sentence for the offence of doing grievous bodily harm, in our view, is one of three years' imprisonment which both counsel agreed was an appropriate penalty."

[19] The next case referred to was *R v Weare* [2002] QCA 183. That involved a plea of guilty to doing grievous bodily harm. The victim was struck from behind with the branch of a tree causing serious damage to an eye. The sentence initially imposed was three and a half years' imprisonment. This Court held that the sentence was manifestly excessive because mitigating factors had not been given proper weight and ordered that the three and a half year period of imprisonment be suspended after 12 months had been served with an operational period of three and a half years.

[20] The next case is *R v Tupou*; *ex parte Attorney-General* [2005] QCA 179. The young offender there had pleaded guilty to doing grievous bodily harm. The circumstances were that there was an unprovoked, cowardly and vicious attack on the complainant; the attack involved punching a much more lightly built man and then kicking at him whilst he was on the ground. The sentence initially imposed was three years' imprisonment suspended after nine months for an operational period of three years. This Court varied the sentence by providing for suspension after 15 months had been served.

[21] Brief mention should also be made of *R v Bryan; ex parte Attorney-General* [2003] 137 A Crim R 489 and *R v Harvey* [2003] QCA 286. The former was a far more serious case of doing grievous bodily harm. There a young man had been stabbed while innocently walking in a public street. This Court increased the sentence on the offender to six years' imprisonment. The latter case involved a conviction for doing grievous bodily harm consequent upon the offender punching the complainant on the jaw. The jaw was broken, resulting in some permanent altered sensation to the left lower lip and a permanent mildly affected bite. The initial sentence imposed was two years' imprisonment. This Court varied the sentence by ordering that the sentence be suspended after 12 months had been served with an operational period of three years. The real relevance of those two cases is to demonstrate that the level of punishment will be significantly affected by the circumstances of the assault resulting in the doing of grievous bodily harm and the extent of the injury sustained.

[22] The sentences imposed by this Court in *Rehavi* and *Weare* support the sentence imposed here, namely three years' imprisonment suspended after 12 months with an operational period of three years.

[23] The only submission addressed to this Court was that the sentence imposed was manifestly excessive because it was out of line with the authorities said to determine the appropriate range. It was not contended that the learned sentencing judge otherwise erred in determining the appropriate sentence.

[24] Particularly given that this was a plea of guilty to doing grievous bodily harm, the sentence was within range and the application for leave to appeal against sentence should be dismissed.

[25] **HELMAN J**: I agree with the order proposed by Williams JA and with his reasons.

[26] **CHESTERMAN J**: I agree with Williams JA.