SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lam* [2006] QCA 560
PARTIES:	**R** **v** **LAM, Tyson Tattan** (applicant/appellant)
FILE NO/S:	CA No 308 of 2006 DC No 1428 of 2006 DC No 2992 of 2006 DC No 915 of 2004 DC No 174 of 2001 DC No 3510 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	22 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	8 December 2006
JUDGES:	McMurdo P, Helman and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal granted** **2. Appeal allowed to the limited extent of setting aside the order that the applicant serve the balance of the term of imprisonment imposed on 6 August 2001** **3. Otherwise, the sentences imposed at first instance are confirmed**
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 - WHEN GRANTED - GENERALLY - where applicant was with a group of people when he assaulted the complainant in Brisbane CBD - where applicant pleaded guilty to two counts of assault occasioning bodily harm in company and was sentenced to two years imprisonment on each count - where the offences were committed within the extended operational period of a suspended sentence imposed in August 2001 and extended in November 2004 and also within the operational period of a suspended sentence

imposed in November 2004 for separate offences - where sentencing judge ordered that applicant serve the balance of the suspended sentences - where applicant seeks leave to appeal claiming that the sentences are manifestly excessive - whether sentencing judge erred in activating the suspended sentence imposed in August 2001 and extended in November 2004 - whether the sentences were manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 147

R v Amituanai [1995] QCA 80; (1995) 78 A Crim R 588, considered
R v Bryan; ex parte A-G (Qld) [2003] QCA 18; CA No 410 of 2002, 5 February 2003, applied
R v Craske [2002] QCA 49; CA No 11 of 2002, 1 March 2002, considered
R v Cuff; ex parte A-G (Qld) [2001] QCA 351; CA No 151 of 2001, 22 August 2001, distinguished
R v McDonald [2005] QCA 383; CA No 236 of 2005, 14 October 2005, distinguished
R v Muller [2005] QCA 417; (2005) 157 A Crim R 104, considered
R v O'Grady; ex parte A-G (Qld) [2003] QCA 137; (2003) 138 A Crim R 273, considered
R v Tupou; ex parte A-G (Qld) [2005] QCA 179; CA No 88 of 2005, 31 May 2005, applied
R v Walsh, Sayer & Thompson; ex parte A-G (Qld) [1998] QCA 217; CA Nos 158, 159 & 160 of 1998, 28 July 1998, considered

COUNSEL: A Boe (*sol*) for applicant
M R Byrne for respondent

SOLICITORS: Boe Lawyers for applicant
Director of Public Prosecutions (Queensland) for respondent

[1] **McMURDO P:** I agree with Philippides J.

[2] **HELMAN J:** I agree with the orders proposed by Philippides J and with her Honour's reasons.

[3] **PHILIPPIDES J:** The applicant seeks leave to appeal against the sentences imposed on 23 October 2006 on the basis that they are manifestly excessive. The applicant pleaded to two counts of assault occasioning bodily harm in company and was sentenced to two years imprisonment on each count. In addition, sentences of two months imprisonment were imposed on summary charges of assaulting and obstructing police. A parole release date was set at 12 months.

[4] The offences for which the applicant was sentenced were committed within the extended operational period of a suspended sentence for fraud offences imposed on 6 August 2001 and extended on 8 November 2004, and the operational period of a suspended sentence imposed on 8 November 2004 for receiving offences. His Honour ordered that the balance of the suspended sentences be served concurrently,

being seven and a half months in respect of the first suspended sentence and four months in respect of the other.

