SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dillon; ex parte A-G (Qld)* [2006] QCA 521
PARTIES:	**R** **v** **DILLON, Blake Joseph** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 217 of 2006 DC No 3579 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Sentence by A-G (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	8 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	19 October 2006
JUDGES:	McMurdo P, Mackenzie and Fryberg JJ Separate reasons for judgment of each member of the Court, McMurdo P and Mackenzie J concurring as to the orders made, Fryberg J dissenting in part
ORDER:	**1. Appeal allowed** **2. Sentence imposed at first instance is varied by deleting that part of the sentence suspending the term of imprisonment and instead recommending the respondent be eligible for post-prison community-based release after serving 15 months of that sentence, on 6 October 2007**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER - APPLICATIONS TO INCREASE SENTENCE - OFFENCES AGAINST THE PERSON - where respondent pleaded guilty to one count of grievous bodily harm - where respondent hit and kicked complainant causing facial fractures and other significant injuries necessitating hospitalisation - where respondent has a criminal history for previous drug and street offences, assault and breaching probation orders - where respondent was sentenced to imprisonment for three years suspended after 10 months with

an operational period of three years - where respondent appears to be making genuine attempts at rehabilitation - where Attorney-General appeals against sentence claiming that it is manifestly inadequate - whether sentence is manifestly inadequate - whether this Court should impose a sentence with a parole recommendation rather than a suspended sentence so that respondent can benefit from support and supervision

Criminal Code 1899 (Qld), s 669A(1)
Penalties and Sentences Act 1992 (Qld), s 154, s 157, s 160B, s 213, s 214

Bond v The Queen (2000) 201 CLR 213, applied
Dinsdale v The Queen (2000) 202 CLR 321, applied
Everett v The Queen (1994) 181 CLR 295, applied
R v Dobinson [2006] QCA 357; CA No 178 of 2006, 15 September 2006, distinguished
R v Johnston [2004] QCA 12; CA No 263 of 2003, 6 February 2004, distinguished
R v Tupou; ex parte A-G (Qld) [2005] QCA 179; CA No 88 of 2005, 31 May 2005, applied
R v Wall [2002] NSWCCA 42, applied

COUNSEL: S G Bain for appellant
M O Anderson for respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for appellant
Adams Luca & Smith Lawyers for respondent

[1] **McMURDO P:** The respondent Blake Joseph Dillon pleaded guilty in the District Court at Brisbane on 7 July 2006 to one count of doing grievous bodily harm to Christopher Gregory Wilkins on 1 May 2004. He was sentenced to imprisonment for three years suspended after 10 months with an operational period of three years. The appellant, the Attorney-General of Queensland, appeals against that sentence contending that it is manifestly inadequate in that it does not reflect adequately the gravity of the offence or principles of general deterrence and gives too much weight to mitigating factors.

[2] The respondent was 22 at the time of the offence and 24 at sentence. He has a criminal history. In 2000 he was fined in the Holland Park Magistrates Court for possessing dangerous drugs. Between 2000 and 2002 in four court appearances in the Southport, Beenleigh and Inala Magistrates Courts he was convicted of and fined for various street offences. In July 2003 he was convicted of and fined in the Holland Park Magistrates Court for wilful destruction of property. In the Southport Magistrates Court on 9 October 2003 he was fined $600 without conviction for an assault occasioning bodily harm on 15 August 2003. The complainant in that offence was a 39 year old man who intervened in Cavill Avenue at the Gold Coast around midnight one evening in August 2003 in a fracas between people unknown to him. He tried to calm the situation. The respondent, who was intoxicated, approached him from behind and punched him in the forehead. The complainant told the respondent to calm down and began to walk away. The respondent again struck him in the forehead. The moderate penalty imposed suggests the

complainant's injuries were fortunately minor. The present offence occurred eight and a half months later on 1 May 2004. In August 2005 the respondent was convicted and fined $1,000, placed on probation for two years and disqualified from holding a driver's licence for 18 months for failing to stop a vehicle and for other traffic matters. The next month he was convicted and fined $1,200 for drug offences, receiving stolen property and possession of tainted property. At least the first of these offences breached the probation order imposed the previous month. On 25 January 2006 he was convicted and fined $240 for breaching that probation but the probation order continued. On 10 April 2006 he was convicted and sentenced to three months imprisonment wholly suspended for 18 months and convicted and fined $750 for possessing dangerous drugs, possessing property suspected of having been used in commission with the commission of a drug offence and committing a public nuisance. All these offences were committed on 2 October 2005 and so were further breaches of the probation order imposed in August 2005.

