SUPREME COURT OF QUEENSLAND

CITATION:	*R v Stone* [2010] QCA 157
PARTIES:	**R** **v** **STONE, Joshua Lee** (applicant)
FILE NO/S:	CA No 50 of 2010 DC No 409 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	22 June 2010
DELIVERED AT:	Brisbane
HEARING DATE:	27 May 2010
JUDGE:	Holmes and Muir JJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence is allowed.** **2. The appeal is allowed.** **3. The sentence imposed is set aside.** **4. The applicant is sentenced to 12 months imprisonment with a parole release date set at six months.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded not guilty to one count of dangerous operation of a vehicle and one count of assault occasioning bodily harm in company – where applicant convicted and sentenced to 18 months imprisonment – where applicant aged 21 years old at the time of sentence – where applicant had no criminal history – whether the sentence imposed was manifestly excessive CRIMINAL LAW – PARITY BETWEEN CO-OFFENDERS – GENERAL PRINCIPLES – where applicant's older brother was jointly charged with the offence of assault occasioning bodily harm in company – where the co-offender pleaded guilty – where significant personal circumstances of the co-offender taken into account – where the co-offender was sentenced to 15 months imprisonment suspended after five months with an operational period of two years in relation to

that charge – where both offenders had similar culpability – whether applicant's sentence excessive when compared with the co-offender's sentence

Penalties and Sentences Act 1992 (Qld), s 9(2)(a)(i), s 9(3)(b), s 9(4)(i), s 13(1)

Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, cited
R v Abednego [2004] QCA 377, distinguished
R v Dempsey and Perks; ex parte A-G [1999] QCA 520, distinguished
R v Fortnum & Fortnum [2006] QCA 147, considered
R v Jones; R v Hili [2010] NSWCCA 108, cited
R v Lam [2006] QCA 560, distinguished
R v Lovell [1999] 2 Qd R 79; [1998] QCA 36, cited
R v Lude; R v Love [2007] QCA 319, distinguished
R v McDonald [2005] QCA 383, considered
R v Middleton and Johns (2006) 165 A Crim R 1 ; [2006] QCA 92, discussed
R v Stinton [1999] QCA 15, cited
Siganto v The Queen (1998) 194 CLR 656; [1998] HCA 74, considered

COUNSEL: A W Collins for the applicant
A D Anderson for the respondent

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

[1] **HOLMES JA:** I agree with the reasons of McMeekin J and the orders he proposes.

[2] **MUIR JA:** I agree with the reasons of McMeekin J and the orders proposed by him.

[3] **McMEEKIN J**: The applicant seeks leave to appeal against a sentence imposed on 25 February 2010 on the basis that it was manifestly excessive. The day before the sentence was imposed a jury had found the applicant guilty of the dangerous operation of a vehicle and of assault occasioning bodily harm in company.

[4] The learned sentencing judge sentenced the applicant to six months imprisonment in relation to the dangerous operation of a vehicle charge and 18 months imprisonment on the assault occasioning bodily harm in company charge. The terms of imprisonment were to be served concurrently and a parole release date was set at 23 November 2010 requiring that nine months actual custody be served. As well, the applicant was disqualified from holding or obtaining a driver's licence for a period of two years. This application relates only to the sentence imposed on the charge of assault occasioning bodily harm in company.

[5] The only specific ground argued on the appeal as demonstrating that the sentence was manifestly excessive, was that the co-offender, Cory Stone, received a sentence of 15 months imprisonment with a suspension after five months and that parity of sentencing required that the applicant receive no more, and arguably less, as it was

the co-offender who was first out of the car and who first assaulted the complainant and as personal factors suggested that the co-offender was more deserving of harsher punishment than the applicant.