[5] The relevant facts concerning the offences are set out in the Schedule of Facts which was tendered at sentence. At about 5.15 am on 9 October 2005, the complainant, who had been enjoying a night out drinking in the Brisbane CBD, passed a group of about ten people which included the applicant. One of the group said to the complainant, "Are you gay?" The complainant stopped said, "No, mate" and kept walking. The applicant who was intoxicated then jumped up and whilst walking backwards in front of the complainant repeatedly said, "Come around the corner, come around the corner. You can eat me. You can suck me." The complainant replied "No, mate, no" and tried to walk away. The applicant then punched the complainant on the nose causing it to bleed. The complainant continued to back away and to tell the applicant that he did not want a fight. The applicant was joined by a male from his group who also punched the complainant in the face. The applicant continued with a second blow to the complainant, striking him in the mouth, which loosened a tooth, and in the process the applicant cut his own hand. The complainant backed away across the road but was pursued by the applicant and the other male. The applicant punched the complainant in the forehead. The complainant attempted to duck and cover his head with his hands. He then felt two or three punches to his face, but was unable to say which of the two men threw these punches.

[6] Soon after the assault the subject of count 1, the complainant, who had managed to get away from the applicant and his group, came across them again. The applicant approached the complainant saying, "You dog!" This may have been a reference to the complainant having reported the first incident. The applicant punched the complainant on the left side of the head, knocking a mobile telephone out of the complainant's hands. The applicant then punched the complainant several more times whilst saying, "You dog!" Two or three other men joined the applicant in assaulting the complainant. The complainant again attempted to protect himself but was knocked to the ground. The applicant then proceeded to kick the complainant and the other men joined in. The complainant received kicks to the head, arms, legs, stomach and back region. The complainant was able to avoid being further assaulted by pretending to have been knocked out. The assailants then desisted, with the applicant being the last person to cease the assault.

[7] The assault was witnessed by a police officer who happened to be travelling to work. He approached the applicant and two others, identified himself as a police officer and told them to stop. While the police officer was taking details from others involved in the assault, the applicant slipped away. Other police arrived. The complainant approached the police, informing them that the applicant was at a nearby taxi rank and identifying him as the main assailant. The applicant attempted unsuccessfully to get into a taxi with other people unknown to him. He then walked off ignoring police directions to stop and when pursued, turned on the police officers. The applicant was only captured after a violent struggle and the use of capsicum spray by the police.

[8] The injuries suffered by the complainant as a result of the first incident consisted of lumps on his forehead which did not bruise, a bruise to his nose, a bloody nose, a loose tooth and a cut lip. As a result of the second assault, the complainant suffered further lumps on his head, bruising of his arm and ribs and a broken fingertip, which

resulted in the complainant requiring two weeks off work. Given the nature of the assaults, which involved kicks to the head while the complainant lay on the ground, the complainant was extremely fortunate not to have suffered more serious injuries.

[9] The prosecutor's submission at sentence was that the appropriate sentencing range was one of two to three years imprisonment and that a sentence towards the top of that range ought to be imposed. In making that submission the prosecutor emphasised the serious nature of the offending which involved gratuitous street violence in the inner city. It was also submitted that, whilst credit ought to be accorded for the applicant's plea, it was made in the face of a strong Crown case and in circumstances where the matter proceeded to a committal hearing. The prosecutor did not argue for the suspended terms to be served cumulatively, but contended that the parole release date be set beyond the end of the period remaining to be served on the suspended sentences and submitted that it would be appropriately set at 12 months. The applicant's counsel joined in the submissions made by the prosecutor in respect of the activation of the balance of the suspended sentences and the setting of the parole release date. However, he urged a head sentence in the range of two years imprisonment for counts 1 and 2, submitting that the offending conduct would ordinarily have attracted a term of 12 to 18 months imprisonment in the absence of a criminal history.

[10] In imposing sentence, the learned sentencing judge had regard to the applicant's age (28 years of age at the time of the offences), his serious criminal history and that the offending involved conduct which must be deterred, stating: "In the Brisbane city area persons should be allowed to go about their business without fear of being assaulted on the way home from an evening out."

[11] It was not initially suggested on behalf of the applicant that the orders made under s 47 of the *Penalties and Sentences Act* 1992 (Qld), that the balance of the suspended sentences be served, was attended with any error. However, as was properly pointed out by the respondent in submissions, it was not open to the learned sentencing judge to activate the period of some seven and a half months in respect of the suspended sentence originally imposed on 6 August 2001, given the decision of this Court in *R v Muller* (2005) 157 A Crim R 104 (at [14] – [17], [49] – [51]) to which his Honour was not referred. This is because the present offences occurred during the extension of the operational period which was ordered on 8 November 2004. Accordingly, the order made by the learned sentencing judge that the applicant serve the balance of the term of imprisonment imposed on 6 August 2001 cannot stand. No similar error attended the activation of the four month term in respect of the other suspended sentence of 8 November 2004.