[3] The prosecutor at sentence tendered a report prepared for the court by Corrective Services officer Allen Pappas as to the respondent's response to supervision on probation. The report noted that the respondent had twice breached his probation order and breach proceedings were pending as at the date of the report on 29 May 2006. Mr Pappas considered the respondent's response to supervision was superficial. Despite many requests the respondent had paid only $400 of the $500 fees for the "Under the Limit Program" he was required to undertake. He had, however, completed nine of the 11 sessions of that programme and once he had paid the outstanding $100 he would have successfully completed it. (This amount was paid by the time of sentence.) Mr Pappas noted that the respondent appeared to minimize the amount of his consumption of alcohol relating to the offence the subject of the probation order. He had initially agreed to take part in a cognitive skills programme but had since expressed a reluctance to commit to it. The respondent had been referred to drug and alcohol counselling at Biala. (A later report from Ms Lyn Cobb tendered by the defence showed that Mr Pappas had not appreciated the extent of this counselling undertaken by the respondent.) The respondent had assured Mr Pappas that his drinking and drug habits were being managed by him following the September and October 2005 offences. Mr Pappas considered that the respondent overall did not appear to have taken the conditions of the probation order seriously, although he had reported as directed, maintained full time employment and not changed his residence. Mr Pappas concluded his report with cautious and considered optimism: "It is thought that, to the best of his efforts, he might finally be making an effort to conform within community requirements".

[4] The facts of the present offence are as follows. The complainant was a 36 year old man unknown to the respondent. On 1 May 2004 he was at the Runcorn Tavern drinking and watching football until about 12.30 am. During the evening he said to the respondent, who swore at a female staff member, words to the effect of "Don't swear like that out here, especially at a woman". The respondent told him to mind his own business. They had no further contact until about 12.30 am when the complainant was about 150 m from the tavern on his way home. He was sending an SMS message on his phone. The respondent stepped out in front of him from the shadows of a garden. He appeared angry and had his fists clenched. The complainant said "You're not worth it" and continued sending his message as he walked away. He next felt a hit to the back of his head which dazed him and caused him to stumble and fall down. He attempted to stand up but the respondent kicked

him in the face in the region of his left cheek bone. He lost consciousness. A female friend of the respondent threw herself on top of the complainant to protect him. The respondent walked away but remained in the general vicinity. A security guard stopped and called police. The respondent provided his name and details to police once they arrived. He seemed to deny assaulting the complainant stating there were no witnesses nor cameras and nothing could be proved.

[5] On 1 August 2004 CIB police officers interviewed him. He told them he had been in trouble before and there was alcohol involved; when he drinks rum he finds it harder to walk away; he had stopped drinking rum since this offence. He declined a formal police interview and was charged. Full committal proceedings followed. The matter was listed for trial in the week commencing 8 May 2006. His lawyers notified the prosecution of his plea of guilty on the Monday before the trial was due to commence so that it was a relatively late plea.

[6] The complainant was taken to the emergency department at Princess Alexandra Hospital after transfer from QEII Hospital. He had a swollen left eye, left cheek pain, reduced sensation in the left cheek and upper lip and malalignment of teeth. Radiology showed fractures to the bones around the left eye and the nose. The left orbital wall, left maxillary sinus, left ethmoid sinus, nose and dorsum sella were all fractured. He was hospitalized until 5 May 2004 and released after conservative management. The dorsum sella fracture was likely to have resulted in a pituitary gland injury which would have endangered his life. At sentence he was still suffering a loss of sensation on the left side of his face between his nose and the top of his lips and now wears reading glasses. Clearly a great deal of force had been inflicted to cause these significant injuries.