The Factual Background

[6] The factual basis on which the sentencing judge proceeded was described by him as follows:

> "… that a dispute arose between your older brother Cory and his girlfriend which resulted in her requesting her mother and her mother's fiancé, the complainant, to attend at the address in Drysdale Street. Your brother requested that you attend there as well in order to collect him. That is what brought the occupants of your car and the complainant into contact.
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> I accept that you drove the vehicle, after collecting your brother, on the incorrect side of the road deliberately and that you swerved at the last minute causing Mr Cooper [the complainant] to swerve his motor vehicle and to take it either into or onto the gutter. You then returned down Drysdale Street, Mr Cooper having sufficient time to get out of his car in order to write down the registration number of your vehicle, and you drove so close to him that he had to move out of the way. Those are the elements of the offence of dangerous driving and, in my view, those are the elements that the jury clearly accepted on the trial.
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> That sort of driving behaviour is potentially dangerous to other persons using or in the vicinity of the road, let alone persons within one or other of the vehicles, and it clearly, in my view, was dangerous driving and was a serious case of dangerous driving.
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> Within a couple of minutes you had returned again to the roadway outside the house in Drysdale Street, ostensibly so that your brother could collect another item of property. In a sense, your driving of the car in the way that I have described seems to me to have been the catalyst for what followed. It brought you back and brought your brother back in contact with Mr Cooper. He had moved to another part of the roadway in the vicinity of the car. Your older brother challenged him and then an altercation took place. You quickly joined the altercation and the jury verdict is clearly one that accepted that you, in joining the altercation, presented the much older Mr Cooper with the force of two persons who were aggressive towards him physically.
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> I accept that you punched Mr Cooper; that you stood on and applied your weight to an arm which meant that he was unable to take fully evasive action to avoid what was happening to him; and that you kicked him. When you all desisted, you then left, running off, getting in the car and driving away. No offer of, or other assistance was given to Mr Cooper who must clearly have appeared to you to have been injured. In doing so, as you left I accept, as I believe the jury did, that you made the comment about things happening to your family and things happening to his.
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> In my view, your conduct was cowardly, it was vicious, it was gratuitously violent, and it was totally unnecessary."

[7] The comment to which the sentencing judge referred was: "See what happens when you fuck with my family? I'm going to get yours".

[8] The injuries suffered by the complainant included a fractured nose, a significant injury to the eye causing the closing of the eye for a week and blurred vision for a longer period, bruising and lacerations on parts of his body, and distress and anxiety. He had to take a week off his contracting work as a result of the assault on him. I comment that the injuries suffered by the complainant were significant and the applicant is lucky that they were not more severe.

[9] Mr Cooper was aged 58 years, the applicant 19 years, and his brother 21 years, at the time of this assault.

Submissions on Sentence

[10] The prosecutor's submission at sentence was that imprisonment for a period of two years was warranted. The prosecutor pointed out that the principle that imprisonment should only be imposed as a last resort had no application in this case as the offence was one involving violence against another person: see s 9(2)(a)(i) and s 9(3)(b) of the *Penalties and Sentences Act* 1992 (Qld) ("the Act"). She emphasised that conduct involving group assaults on people in public places required denunciation by the court.

[11] The applicant's counsel submitted that nine months imprisonment served by way of an intensive correction order would be appropriate. She referred to the applicant's youth – he was 21 years of age when sentenced – and his lack of any prior, or subsequent, criminal history. She submitted that it was his brother, not the applicant, who was the principal aggressor and that there were no weapons involved. The submission was that the applicant's sentence should be less than that of his brother because the brother was "the first and main offender". She stressed that if the applicant was required to serve actual custody then there would be reduced chances of favourable reformation. The applicant had been educated to a Grade 12 standard, had then taken a year off, and had worked "most of the time" thereafter in the mining and landscaping industries. It was said that his employment had been casual in more recent times and he had been unemployed for some months prior to sentence. He hoped to advance his career in landscaping architecture by further study.

The Sentencing Judge's Approach

[12] The learned sentencing judge took the following matters into account. He said that he could not see that there was much to distinguish the applicant's conduct from that of his older brother. He accepted that the brother was first out of the car and the instigator of the physical violence but from there said "you both acted viciously and irresponsibly in a public street outside this man's home". He observed that there was no evidence of any cooperation or assistance with the law enforcement agencies that could be brought into account in mitigation of penalty. He considered that the applicant had shown no remorse at all for either of the offences. He noted that subsequent to this offending conduct the applicant had accumulated a number of traffic convictions which "demonstrates a disregard for the law". He took into account the applicant's age and lack of prior criminal convictions. He also commented on the injuries suffered by the complainant and observed that he was a much older man than his assailants. He noted that: "There was no suggestion that

you got out of the car and joined your brother in order to get him out of trouble. Both of you were clearly more able to physically exert yourselves than he was."

