SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mitchell* [2010] QCA 20
PARTIES:	**R** **v** **MITCHELL, Wendy Ellen** (applicant)
FILE NO/S:	CA No 256 of 2009 DC No 1317 of 2009 DC No 2185 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	19 February 2010
DELIVERED AT:	Brisbane
HEARING DATE:	10 February 2010
JUDGES:	McMurdo P, Muir and Fraser JJA Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal allowed;** **2. Appeal allowed to the extent only that a sentence of two years be substituted for the sentence of 30 months imposed at first instance.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where applicant convicted of two counts of unlawful assault (counts 1 and 2) and one count of serious assault (count 3) – where applicant sentenced to nine months imprisonment for counts 1 and 2 and 30 months imprisonment for count 3 – where the sentences were to be served concurrently – where the complainant in count 3 was an elderly woman – where the applicant was on probation at the time of the offences – where the applicant had an extensive criminal history – where the applicant was an alcoholic – where the applicant lived on the street and suffered from depression – whether sentence for serious assault (count 3) manifestly excessive *Criminal Code* 1899 (Qld), s 335, s 340(1)(g) *Summary Offences Act* 2005 (Qld), s 16A, s 19AL, s 19AM *R v Amituanai* (1995) 78 A Crim R 588; [1995] QCA 080, cited

R v Elliott [2000] QCA 267, cited
R v Greczko [2001] QCA 221, discussed
R v Johnson [2002] QCA 283, cited
R v Jones [2003] QCA 474, discussed
R v King [2006] QCA 466, considered
R v Mathieson [2001] QCA 45, discussed
R v Mayall [2008] QCA 202, cited
R v Roach [2009] QCA 360, discussed

COUNSEL: M J Power for the applicant
M B Lehane for the respondent

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

[1] **McMURDO P:** I agree with Muir JA's reasons for granting the application for leave to appeal against sentence and allowing the appeal, only to the extent that a sentence of two years is substituted for the sentence of 30 months imposed at first instance.

[2] **MUIR JA:** The applicant pleaded guilty to unlawfully assaulting a 10 year old girl on 28 August 2008 in Townsville (count 1); unlawfully assaulting a 14 year old boy in Townsville on 28 August 2008 (count 2); and to the serious assault of a woman over the age of 60 years in Brisbane on 15 January 2009 (count 3). She was sentenced on 16 September 2009 to nine months imprisonment with a parole release date of 22 September 2009 for each of counts 1 and 2 and to two years and six months imprisonment with the same parole release date for count 3. The sentences were ordered to be served concurrently and convictions were recorded. The applicant was also sentenced for a summary offence of public nuisance committed on 12 December 2008 in respect of which no conviction was recorded and no further punishment was imposed.

[3] The applicant seeks leave to appeal against the sentence imposed for the serious assault offence on the grounds that it was manifestly excessive.

[4] The applicant was born on 28 February 1957 and was 51 at the time of the offences. She was on probation for an offence of serious assault and a number of other offences when the subject assaults were committed. She had an extensive criminal history commencing with a Magistrates Court conviction in March 1996 for the unlawful taking of shop goods. There then followed a number of convictions for offences such as wilful damage, obstruction of police officers, vagrancy and behaving in a disorderly manner. Her first conviction for assault was on 27 February 2002 when she was convicted of a common assault and assaults occasioning bodily harm and placed on probation for two years. She was convicted of various other summary offences in 2002, including assault occasioning bodily harm and assaulting a police officer. In March 2003 she was convicted of assaults occasioning bodily harm and sentenced to three months imprisonment for each offence, fully suspended. Convictions for other public nuisance, vagrancy and dishonesty offences continued through 2004, 2005, 2006 and 2007. On 1 July 2008 she was convicted of a number of summary offences, including wilful damage, public nuisance, serious assault of a police officer and resisting arrest. On each

charge she was convicted and sentenced to 69 days imprisonment and nine months probation was ordered. The 69 days spent in pre-sentence custody was deemed to be time already served under the sentences. It was while the applicant was subject to this probation order that the subject offences were committed.