[7] The prosecutor submitted that the offence was a cowardly unprovoked attack in a public area involving the kicking of the complainant whilst he was on the ground. The respondent had a previous conviction for an offence of violence in public whilst intoxicated. His conduct warranted a deterrent sentence in the order of three to four years imprisonment. The prosecutor in making this submission relied on this Court's decision in *R v Tupou; ex parte A-G (Qld).*[1] The prosecutor conceded that because the respondent had made efforts at rehabilitation the sentence imposed should be suspended after 15 months, as in *Tupou*.

[8] The respondent's counsel at sentence tendered a report from Ms Lyn Cobb, a social worker at Queensland Health's Alcohol and Drug Service. Ms Cobb recorded that the respondent first reported to the service on 25 October 2005 because he was concerned that his substance use and related legal problems needed to be addressed. He attended the arranged six appointments over five months from 25 October 2005 to 8 March 2006. The treatment encouraged his responsible use of alcohol and abstinence from other substances under a relapse, prevention and management model. He was attempting to make the changes necessary to remove drug use from his life and to increase his knowledge about binge drinking and risky drinking behaviours. He reported cycles of several weeks abstinence from drugs and then relapsing. He expressed a determination to make positive changes in this respect so that Ms Cobb considered he would now benefit from a structured relapse prevention programme such as that offered by the Department of Community Corrections, a cognitive behaviour therapy approach to counselling (privately or within

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1 [2005] QCA 179; CA No 88 of 2005, 31 May 2005.

Queensland Health's Alcohol and Drug Service) and random drug screening. The respondent acknowledged that ecstasy and alcohol were substances which he took regularly and that his substance use, especially alcohol, had resulted in his various convictions. He participated regularly in kick-boxing and was serious about his training commitments to this sport so that this benefited his health and fitness and encouraged him to curtail his use of drugs and alcohol. He described his father as a violent alcoholic who left the family home when the respondent was about 14 years old. The respondent had been punctual in attending appointments and responsive in counselling sessions and had made steady progress.

[9] The respondent's counsel submitted that the respondent had completed an apprenticeship as a floor sander and had an excellent employment history. He tendered a number of references. His employer considered him to be a hard worker and a good-hearted young man. Personal referees supported the submission that the respondent, in spite of his dysfunctional background, was when sober a good citizen who was now making genuine efforts to rehabilitate and to curb the substance abuse which was at the heart of his offending.

[10] The respondent's counsel at sentence sought to distinguish *Tupou* because it was a completely unprovoked attack whereas here there had been a minor dispute between the respondent and the complainant earlier in the evening. The complainant took offence at some banter between the respondent and a staff member known to the respondent. The respondent and his girlfriend were later "canoodling" in the bushes near the hotel when unfortunately he saw the complainant. Because the respondent was intoxicated he formed an unreasonable perception that the complainant was looking for him and attacked him. Defence counsel referred the judge to two District Court decisions and urged the judge to place greater emphasis on rehabilitation rather than deterrence and to impose a wholly suspended three year term of imprisonment.

[11] The sentencing judge referred to the facts that the offence occurred in a public place and that the respondent kicked the complainant; consistent with *Tupou*, deterrence was important. His Honour noted the respondent's criminal history and his previous conviction for assault. The judge referred to and was impressed by the respondent's rehabilitation. His Honour considered that the appropriate sentencing range was as suggested by the prosecutor but that suspension a little earlier than the prosecutor submitted was appropriate in this case because of the plea of guilty, the respondent's good employment record and promising rehabilitative prospects and efforts. The judge warned the respondent that if he committed a further offence during the operational period he would be in jeopardy of having to serve all of the remaining sentence of imprisonment.

[12] The submissions now made by counsel for the appellant are consistent with those made by the prosecutor at sentence. She contends that a sentence of three to four years imprisonment should be imposed, suspended after 15 or 18 months. She places great emphasis on the need for deterrence in the commission of an offence such as this, perpetrated as it was on an innocent victim and causing him life-threatening injuries, especially where the respondent has a previous conviction for an offence of street violence whilst intoxicated. She submits that as the respondent committed a serious act of alcohol-fuelled street violence only eight and a half months after he had been dealt with for a similar unprovoked attack the primary judge should not have sentenced him to a lesser penalty than that imposed

in *Tupou*. In doing so, his Honour gave too much weight to rehabilitation. She contends that the sentence substituted by this Court in *Tupou* of three years suspended after 15 months was the lightest sentence that could have been fairly imposed in this case, especially as the respondent was older than Tupou and had a more serious criminal history.