[12] The erroneous application of principle by the sentencing judge may have influenced the imposition of the sentences in respect of counts 1 and 2. It is therefore appropriate that this Court considers the sentencing discretion afresh.

[13] On behalf of the respondent it was submitted that, regardless of the error concerning the activation of the term remaining in respect of the first suspended sentence, sentences of two years imprisonment with parole set at 12 months were appropriate sentences in the present case even after a discount for the plea and well within the relevant sentencing range which was said to be one of two to three years.

[14] On behalf of the applicant it was contended by reference to various authorities that the appropriate sentences for counts 1 and 2 ranged between 15 and 18 months imprisonment with a suspension or parole after six to eight months. Emphasis was placed on the applicant's plea, the moderate nature of the complainant's injuries and the relative lack of prior offences of violence by the applicant.

[15] It was contended that the applicant's plea would ordinarily have warranted a discernible reduction in the custodial term imposed of about a third. Appropriate credit must of course be accorded for the applicant's plea. However, although the plea might be said to have been timely, it was not an early plea and was not attended with other co-operation. The applicant declined a police interview and required a committal with full evidence from the complainant and an eyewitness. Nor did the applicant display any remorse after assaulting the complainant, as evidenced by the conduct the subject of the summary charges. Moreover, as the prosecutor submitted at sentence, the plea was made in the face of a strong Crown case: the complainant identified the applicant at the scene, the applicant's DNA was on the complainant's shirt, there was evidence of a fight at the scene, two witnesses saw the second assault and the complainant's version was corroborated by his injuries and the injury to the applicant's hand. Accordingly, the applicant could not reasonably expect a discount of the magnitude that might be warranted where there was greater co-operation and where the plea reflected genuine remorse, as for example where it is accompanied by an offer of monetary compensation (as in *R v Cuff; ex parte A-G (Qld)* [2001] QCA 351, to which the applicant referred). Nevertheless, the applicant is entitled to credit for the utilitarian value of his plea and has apparently made some efforts towards rehabilitation.

[16] It was contended, relying on *R v Amituanai* (1995) 78 A Crim R 588 at 589, that the appropriate range in relation to offences of the nature involved in the present case is significantly set by the extent of the resultant injuries. On behalf of the applicant it was contended that the applicant was entitled to share the benefit of the fortuitous result that the complainant's injuries were fortunately relatively moderate. While the nature of injuries inflicted by an offender are taken into account in the sentence imposed, and in the present case the complainant was indeed fortunate not to have suffered more serious injuries, it must also be borne in mind that the vicious and protracted nature of the offending had the potential to lead to serious, and possibly tragic, consequences.

[17] A further matter on which emphasis was placed was that the applicant's criminal history involved only one entry which concerned any aspect of violence. That concerned an event which occurred whilst the applicant was in custody more than five years ago on 13 November 2000 and in respect of which he received two months imprisonment. However, it remains relevant that the applicant has a significant criminal history, including for offences which have attracted terms of imprisonment, and that the present offences were committed nine days after the applicant's release from a period of two months imprisonment for breach of the suspended sentence imposed on 8 November 2004, which had been activated on 4 August 2005.

[18] Relying on a number of authorities, including cases where serious grievous bodily harm was caused, it was submitted for the applicant that a head sentence of two years imprisonment, although not outside the sentencing range, was at the high end of the appropriate range. Furthermore, the authorities revealed that, even when a

two year sentence was imposed, it was significantly ameliorated by either a complete suspension or a suspension after a short term of imprisonment.