[5] The applicant is an alcoholic. She lived on the street and suffered from depression.

[6] The circumstances of the count 1 and 2 offences were as follows. On 28 August 2008 the applicant verbally harassed a family, including the complainant children, outside a Townsville shopping centre. She removed a toothpick from her own mouth and rubbed it on the 10 year old female complainant's collar before placing it in the complainant's mouth. She then poked the 14 year old male complainant in the back with a toothpick. The summary offence was committed when the applicant removed her clothes as she walked through the shopping centre.

[7] The acts constituting the count 3 offence were perpetrated when the 89 year old female complainant unintentionally blocked the applicant from leaving a lift from Ann Street, Brisbane to the concourse of Central Station, or at least was perceived by the applicant to have obstructed her. The complainant was punched in the face and knocked to the ground by the inebriated applicant, suffering a fracture of the little finger of her left hand, bruising and swelling to her left cheek and her upper jawbone and a 3 centimetre x 3 centimetre area of broken skin. The complainant also sustained a torn ligament in her left shoulder and, as at 26 August 2009, was still suffering back pain for which she was obliged to wear a brace and undertake physiotherapy treatment. At that date, she was experiencing general weakness in her left arm and hand, pain if she slept on her left side, stiffness in her back and an inability to use a knife and fork properly. She is now more timid than she used to be and takes particular care when she goes from her unit in Spring Hill to the City and back.

[8] The submissions of counsel for the applicant were to the following effect. The applicant had been in custody for 243 days (approximately eight months) prior to being sentenced. That period could not be declared time spent in custody under the sentence. The practical effect of the sentence was that the applicant became liable to serve three years and two months imprisonment, i.e. the eight months on remand and the further two years and six months on parole and, in consequence, that sentence was manifestly excessive.

[9] The applicant's counsel referred to *R v Mayall*,[1] in which it was said:

> "… it was within the sentencing judge's discretion to take account of so much of the pre-sentence custody as could not be declared under the Act by making an appropriate adjustment only to the parole release date: *R v Skedgwell*[2] … That approach does make the sentence somewhat more severe than would have been the case had credit been given also in determining the head sentence, but that is not demonstrative of error."

[10] However, it is submitted that, in this case, the sentence imposed, as well as being beyond the range submitted for by the prosecution, was beyond the range indicated

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1 [2008] QCA 202.

2 [1999] 2 Qd R 97 at 99.

by a number of comparable sentences relied on by counsel, namely: *R v Greczko*;[3] *R v Mathieson*;[4] *R v Jones*;[5] *R v King*;[6] and *R v Roach*.[7]

[11] The facts in *Greczko* bear little resemblance to those now under consideration and I found that decision of no real benefit. The same may be said of *Mathieson*, in which the 72 year old female complainant, with the assistance of neighbours, put to flight the applicant, who had entered her dwelling unlawfully. She was not physically injured. The applicant was sentenced to concurrent sentences of two years imprisonment for entering a dwelling with intent, 12 months imprisonment for entering premises with intent and six months imprisonment for two charges of serious assault. The assaults occurred when neighbours attempted to restrain the applicant and his companion and were scratched and bruised for their trouble. The elderly householder was untouched.

[12] In *Jones*, the 44 year old solidly built applicant, with a good work history, two old convictions for dishonesty but no history of violence, was refused leave to appeal against a sentence of imprisonment of 18 months suspended after three months. He drove into a car park where he had a permanent car parking space and found it occupied. He then saw the 70 year old complainant who had parked his car where it should not have been parked. The two men argued and the applicant struck the complainant twice in the face. The second blow caused the complainant to fall back and hit his head on a car behind him before striking his head on the concrete floor and sustaining an extensive comminuted fracture of the skull and an underlying extradural haematoma. He was hospitalised for one month but his injuries had been largely resolved by the time of sentencing. On the day prior to the incident the applicant's car had been written off in a serious accident. After striking the complainant, the applicant remained behind, called an ambulance and waited for it to arrive.