[13] *Tupou* involved an attack on a 25 year old who had recently left a city restaurant and was waiting in a taxi rank outside the Treasury Casino. As a taxi pulled up the complainant moved towards it, waving his arms about, although not threateningly. Tupou, who was in the taxi with a friend, said to the gesticulating complainant "What did you say, fuckhead?". The complainant returned to the queue. Tupou alighted from the taxi and moved quickly towards the complainant, punching him without warning and knocking him to the ground. He then went to kick him although it is not clear whether the kick made contact. Tupou was 18 years old and was more heavily built than the complainant who had cerebral palsy. Tupou's friend pulled him away and they ran off. They removed their shirts, apparently in the hope of avoiding detection. Later that evening Tupou was involved in a disturbance at a nightclub and police were called. He again decamped and was pursued by police before being detained. Police recognized him as the antagonist in this offence. When interviewed by police about three weeks later he admitted committing the offence and said that he was intoxicated. He was a diabetic whose failure to take insulin that night compounded the adverse effects on him of the alcohol. The complainant suffered a depressed fracture of the right cheek, fractures to the left cheek, nose and jaw and the loosening of three teeth. He spent one night in hospital. He was unable to eat solid foods for two months and lost seven kilograms. He suffered severe headaches and had difficulty sleeping for some months. He was off work for three months and lost self-confidence. He redeveloped a stutter. His work suffered and his income was diminished. At sentence he was still suffering from numbness in the cheek, his teeth were loose and he may lose them. He was in need of ongoing dental and perhaps maxillofacial treatment to restore his appearance and his ability to chew. Tupou had previous street offences for which he had been fined. He was on a good behaviour bond in respect of one street offence when he attacked the complainant. He pleaded guilty at an early stage following a full hand up committal and co-operation with the police. This Court emphasized the importance of deterrence in imposing sentences for such violent offences and considered that a head sentence of three to four years imprisonment was appropriate, taking into account the plea of guilty. A sentence requiring him to serve only nine months of that term in actual custody was manifestly inadequate. The Court, making appropriate allowance for the moderate approach adopted when allowing an Attorney's appeal, varied the sentence by leaving the term of imprisonment at three years but suspending it after 15 months rather than nine months.

[14] The respondent in supporting the sentence imposed refers us to two authorities *R v Dobinson*[2] and *R v Johnston*.[3] *Johnston* is of no real relevance because its facts are quite different. A sentence of six years imprisonment was imposed there after a trial in respect of an offence of grievous bodily harm involving a knife. It was not an Attorney's appeal. This Court did not consider the sentence was manifestly excessive.

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2 [2006] QCA 357; CA No 178 of 2006, 15 September 2006.

3 [2004] QCA 12; CA No 263 of 2003, 6 February 2004.

[15] *Dobinson* pleaded guilty to one offence of grievous bodily harm, two offences of performing negligent acts causing harm and to a summary offence of drink driving. He was sentenced to three years imprisonment suspended after 12 months on the offence of grievous bodily harm and to lesser concurrent sentences on the remaining offences. He had previous convictions for two assaults occasioning bodily harm in 2003 and whilst on bail for the pertinent offences was convicted of common assault. He applied for leave to appeal to this Court contending the sentence was excessive. Dobinson was not the main protagonist in the attack which involved two other offenders. The complainant suffered serious injuries to his spleen and was hospitalized for five weeks although he recovered sufficiently to enable him to continue to serve as a soldier in East Timor. Counsel for the respondent submitted in *Dobinson* that, if anything, the sentence imposed was too low but agreed that there was no appeal by the Attorney-General against sentence. This Court noted that the sentence was "clearly appropriate" for the serious criminal conduct committed. Unsurprisingly, Dobinson's application was dismissed. *Dobinson* does not provide support for the sentence imposed on the respondent below as it was not an Attorney-General's appeal.