[13] The learned sentencing judge concluded: "Young people who attack any person, let alone an older person, in a public street and are violent towards them and cause injury, face the prospect of going to gaol, regardless of their age."

Arguments on Appeal – the "Parity Principle"

[14] In *Postiglione v The Queen*[1] Dawson and Gaudron JJ said:

> "The parity principal upon which the argument in this Court was mainly based is an aspect of equal justice. Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them. In the case of co-offenders, different sentences may reflect different degrees of culpability or their different circumstances. If so, the notion of equal justice is not violated. On some occasions, different sentences may indicate that one or other of them is infected with error. Ordinarily, correction of the error will result in there being a due proportion between the sentences and there will then be equal justice. However, the parity principal, as identified and expounded in *Lowe v The Queen*, recognises that equal justice requires that, as between co-offenders, there should not be a marked disparity which gives rise to 'a justifiable sense of grievance'. If there is, the sentence in issue should be reduced, notwithstanding that it is otherwise appropriate and within the permissible range of sentencing options.
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> Discrepancy or disparity is not simply a question of the imposition of different sentences for the same offence. Rather it is a question of due proportion between those sentences, that being a matter to be determined having regard to the different circumstances of the co-offenders in question and their different degrees of criminality." (underlining added)

[15] The first issue is to determine the relative culpability of the two men. It is true that the sentencing judge expressly found that the co-offender was the instigator of the physical violence and that fact deserves some weight but in my view does not merit any great weight. The applicant was the driver of the vehicle and presumably had to secure the vehicle before joining the assault. It is evident that the applicant was only just behind his brother and his attack followed the dangerous operation of the motor vehicle. This conduct was plainly aimed at the complainant and, as the sentencing judge observed, was the catalyst in the sense that it brought the parties together. The sentencing judge, having conducted both the trial and the earlier sentence of the co-offender, was in a good position to assess their relative culpability. In my view, the sentencing judge was justified in finding that there was not much to distinguish the applicant's conduct in the assault from that of his older brother.

[16] Given that the culpability of the offenders is much the same, the issue is whether different personal circumstances justified a different approach.

[17] The applicant points to the fact that his brother faced a number of charges when sentenced, including one of unlawfully maintaining a sexual relationship with a

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1 (1997) 189 CLR 295 at 301-302.

minor, was on bail at the time of this offence, was the elder by two years, and had a criminal history, albeit one that the sentencing judge considered to be relatively minor. Balanced against that criminal history was the fact that the applicant had been found guilty of the dangerous driving charge, which the sentencing judge described as a "serious" example of such a charge.

[18] The chief distinguishing feature between the applicant and his brother is that his brother pleaded guilty to this charge and indeed all charges that he faced. Section 13(1) of the Act requires that a court take a guilty plea into account and permits a court to reduce a sentence that it would otherwise have imposed had the offender not pleaded guilty. Here the sentencing judge in each of the two cases was the same. At the time of imposing sentence on the applicant he was well aware of the sentence that he had imposed on his brother and the reasons for it, as a transcript of his reasons was tendered. He was very much alive to the parity principle and made specific mention of it in his remarks noting that the applicant, unlike his brother, faced two guilty verdicts.

[19] The applicant argues that the guilty plea was taken into account by reduction in the time actually served, and so not in the head sentence imposed, but that is not necessarily so. The sentencing judge made no express statement of how the guilty plea was brought into account when sentencing Mr Cory Stone. He was however well within normal principles if he chose to reduce the head sentence. In *R v Stinton*,[2] McPherson JA (de Jersey CJ and McMurdo P agreeing) said:

> "As is shown by the reasons and the decision in *Banks*, this Court takes the view that guilty pleas are ordinarily to be encouraged and ordinarily to be acknowledged in the sentencing process by a reduction in the head sentence, or perhaps by the addition of a recommendation for early parole, and that such recognition should not be insubstantial."

Given that the same judge imposed the two sentences, it is legitimate to assume that the sentence imposed on the applicant reflects the learned judge's views as to what was appropriate condign punishment and that the sentence imposed on his brother reflects the reduction appropriate to reflect the impact of mitigatory factors including the plea of guilty and his personal circumstances.

