SUPREME COURT OF QUEENSLAND

CITATION:	*R v Brand* [2006] QCA 525
PARTIES:	**R** **v** **BRAND, Christopher John** (applicant)
FILE NO/S:	CA No 253 of 2006 DC No 118 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	8 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	27 October 2006
JUDGES:	Williams, Jerrard and Holmes JJA 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 refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS - APPLICATIONS TO REDUCE SENTENCE – where the applicant pleaded guilty to unlawfully doing grievous bodily harm and was sentenced to three years imprisonment, suspended after nine months, with an operational period of three years – where the complainant was a 72 year old man and the attack lasted for about one and a half minutes – where the ill health of the applicant's baby and the stress this caused was relied upon as a mitigating factor – whether the sentence was manifestly excessive in all the circumstances *R v Bryan; ex parte A-G (Qld)* [2003] QCA 18; (2003) 137 A Crim R 489, considered *R v Tupou; ex parte A-G (Qld)* [2005] QCA 179; CA No 88 of 2005, 31 May 2005, followed
COUNSEL:	A J Kimmins, with D James, for the applicant M J Copley for the respondent
SOLICITORS:	Buckland Criminal Lawyers for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **WILLIAMS JA:** The applicant seeks leave to appeal against a sentence of three years imprisonment, suspended after nine months, with an operational period of three years, imposed after he pleaded guilty on 16 August 2006 in the Maroochydore District Court to the offence of unlawfully doing grievous bodily harm committed on 9 October 2005.

[2] An agreed statement of facts was presented to the sentencing Judge and that formed the basis of the description of the offence given by the Judge in his remarks on sentence. The complainant was a 72 year old man. On Saturday, 8 October 2005 he heard loud music coming from a nearby house. The noise continued throughout the night and on the following day until early afternoon. It then stopped for a period but again commenced somewhere around 6.30 pm on 9 October. The complainant went to where the music was coming from and on arrival at the house walked towards the front door. It was dark and a dog commenced to bark. The complainant commenced to knock on the side wall and said: "Is anyone home". The applicant, a male aged 25, then came out of the house and immediately pushed the complainant in the chest; that caused the complainant to fall and then he was kicked by the applicant. The applicant was screaming: "Get off my fucking property – you are trespassing". A neighbour and her husband gave evidence at the committal that they saw the applicant punch and kick the complainant at that stage.

[3] The applicant's female partner then arrived home and attempted to break the two apart. The complainant said at committal that at that time he threw a punch at the applicant but it missed and hit the female. The applicant in a record of interview with the police stated that after his partner was hit he became angry.

[4] The neighbour went inside and called the police. When he returned he saw the applicant punch the complainant in the face and chest area on at least 10 occasions. The applicant also bit the complainant on the arm. The punching went on for about one and a half minutes. The complainant then managed to stagger to his vehicle and drive off. The applicant continued yelling at his neighbours.

[5] In the record of interview with the police on 10 October, the applicant asserted that the complainant was the aggressor and that the complainant punched his partner first which made him angry. He said he recalled hitting the complainant once but could not recall any further assault.

[6] Various medical reports were tendered on sentence. The complainant was recorded as having swollen both lids of his right eye; pain on the orbital margins of his left eye; pain in the left cheek area; pain in the left mandible; a one centimetre laceration inside the lower lip; a four centimetre laceration on the inner side of the upper lip, a one centimetre puncture wound to the upper lip; a two centimetre laceration on the medial side of the left eye; abrasions to both knees; abrasions on the left elbow and an abrasion behind the lower part of his abdomen. Subsequent examination revealed multiple severe displaced facial fractures particularly to the region of the upper jaw. A number of doctors expressed the view that the injuries constituted grievous bodily harm. It is clear from the injuries that a number of severe blows were struck. That is also confirmed by looking at photographs of the complainant's injuries.

[7] The applicant had a criminal history which included a conviction in 1997 for stealing a car, wilful damage and fraud, a conviction in 1998 for dangerous operation of a motor vehicle and unlawful use of a motor vehicle, a conviction in

1998 for attempted armed robbery (for that offence he was sentenced to three years imprisonment suspended after serving three months), a number of instances of obstructing police (the last in December 2003), and breaching probation. The period on probation finished about one month before the commission of this offence.

[8] During submissions on sentence counsel for the prosecution submitted that a term of imprisonment of between three and four years was within range and experienced defence counsel submitted that the appropriate sentence would be a head sentence of the order of three years suspended after serving "somewhat less than what might be considered to be the one third option simply for pleading guilty". Ultimately defence counsel submitted the period of actual custody should be of the order of six to nine months.