[16] I had initial concerns that, if a three year term of imprisonment suspended after 15 months was an appropriate penalty as the appellant's counsel concedes, a three year sentence suspended after 10 months may not be manifestly inadequate. After careful consideration I am, however, persuaded that the sentence imposed is inadequate and that this Court should allow the Attorney's appeal and increase the sentence under s 669A(1) *Criminal Code*. The respondent attacked the complainant, who was completely innocent, in a violent and unjustified manner in a public place, causing him serious, life-threatening and perhaps permanent injury. The respondent was 22 years old at the time and eight and a half months earlier had been dealt with leniently for an offence of violence committed in public whilst intoxicated. As the sentencing judge does not seem to have fully appreciated, the respondent did not immediately rehabilitate after committing this second and very serious offence of violence but went on to commit further offences associated with his substance abuse and to then twice reoffend whilst on probation. Fortunately, by the time of his sentence more than two years after committing the present offence, he was at last making genuine efforts at rehabilitation, and apparently with some success, because he had not reoffended since October 2005 and was able to place positive references and reports before the court from his employer and others. This Court has often stated the need for deterrence when imposing sentences for vicious examples of serious street violence fuelled by substance abuse. This was such an example. The attack was in its own way as serious as that in *Tupou*. Tupou, a much younger offender than this respondent, with a lesser criminal history, an earlier plea of guilty and greater co-operation with the administration of justice, had his sentence of three years imprisonment suspended after nine months increased on appeal so that it was suspended after 15 months, with the Court noting its moderate approach because the sentence was being increased on a Crown appeal. On the present facts, the sentence imposed in *Tupou* was, contrary to the primary judge's view, at the most lenient end of the appropriate sentencing range. To suspend the three year sentence after 10 months in the present case was to impose a manifestly inadequate sentence.

[17] Because the sentencing discretion has miscarried this Court must allow the appeal, set aside the sentence imposed and exercise its discretion afresh. A Crown appeal against the inadequacy of a sentence is traditionally considered to put an offender in

jeopardy a second time so that the jurisdiction is considered exceptional: *Everett v The Queen*;[4] *Bond v The Queen*.[5] That is why it is conventional for an appellate court in allowing a Crown appeal against sentence and substituting its own sentence to impose a sentence towards the lower end of the appropriate sentencing range: *Dinsdale v The Queen*;[6] *R v Wall*.[7] Like Tupou, and adopting the moderate approach apposite in a Crown appeal, the respondent should be sentenced to three years imprisonment and spend 15 months of that in custody before his release into the community. The material before the sentencing court suggests that if the respondent is to succeed in his commendable efforts at rehabilitation he will benefit, as Ms Cobb stated in her report, from a structured relapse prevention programme such as that offered by the Department of Community Corrections, cognitive behavioural therapy counselling and random drug screening. He will not necessarily have the advantage of that support and supervision if his sentence is suspended. Release on parole rather than under a suspended sentence is the preferable order here.

[18] The making of such an order is not entirely straightforward because of recent amendments to the *Penalties and Sentences Act* 1992 (Qld) ("the Act"). Under the recently added s 160B of the Act, a court in imposing a term of imprisonment of three years can no longer, as it could at the date of the imposition of the original sentence on 7 July 2006, recommend release on parole (or post-prison community-based release) but rather is required to fix the date the offender is to be released on parole. When this Court allows an appeal against sentence and passes another sentence in substitution for the original sentence under s 668E(3) *Criminal Code* or, as is apposite here, under s 669A(1) *Criminal Code* varies the sentence or imposes another sentence, the sentence imposed by this Court ordinarily runs from the date of the original sentence, here 7 July 2006: s 154 of the Act. The sentence date preceded the coming into operation of s 160B. Should this Court fix a date for the respondent to be released on parole under s 160B or make a recommendation to that effect as was possible on the original sentencing date (7 July 2006) under the now repealed s 157 of the Act? The relevant transitional provisions of the Act are contained in s 213 and s 214. If under s 669A(1) this Court varies the sentence imposed at first instance it seems to me the Court should make a recommendation under the now repealed s 157 of the Act; s 213(1) would then apply so that the date for recommendation for post-prison community-based release eligibility is taken to be the parole eligibility date fixed under s 160B. If on the other hand the Court under s 669A(1) allowed the appeal, set aside the sentence imposed at first instance and imposed another sentence, s 214 of the Act would make s 160B applicable and this Court would be required to fix a parole eligibility date. I propose under s 669A(1) to allow the appeal and to vary rather than set aside the sentence imposed at first instance by deleting that part of the sentence suspending the term of imprisonment and instead recommending that the respondent be eligible for post-prison community-based release after serving 15 months of that sentence. Under s 213(1) the date for recommendation for post-prison community-based release eligibility is taken to be the parole eligibility date fixed under s 160B. This Court can therefore confidently expect that the respondent will be released on parole