[20] When one turns to the reasons for such a reduction, in a case like the present there is even more reason to suppose that the sentencing judge was properly alive to the significant relevance of an early guilty plea.

[21] In *Siganto v The Queen*,[3] it was said:

> "… a plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case."

It should at once be noted that remorse is not necessarily the only subjective matter revealed by a plea of guilty. The plea may also indicate acceptance of responsibility and a willingness to facilitate the course of justice.

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2 [1999] QCA 15.

3 (1998) 194 CLR 656 at 663-664 (per Gleeson CJ, Gummow, Hayne and Callinan JJ).

[22] Thus the sentencing judge was entitled to consider that the early plea, as well as demonstrating a willingness to facilitate the course of justice, provided evidence of remorse and acceptance by Mr Cory Stone of responsibility for his conduct. As well, he was entitled to have regard to matters personal to him that could legitimately affect the sentence imposed.

[23] The sentence of Mr Cory Stone was a complicated one as he was dealt with for a number of offences at that time. He was sentenced to two years imprisonment in respect of a charge of maintaining a sexual relationship with a minor, 15 months imprisonment for this assault and three months imprisonment on other charges, all to be served concurrently. The sentences were suspended after a period of five months had been served with an operational period of two years and six months. It is clear that the sentencing judge was particularly concerned with the circumstances relating to the charge of maintaining a sexual relationship. He noted that the relationship was a loving one, encouraged by the girl's mother, and hence neither predatory nor clandestine. The facts placed before him included that the prisoner had accepted responsibility and provided, and continued to provide, emotional and financial support for the girl the subject of the charge, who was by the time of sentence his partner, and their child born to that girl when she was aged just 15 years. In my view the sentencing judge was quite entitled to accept that remorse was demonstrated and responsibility accepted. As well, in the circumstances, the impact on third parties of any period of actual custody was a legitimate matter to bring into account in the sentencing judge's determination of the appropriate time to be actually served. He expressly mentioned the continuance of the relationship as a significant matter in determining the time actually to be served.

[24] That acceptance of remorse is not an insignificant matter. Where an offence, like that here, results in physical harm to another, s 9(4)(i) of the Act expressly requires that the court have regard "primarily" to a number of factors including "any remorse or lack of remorse of the offender". Here the sentencing judge expressly found, and in my view he was clearly justified in so doing, that there was no basis for assuming any remorse on the part of the offender. The applicant's somewhat chilling statement to the complainant after he and his brother had punched the complainant to the ground and when on the ground punched and kicked him, his plea of not guilty, and the manner of conduct of the trial in which he endeavoured falsely to suggest that his actions were to protect his brother, all supported that finding.

[25] My mind has fluctuated on the point. In the end I have come to the view that the applicant's evident lack of remorse and the overall criminality of his conduct cannot explain the different approach taken by the learned sentencing judge to the two sentences. The fact of the co-offender's greater age, not insignificant criminal history, particularly when compared to the applicant's previous good history, and the multiplicity of charges that Mr Cory Stone faced, outweigh the significant discount justified by his guilty plea and the obvious benefit to the community in having him take up his responsibility to his young partner and their baby child by minimising his time in custody.

[26] That being so then, to achieve parity, a sentence of no more than 15 months imprisonment was appropriate.

[27] There remains the issue of whether the sentence was otherwise within range.

Manifestly Excessive – General Considerations

[28] In *R v Jones; R v Hili*,[4] Rothman J, with McClellan CJ at Common Law and Howie J agreeing, explained concisely the task of a court on an appeal such as this:

> "This Court's task is to correct error and not to substitute one exercise of discretion for another, where error has not been shown. That error must be either identifiable or manifest from the sentence imposed: *House v The King* [1936] HCA 40; (1936) 55 CLR 499. Manifest error is not to be equated with mere inadequacy or excess. But manifest error is fundamentally intuitive. It arises because the sentence imposed is out of the range of sentences that could have been imposed and therefore there must have been error, even though it is impossible to identify it."