[9] References were tendered indicating the applicant had a good work history and was in a stable relationship. The principal mitigating matter relied on was that on 29 September 2005 the applicant's partner gave birth to a premature baby boy who suffered hydrocephalus requiring the insertion of a shunt into his head. His partner was regularly travelling from the Sunshine Coast where they lived to the hospital in Brisbane. It was submitted that at the time the offence was committed the applicant was under stress because of his concern for the baby and the circumstances in which he and his partner found themselves.

[10] It was also put to the sentencing Judge, but without any further elaboration, that the applicant was "horrified to learn that the complainant was a man in his early seventies".

[11] The experienced sentencing Judge described the offence as "appalling". He said there was –

> "Absolutely no justification at all to suddenly – without any other reason than your own bad temper – violently assaulting the neighbour. There is no real doubt that you completely lost control of yourself."

The sentencing Judge acknowledged that there were "stressors" in the applicant's life and he was going through a "difficult time". But he said, correctly, that that did not "justify the violent assault you visited upon this man". He also referred to the necessity to deter people from behaving in that way.

[12] The learned trial Judge essentially adopted the submission of experienced defence counsel by suspending the sentence after a period which recognised a greater discount than that usually given for a plea of guilty.

[13] On the hearing of this application, present counsel for the applicant contended for a sentence of 18 months imprisonment suspended after serving four and a half months. In my view such a sentence would be out of step with recent sentences imposed by this Court for gratuitous violence resulting in grievous bodily harm. Relevantly this Court in *R v Tupou; ex parte A-G (Qld)* [2005] QCA 179 varied a sentence of three years imprisonment suspended after nine months by increasing the time to be served before suspension to 15 months. The offender in that case was aged 18 years and had no previous convictions for offences of violence. He was on a bond at the time the offence occurred. The complainant in that case suffered a

number of facial fractures making the injuries broadly comparable with those in issue here.

[14] Counsel for the applicant sought to distinguish *Tupou* on the basis that cases such as it and *R v Bryan; ex parte A-G (Qld)* (2003) 137 A Crim R 489 were primarily concerned with the imposition of a severe sentence to constitute a deterrent to gratuitous street violence. Whilst it is true that each of those cases did involve violence in a public place the overall criminality of the act in question will be largely determined by a consideration of the nature of the assault. Circumstances such as the fact that a weapon was used, or the assault was prolonged, could often be as significant as the fact that the assault took place in a public place.

[15] Counsel for the applicant referred the Court to some 14 cases in support of his contention that a head sentence of two years imprisonment was appropriate in a case such as the present. It is not necessary to refer to all of those cases by name. In nearly all of the cases referred to the ultimate conclusion of this Court was that the sentence in question was not manifestly excessive. The cases disclosed a wide variety of relevant facts. The common feature was that the injuries sustained by the complainants were predominantly facial. In many instances only one blow was struck. In others the offender was very young with no previous convictions. The only real conclusion that can be drawn from a consideration of the cases referred to is that the appropriate sentence for the offence of grievous bodily harm will vary significantly and that relevant factors will include the nature of the injuries sustained, the age of the offender, the criminal history of the offender, whether or not a weapon was used, whether the offence was established by one blow or whether there was a sustained attack on the complainant.

[16] In the present case the attack was entirely unprovoked and was sustained over a period of time. Even the intervention of the applicant's partner was not successful in causing the applicant to desist. His subsequent attempt to explain away his conduct by saying it was an angry response to the complainant being the aggressor and striking his partner demonstrates there was little, if any, remorse.

[17] In all of those circumstances this case is more serious than those referred to by counsel for the applicant in support of a head sentence of two years imprisonment. Whilst three years imprisonment might well be regarded as towards the upper limit, it was within the appropriate range.

[18] The Court is now concerned with an applicant aged 25 who has previously been sentenced to imprisonment for a short period and who carried out an unprovoked and sustained attack on a 72 year old man. In those circumstances the sentence contended for by counsel for the applicant cannot be supported.

[19] The sentence in fact imposed clearly indicated that the sentencing Judge had given appropriate weight to the mitigating factors relied on by the applicant. Many of the cases referred to by counsel for the applicant where there was a two year head sentence required the offender to serve approximately nine months.

[20] The application for leave to appeal should be refused.

[21] **JERRARD JA:** In this application I have read the reasons for judgment and order proposed by Williams JA, and respectfully agree with those.

[22] **HOLMES JA**: I agree with the reasons of Williams JA and with the order he proposes. While I consider that the head sentence of 3 years imprisonment was certainly at the upper end of an appropriate range, the ameliorating effect of the suspension after 9 months convinces me that the sentence was not, as a whole, excessive.