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4 (1994) 181 CLR 295, 299.
5 (2000) 201 CLR 213, 222 - 223.
6 (2000) 202 CLR 321, 340 - 341.
7 [2002] NSWCCA 42, [70].

on the date of this Court's recommendation for post-prison community-based release eligibility.

Order

[19] 1. Allow the appeal.

2. Vary the sentence imposed at first instance by deleting that part of the sentence suspending the term of imprisonment and instead recommending that the respondent be eligible for post-prison community-based release after serving 15 months of that sentence, that is, on 6 October 2007.

[20] **MACKENZIE J:** I agree with the orders proposed by the President for the reasons she gives. I wish only to add the following remarks.

[21] In the written submissions, the appellant submits that a sentence of three to four years imprisonment suspended after fifteen to eighteen months could be imposed. In oral submissions the appellant's counsel's "ultimate submission" was that a sentence not less than that imposed in *R v Tupou; ex parte Attorney-General (Qld)* [2005] QCA 179 should be imposed. It was submitted that a head sentence of up to four years imprisonment could have been imposed, given the respondent's previous conviction for another assault in a public place. That was consistent with the submission of the Crown Prosecutor at sentence that the appropriate sentencing range was three to four years and that suspension after fifteen months was appropriate.

[22] In *Tupou*, the three to four year range of head sentence was, according to the Chief Justice, to be taken as taking into account the plea of guilty. Later, he said "I earlier referred to an appropriate range, after allowing for the plea of guilty and other matters of mitigation, of three to four years imprisonment. ... I make it clear that the suspension after fifteen months, leaving the term at three years, is intended to reflect the moderate approach appropriate to the disposition of an appeal by the Attorney-General."

[23] It is implicit in that approach that the sentencing judge at first instance would have been entitled to impose a head sentence at a higher level than three to four years in *Tupou*. If such a sentence had been imposed, and the usual kind of allowance for mitigating factors present in *Tupou* had been made, the period to be served in custody before eligibility for release would ordinarily have been longer than that imposed by the Court of Appeal. Conversely the period to be spent in custody pursuant to the Court's order in *Tupou* was longer than it would ordinarily have been if the usual kind of allowance for plea of guilty and other mitigating circumstances had been made. The unusual structure of the sentence was accounted for by the factors mentioned by the Chief Justice.

[24] In the present case, therefore, if the three year head sentence was the objectively appropriate sentence, the respondent should have been entitled to eligibility for release earlier than fifteen months into his sentence. While exact comparison of facts of cases and mitigating circumstances is rarely possible, there was general equivalence between those in *Tupou* and those in the present case. The effect of the order proposed by the President is that the time to be spent in custody, as in *Tupou*, is indicative of a notionally higher head sentence than three years.

[25] **FRYBERG J:** For the reasons given by the President this appeal should be allowed. The sentence imposed in the District Court was manifestly inadequate. I need not repeat the facts, which are set out by the President.

[26] In *R v Tupou*, the Chief Justice, with whom Mullins J agreed, said:

> "Considerable importance should nevertheless attach to *Bryan* in our disposition of this appeal. As observed by Justice McPherson in *R v Johnston* [2004] QCA 12:
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> > 'The Queen against Bryan is one of two or more recent decisions of this Court that establish a benchmark in cases of this kind that may be higher or more severe than has been common in the past.'"[8]

In my judgment the majority decision in *Tupou* contained a deliberate indication to trial judges of the need for increased severity in sentencing for offences such as that the subject of the present appeal.