[29] The prosecutor referred the sentencing judge to *R v Lam*,[5] *R v Lude*; *R v Love*,[6] and *R v Middleton and Johns*[7] and the applicant's counsel referred him to *R v Dempsey and Perks; ex parte A-G.*[8] On appeal we were referred, in addition, to *R v Abednego*,[9] *R v McDonald*[10] and *R v Fortnum & Fortnum*.[11]

[30] In *Dempsey and Perks*, a sentence of nine months imprisonment to be served by way of an intensive correction order was not interfered with on appeal. That is the sentence contended for on appeal here. However, that case can readily be distinguished. It involved offences of violence by 17 year olds who pleaded guilty to the charges brought. The age difference is of significance, as is the plea. As well, the appeal was an Attorney's appeal with the constraints then in place.

[31] In *Lam*, the offender pleaded to two counts of assault occasioning bodily harm in company and was sentenced to two years imprisonment on each count with a parole release date set at 12 months. The offences were committed within the operational period of two suspended sentences for fraud and receiving. The case concerned gratuitous, unprovoked violence offered by a 28 year old to a stranger in the Brisbane CBD with comparable injuries resulting to those here. Whilst the circumstances surrounding the offences were more serious than here as they involved two separate assaults on the complainant, the complainant being a stranger, and the fortuitous intervention of a passing police officer which probably prevented more significant injuries, it is quite apparent that the court considered that the two years imposed was not at the top of the appropriate range. Rather the court was constrained by the exercise of discretion of the sentencing judge. The sentence here was not inconsistent with that imposed in *Lam*, although the distinguishing features make comparison difficult.

[32] *Lude and Love* involved offenders who were of similar background and age, one being 20 and the other 21 years of age. One had a minor criminal history and the other none. This Court reduced the sentence from 18 months imprisonment with parole release after six months to nine months imprisonment with a release after

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4 [2010] NSWCCA 108 at [41].
5 [2006] QCA 560.
6 [2007] QCA 319.
7 [2006] QCA 92.
8 [1999] QCA 520.
9 [2004] QCA 377.
10 [2005] QCA 383.
11 [2006] QCA 147.

three months for one offender and two months for the other offender. However the case is distinguishable in that both offenders pleaded guilty and both co-operated by agreeing to an interview with the police, although one was unable to recall anything because of his intoxication. The attack was on a taxi driver and the courts are astute to protect such people, vulnerable as they are to attacks from drunken louts. However in other respects the circumstances of the offence were less serious – there was no pre-meditated aspect to the assault and the complainant suffered minor physical injuries and completed his shift as a taxi driver. There were significant personal factors too that merited a more lenient sentence by providing some grounds for optimism that rehabilitation would be encouraged by such leniency.

[33] *Middleton and Johns* concerned offenders aged 19 and 22 years respectively who pleaded to a charge of unlawful assault occasioning bodily harm in company. They had gone to the complainant's house believing that he had stolen something from them, sprayed him with mace or a similar substance, punched him and kicked him. The complainant suffered multiple abrasions and bruising over his torso and arms as well as possible concussion. Johns was sentenced to six months imprisonment to be followed by three years probation and Middleton to three months imprisonment to be followed by three years probation. Neither had criminal convictions of any significance and both had good employment histories.

[34] Notably both offenders there pleaded guilty. Again there were factors personal to the applicants which justified a more lenient approach; factors that are not present here. Jerrard JA noted,

> "that both these applicants have good records of prior employment and of taking advantage of opportunities they have had, and good prospects for lives without any further serious offending behaviour; and that the learned judge erred in not treating that aspect as relevant to a likely response by each of them to a more lenient sentence, and as evidence their offending aggression was out of character. The six month term imposed on Mr Johns was too high for an applicant of his age with those sound future prospects, when there was no finding of an overall unlawful purpose."[12]

[35] *Abednego* concerned a 20 year old with no previous convictions and a good employment record who pleaded guilty to assault occasioning bodily harm whilst armed and in company. On appeal his sentence was reduced from one of two years imprisonment to be suspended after six months to one of six months imprisonment to be suspended after three months with an operational period of twelve months. The applicant had gone to the complainant's house "essentially to prevent or to minimise trouble" and the complainant had offered to fight, apparently approaching the applicant aggressively. The applicant was armed with part of a metal steering lock which he had picked up for preventive rather than aggressive purposes. Jones J remarked that the "violence was not premeditated, expected, or wished for by the applicant".[13] It can be seen that the facts were very different to those here and offer little in the way of guidance.