[19] Of the authorities referred to in support of the sentencing range put forward by the applicant *R v O'Grady; ex parte A-G (Qld)* (2003) 138 A Crim R 273, *R v Walsh, Sayer & Thompson; ex parte A-G (Qld)* [1998] QCA 217 and *R v Craske* [2002] QCA 49 concerned offenders who, unlike the applicant, had no prior criminal history and more promising prospects of rehabilitation.

[20] While the applicant also referred to the decisions of *Cuff* and *R v McDonald* [2005] QCA 383, neither of those cases concerned offending of the type involved in the present case, namely gratuitous street violence against a complete stranger, for which appropriately salutary sentences by way of general deterrence are warranted.

[21] *Cuff* concerned an unprovoked attack on a complainant, who suffered a fracture of the lower jaw. He was known to the offender and had been drinking at the same hotel. A sentence of 12 months imprisonment to be served as an intensive correction order imposed on a plea to one count of occasioning bodily harm was upheld. The Court of Appeal stated that, but for the unusual features of the case, an actual custodial sentence would ordinarily have been called for. Although the offender had a criminal history, he had not previously spent any time in actual custody and had not spent any time subject to substantial supervision. An important factor in the sentence imposed was the offender's offer to pay $10,000 by way of compensation which resulted in an order for such compensation being made. *Cuff* is therefore not an authority of much assistance in the present case. Nor is that of *McDonald* which also concerned assaults committed on a person known to the offender who had been drinking at the same hotel as the offender.

[22] As mentioned, the applicant's legal representative did not argue strongly against a head sentence of two years imprisonment as appropriate. The crux of his submission was that the head sentence ought to be ameliorated by requiring that the applicant serve only a short period in actual custody in the region of eight months.

[23] The applicant's offending was of a serious nature, involving repeated and cowardly acts of violence committed in company. The applicant was very fortunate that the assaults did not result in more serious consequences and to have the timely and public-spirited intervention of an off-duty police officer. This Court has repeatedly endorsed stern sentences for gratuitous violence occurring in the inner city area (*R v Bryan; ex parte A-G (Qld)* [2003] QCA 18; *R v Tupou; ex parte A-G (Qld)* [2005] QCA 179).

[24] The decision of *O'Grady* supports the imposition of a head sentence of two years imprisonment in the present case and the serving of a period of actual custody greater than that urged by the applicant. *O'Grady* was a case of unprovoked street violence on two passers-by unknown to the 28 year old offender, who pleaded to a count of assault occasioning bodily harm and one of doing grievous bodily harm. The Attorney-General successfully appealed a sentence of 12 months imprisonment to be served by way of an intensive correction order. Williams JA (with whom Atkinson J agreed) held that a head sentence of two years imprisonment was indicated and that, notwithstanding the mitigatory considerations of the offender's early plea, clear remorse, previous good character (matters in respect of which the present applicant does not have the benefit) and his relative youth, a short period in

actual custody would normally be required. However, given that by the time of the appeal two months of the intensive correction order had in fact been satisfactorily completed, and taking into account the principles relating to Attorney-General appeals, it was not considered appropriate that any period of actual custody be served. In addition to the distinguishing features which resulted in the Court of Appeal determining that no actual custodial term should be imposed, there was not the further consideration of the breach of a suspended sentence present in this case.

[25] In my view concurrent head sentences of two years are appropriate in respect of each of counts 1 and 2. Because the sentencing discretion is being exercised in the context of an application for leave to appeal, it would not be appropriate to exercise the discretion to impose a higher sentence than two years without notifying the applicant. However, that is not to be taken as indicating that two years marks the top of the appropriate range in the present case.

[26] In considering the period of actual custody that the applicant should be required to serve, regard is to be given to the four month term that the applicant should serve as a result of the breach of the suspended sentence of 8 November 2004, and which may appropriately be activated concurrently with the sentences for counts 1 and 2. In those circumstances a parole release date at 12 months for counts 1 and 2 is warranted.

[27] I would grant the application for leave to appeal and allow the appeal to the limited extent of setting aside the order that the applicant serve the balance of the term of imprisonment imposed on 6 August 2001. I would otherwise confirm the sentences imposed at first instance.