[27] Judges imposing sentence look to decisions of this Court for guidance in the exercise of their discretion. Both they and members of the legal profession use such decisions to establish the range (or their estimate of the range) of sentences open in particular circumstances. It is most important that this Court not send mixed messages. That does not mean that sentencing is a process governed by some notion of binding precedent. It does mean that subsequent sentences should be able to be reconciled with sentences imposed or upheld by this Court on rational grounds.

[28] With the utmost respect to my colleagues, I cannot accept that the head sentence which they propose in this appeal can be so reconciled. Moreover I do not agree that the attack in the present case was equally as serious as that in *Tupou*. The respondent's conduct was worse because he attacked his victim from behind; because he kicked his victim and did so in the face; because he knocked his victim out; and because he inflicted permanent injury (damage to eyesight requiring reading glasses and an apparently permanent loss of sensation in the face) on his victim. For those reasons alone he merited a more severe head sentence than was imposed on Tupou. Paradoxically, the head sentence proposed by my colleagues is, when the reasons for judgment in *Tupou* are analysed, demonstrably more lenient than that imposed on Tupou.

[29] Tupou was originally sentenced to three years' imprisonment suspended after nine months for an operational period of three years. On appeal the head sentence was not varied, but the suspension was ordered after 15 months rather than nine months. That course was taken because of the form of the penalty imposed at first instance and because of the need for moderation in an Attorney's appeal. The Court adopted the approach of allowing for mitigating factors by reducing the head sentence. That is an unusual course to adopt except where the sentence is 10 years or more. The Chief Justice said:

> "If the minimum head sentence appropriate in *Bryan* was six to seven years imprisonment following the plea of guilty, then allowing here for the absence of a weapon but the cases' otherwise general comparability, I would think a head sentence in this case of three to

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[8] [2005] QCA 179 at p 11.

> four years imprisonment to be appropriate. In *Bryan*, it should be noted, there was no suspension or recommendation as to post-prison community based release added. Accordingly, that three to four year level should be seen as taking account of the plea of guilty in particular.
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> …
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> I earlier referred to an appropriate range, after allowing for the plea of guilty and other matters of mitigation, of three to four years imprisonment. … I make it clear that the suspension after 15 months, leaving the term at three years, is intended to reflect the moderate approach appropriate to the disposition of an appeal by the Attorney-General."[9]

[30] The mitigating factors that existed in *Tupou* were of greater force than those in the present case. Tupou readily admitted that he was the offender when first interviewed by police. The present respondent effectively denied assaulting the complainant when first interviewed by police. Tupou was a diabetic and his failure to take his insulin on the night of the offence compounded the adverse affect upon him of the alcohol which he had drunk. His criminal history comprised street offences, none of which was a crime of substantial violence. The respondent had no such disability and his criminal history, which was more lengthy than that of Tupou, included convictions for assault occasioning bodily harm and (on a separate occasion) wilful destruction of property. The President has described the blows which constituted the assault in the present case.[10] I add that the respondent had regular involvement in kick-boxing. Tupou had the benefit of an early plea of guilty following of full handup committal. The respondent required a full committal with cross-examination and pleaded guilty only a few days before his trial was due to take place. The only significant respect in which Tupou was in a worse position than the respondent was that his offence was committed while he was subject to a good behaviour bond. Had Tupou been in the same position as the respondent in respect of mitigating factors, the head sentence would (on the approach taken in the case) doubtless have been higher; perhaps 3½ to 4½ years.

[31] When one has regard to the more serious nature of the respondent's conduct,[11] the range appropriate for consideration in this case is four to five years' imprisonment.

[32] Having regard to the moderation which is appropriate in an Attorney's appeal, I would quash the sentence of the District Court and impose a head sentence of imprisonment for four years.

[33] No consideration appears to have been given by the sentencing judge to recommending post-prison community based release rather than a suspended sentence. That appears to have resulted from a too-close adherence to what was done in *Tupou*. It is unnecessary to consider whether that constituted an error in principle sufficient for this Court to intervene. The Court is varying the sentence imposed below and I agree with the President that a recommendation is the preferable course. This being an Attorney's appeal, I am also content to concur in a recommendation effective after 15 months.

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9 *Ibid.* at pp 11, 14.

10 Paragraph [2].

11 Paragraph [28].