SUPREME COURT OF QUEENSLAND

CITATION:	*R v Nguyen* [2006] QCA 542
PARTIES:	**R** **v** **NGUYEN, Khanh Dinh** (applicant)
FILE NO/S:	CA No 274 of 2006 SC No 130 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	22 November 2006
JUDGES:	Williams, Jerrard and Keane 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 dismissed**
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 with intent and was sentenced to eight years imprisonment, with a serious violent offence declaration – whether the sentencing judge paid adequate regard to the applicant's good work history and favourable references – whether the applicant's plea of guilty was properly reflected in the sentence – 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 Eade* [2005] QCA 148; CA No 50 of 2005, 10 May 2005, distinguished *R v Johnston* [2004] QCA 12; CA No 263 of 2003, 6 February 2004, distinguished
COUNSEL:	P E Smith for the applicant D R MacKenzie for the respondent

SOLICITORS: A W Bale & Sons for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **WILLIAMS JA:** The applicant pleaded guilty on 29 August 2006 to a charge of unlawfully doing grievous bodily harm with intent. The offence was committed on 3 April 2005. He was sentenced to eight years imprisonment and a declaration made that it was a serious violent offence. He was given credit for 514 days spent in pre-sentence custody. He seeks leave to appeal against the sentence on the basis that in the circumstances it was manifestly excessive.

[2] In oral submissions counsel for the applicant advanced three arguments in support of the application:

(i) The sentencing judge did not take into account the favourable references placed before the court and the applicant's good work history;

(ii) The applicant received an inadequate mitigation of penalty consequent upon his timely plea of guilty;

(iii) No regard was had to the fact that the offence was less serious than a carefully premeditated attack resulting in the offence of grievous bodily harm with intent being committed; it was said that the fact that made this case less serious than that was that the applicant was intoxicated.

[3] The applicant was born on 1 January 1982 making him aged 23 at the time of the offence. Between 1997 and 1999 the applicant was dealt with in the Children's Court in Victoria for heroin related offences. Because of his age he received non-custodial sentences.

[4] The offence arose out of an incident which occurred in Adelaide Street, Brisbane not far from Caesars Nightclub which is situated near the George Street intersection. A number of persons were in the vicinity and were involved generally in the confrontation leading to the commission of the offence. As the sentencing judge noted, not unusually there were differences among the accounts given by various eye-witnesses. In consequence the sentencing judge made findings of fact which formed the basis of the sentencing process.

[5] The facts as found were that the complainant, a 22 year old man, attended Caesars Nightclub with two friends and left the nightclub shortly before closing time at 3.00 am. The finding was that "a scuffle, an argument or a commotion ensued outside the club shortly after 3.00 am and that it involved" the complainant, the applicant, and others. The following findings were then made:

> "I find there was an argument over something or other with mutual pushing and shoving. Some observers described the bodily contact as involving punches. The balance of the evidence has the complainant delivering a punch to you. Whatever the precise events at that stage of things, the important feature is that the complainant detached himself from you and walked off down Adelaide Street. You chose, however, to follow the complainant and deliver a challenge to him along the lines of 'do you want to have a go?'. You

> then charged at the complainant who tried to push you back following which you stabbed him a number of times front and back. Security staff had intervened at the earlier stage, but as it turned out, did not succeed in quelling the aggressiveness you ultimately expressed in severe form in the commission of the instant offence. You stabbed the complainant twice around the side of his body and three times in his back. There was substantial consequent bleeding into the lung. One of the injuries you inflicted upon him led to the laceration of one of the intercostal arteries near the ribs. On the medical evidence, the complainant would have bled to death, but for the medical intervention which fortunately came quickly."

[6] In a schedule of facts which became Exhibit 3 it was stated that one of the security providers who witnessed the incident described the knife as a "steak knife with a 3 inch silver blade". That witness also said that the applicant "attempted to conceal the knife by repositioning the blade along the inside of his arm." Another witness is recorded in that schedule as stating that he saw the applicant drop the knife in the early stages of the incident, and then regain possession of it before moving toward the complainant and stabbing him. Those statements in the schedule of facts were not challenged by the applicant.

[7] The sentencing judge referred in the course of his sentencing remarks to *R v Bryan; Ex parte Attorney General* [2003] 137 A Crim R 489, *R v Eade* [2005] QCA 148 and *R v Johnston* [2004] QCA 12. It will be necessary to refer to those cases subsequently.

[8] At first instance counsel for the applicant tendered a handwritten statement signed by the applicant expressing regret and remorse for the incident. In it he sought to explain away his actions by referring to his youth and intoxication. Two references were also placed before the sentencing judge: one was from the applicant's sister. It was also put to the sentencing judge, and not challenged, that the applicant had been in gainful employment until his arrest.