[13] *R v King* is also a case in which an application for leave to appeal against sentence was refused. In that case the applicant, who was 25 and 26 at the time of the two assault offences with a prior criminal history for offences of dishonesty, drugs and violence, was sentenced to two years imprisonment suspended after nine months for assaults occasioning bodily harm, perpetrated on a woman under 20 with whom he was in a de facto relationship. The first offence was committed when the applicant chased the complainant out of her house, grabbed her by the hair or neck and threw her against a fence. She struck her head, suffering bruising and lacerations. The second offence occurred when the applicant grabbed the complainant by the hair, dragged her across the street and threw her to the ground. He punched her repeatedly in the face, on the back and on the head as she screamed for help. She was 10 weeks pregnant at the time.

[14] In *R v Roach*, the 54 year old applicant had two prior convictions for assault. The complainant and the applicant had been in a sexual relationship and, for a time, the applicant had been in receipt of a carer's pension for looking after the complainant, who suffered from a variety of illnesses. The offence was committed when the applicant visited the complainant in her flat and an argument developed. The

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3 [2001] QCA 221.
4 [2001] QCA 45.
5 [2003] QCA 474.
6 [2006] QCA 466.
7 [2009] QCA 360.

intoxicated applicant punched the complainant in the face and then about nine times on her arms. She suffered bruises to her arms and face and a haematoma around the left eye. The complainant was described by the sentencing judge as "physically and mentally fragile". The applicant had a good work record, which included some military service. He had also spent a month in pre-sentence custody which could not be deemed time served in the sentence imposed. The sentence, 18 months with a parole release date after eight months, was described as "at the high end of a proper sentencing range". The parole release date was said to be unremarkable and perhaps slightly on the generous side.

[15] The only sentence referred to by counsel which offers some support for the subject sentence is that imposed in *R v King*. It does not appear that, although the complainant in *King* was pregnant at the time of the second offence, she suffered any lasting injury. Also, although King had a history of dishonesty offences and, more latterly, had been convicted of domestic violence involving assaults occasioning bodily harm, he was 28 years of age when sentenced. In his reasons, Keane JA observed that *R v Johnson*[8] confirmed that a sentence of two years "was comfortably within the appropriate range for multiple assaults of the kind in question …"

[16] The applicant has a long history of offences of violence, she is 51 years of age and her attack on the elderly complainant was singularly reprehensible. The attack was not premeditated in any way. Only one blow was struck, but, having regard to the complainant's age, any punch to the head posed a distinct risk of serious injury. The consequences have been serious: the complainant has suffered a marked diminution in her quality of life as a result of her injuries, both physical and mental. That decreased quality of life might prove permanent. The extent of the injury to the victim is an important consideration in sentencing[9] and in this case it was proper for regard to be had to the protection of the public and, in particular, those members of it less able to defend themselves.

[17] The applicant was also sentenced for two other assaults. It was appropriate that a head sentence for the most serious offence take into account the overall criminality of the applicant's conduct. Nevertheless, particularly when regard is had to the applicant's unfortunate mental condition and the time spent in pre-sentence custody, the sentence of two and a half years was manifestly excessive, even when ameliorated by the setting of the parole release date.

[18] Neither party argued that the parole release date should be altered/varied and, accordingly, I would order that:

- the application for leave to appeal be allowed;
- the appeal be allowed to the extent only that a sentence of two years be substituted for the sentence of thirty months imposed at first instance.

[19] **FRASER JA:** I agree with the reasons for judgment of Muir JA and the orders proposed by his Honour.

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8 [2002] QCA 283.

9 *R v Elliott* [2000] QCA 267 at [10] and *R v Amituanai* (1995) 78 A Crim R 588.