[9] The following extracts from the sentencing remarks at first instance are relevant to the issues raised by this application. On three occasions the sentencing judge referred to the fact that the applicant had pleaded guilty, and on two occasions referred to his remorse; it is clear that it was accepted that the applicant was "remorseful". The other relevant passages are to the following effect:

> "The community expects, and rightly expects, in situations like this, sentences which will hopefully effect deterrence and which reflect strong denunciation. It is a case of gratuitous violence committed at night time in the inner city. The use of the knife in this way, indeed the carrying of the knife, was obviously grossly unacceptable.
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> …
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> On my interpretation of the facts, by the time of the stabbing, any cause for disquiet on your part in relation to the behaviour of the complainant, if it ever existed, had been spent. He had detached himself from you and gone off down the street. That is why I describe your attack which constituted the offence as having been gratuitous. That you were armed with a knife and that you used it is

> obviously a very serious feature of the case. To get your way, you exploited a serious disproportion between your respective capacities to inflict injury. The features which avail you at this stage of things are essentially you are still of comparatively young age; … your lack of any presently significant past criminal history; and your remorse. But as I have pointed out before, in cases of this character, circumstances like deterrence, punishment and community denunciation ordinarily assume much greater significance than the personal circumstances of an offender.
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> …
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> As to the question of whether a declaration should be made in your case … the circumstances which have been advanced before me as justifying such a declaration … are these: the use of a knife; that it was used in a public place where others congregate; that it was used at night time in the inner city; that it was used in a way which was life threatening in relation to the complainant; and that you persisted in your possession of the knife and in your aggression towards the complainant notwithstanding the intervention at the earlier stage of the security staff; and that you persisted in your confrontation with him even though he had sought to detach himself from you and go about his own business."

[10] It was then recorded that the prosecution had submitted for a penalty in the range of eight to ten years imprisonment with a declaration. Defence counsel at first instance argued for a range of six to eight years without a declaration. After recording those matters the sentencing judge went on:

> "I consider in the context of the cases to which I have referred that the Crown contention is right in this case, and that being so, with my intention to make a declaration, I intend to sentence you at the bottom of the range advanced by the Crown."

[11] As already noted the sentencing judge referred to three earlier decisions of this Court. *Eade* concerned a plea of guilty to grievous bodily harm with intent and other serious charges. He was sentenced to ten years imprisonment for the grievous bodily harm with intent and a declaration made that he had committed a serious violent offence. The sentencing judge in this case rightly regarded that case as much more serious because there were two complainants and there was also significant residual physical disability occasioned to one complainant. That case was relevant because in it, this Court emphasised the importance of deterrence when dealing with incidents of street violence. *Bryan*, as the sentencing judge noted, had some comparability with this case, but there the offence was grievous bodily harm simpliciter. That was also a case involving a gratuitous attack with a knife in a street at night. The decision of this Court is of some significance because again there was emphasis on the element of deterrence, and the Court observed that a sentence in the range of six to seven years was the minimum that could be considered as the head sentence in such circumstances. The offender in *Johnston* was found guilty after a trial of causing grievous bodily harm. He unsuccessfully appealed against a sentence of six years imprisonment. A knife was used to cause the injury. The case is clearly distinguishable but again it indicates that a sentence

in excess of six years is called for where the grievous bodily harm is caused with intent.

[12] I can find no fault in any of the foregoing reasoning by the sentencing judge. His references to authority were appropriate and clearly he was entitled to consider that the offence called for a sentence in the range of eight to ten years with a declaration.

[13] The real question is whether or not the applicant can establish error in any one of the three ways relied on by his counsel at the hearing.

[14] The references tendered did not, in my view, require the sentencing judge to be more lenient towards the applicant than he was. The two references do not specifically address the particular offending behaviour and essentially do no more than suggest that the applicant has had some problems in his upbringing but is a relatively young man who could still make something worthwhile of his life. The fact that the applicant has had a reasonably good work history does not mean that the sentence imposed, given the nature of the offence, was too high.

[15] Although the sentencing judge did not specifically say that he was mitigating the penalty because of the early plea of guilty, it is obvious that he did so. The references throughout the sentencing remarks to the plea of guilty clearly indicate that at all times the sentencing judge was aware of the plea and its relevance. He chose the bottom of the range figure in imposing sentence and that did reflect a reduction because of the timely plea.

[16] Finally, I am not persuaded that there is any substance in the third submission advanced by counsel. The fact is that the applicant went nightclubbing armed with a knife, and ultimately pursued the complainant and used the knife to stab him five times. Whilst this case may not be as bad as that where an offender deliberately sets out to stalk a complainant and inflict grievous bodily harm, it is nevertheless an extremely serious offence calling for a penalty which reflects the community's abhorrence of such a crime and operates as an effective deterrence to others.

[17] In all the circumstances I am not satisfied that the applicant has demonstrated any error in the sentencing process; the sentence in fact imposed was not manifestly excessive.

[18] It follows that the application for leave to appeal against sentence should be dismissed.

[19] **JERRARD JA**: I agree with the reasons and order of Williams JA.

[20] **KEANE JA:** I agree with the reasons of Williams JA and with the order proposed by his Honour.