[36] In *McDonald,* the applicant was sentenced to serve 15 months imprisonment suspended after five months with an operational period of two years after pleading guilty to a charge of assault occasioning bodily harm and a second count of doing

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12 [2006] QCA 92 at [41].

13 [2004] QCA 377 at [23].

the same complainant bodily harm when armed. The sentence was not altered on Mr McDonald's appeal. Effectively Mr McDonald attacked an unsuspecting man with a bourbon bottle only half an hour after he had unlawfully assaulted him. The injuries suffered were more significant than those here, involving as they did some apparent permanent effect on vision. In terms of overall criminality the chief distinguishing feature is that Mr McDonald returned to the attack effectively armed. Mr McDonald had good references, good work history, had no relevant prior history of crimes of violence, and was married with the responsibility of a four year old son. The sentence imposed in *McDonald* of 15 months imprisonment given the repeated attacks and the circumstance of being armed on the second occasion with the potential for greater injury suggests that 15 months is too high here.

[37] *Fortnum & Fortnum* concerned an appeal by two brothers against sentence where each pleaded guilty to three counts of assault occasioning bodily harm with circumstances of aggravation. They were each sentenced to twelve months imprisonment, one to serve six months and one to serve three months, before suspension, with an operational period of 18 months in each case. Neither had relevant prior convictions. In some respects the cases were worse than the present – the men were not only in company but armed and used their weapons, albeit to strike only at the legs of their victims. On the other hand there were strong factors in mitigation which makes comparison difficult – co-operation by way of a full hand–up committal, a timely plea, and "excellent work and personal backgrounds"[14] Importantly, the case was not a statement by this Court of what was an appropriate penalty for such offences but merely a rejection of an application that the sentence imposed was manifestly excessive in a case where there was every reason to think that there was remorse and good prospects of rehabilitation.

Conclusion

[38] It will have been seen that all the cases referred to involved sentences after pleas of guilty where the court was entitled to allow a not insubstantial reduction in the head sentence to reflect the plea.[15] Here the circumstances are different.

[39] Nonetheless, a sentence of 15 months imprisonment does not sit comfortably with the cases discussed, particularly *McDonald* and to a lesser extent *Middleton and Johns.*

[40] Further the relative youthfulness of the applicant and his lack of prior convictions are very relevant and serve to distinguish his case from his brother's.

[41] I consider that the appropriate sentence should have been in the order of 12 months imprisonment to reflect these differences.

[42] The applicant submitted that any sentence of imprisonment should be served by way of an intensive correction order. It was urged that it is in the community's interest to bring about favourable reformation of youthful, first time offenders and such an approach facilitated that rehabilitation. In that regard I note the brief review by Chesterman J in *Dempsey and Perks* of some of the cases relating to youthful offenders which serves to emphasise that rehabilitation of youthful and even violent offenders serves to protect the community as much as does their imprisonment (see particularly the comments of Byrne J in *R v Lovell*).[16]

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14 [2006] QCA 147 per Jerrard JA at [13].

15 Per McPherson JA in *R v Stinton* (supra).

16 [1999] 2 Qd R 79.

[43] The relevant circumstances here include that there was some pre-meditation evident, the applicant acted in company, the injuries were reasonably significant albeit not permanent in their effect, and the attack unprovoked. As the sentencing judge rightly observed the applicant's "conduct was cowardly, it was vicious, it was gratuitously violent, and it was totally unnecessary". There was no remorse and no good ground for assuming good prospects of rehabilitation through the offering of any leniency. These circumstances seem to me to justify the sentencing judge's view that there ought to be actual custody served. As Jerrard JA observed in *Middleton and Johns*,[17] after reviewing a number of decisions and with the concurrence of the other members of the Court (Williams JA and Fryberg J):

> "Those decisions make clear that even for offenders aged 18, this Court will uphold sentences resulting in actual custody for first offenders with no prior convictions who plead guilty to assault occasioning bodily harm where there are aggravating circumstances. Those can include the motive for the assault, its severity, or the circumstances of being armed and in company. While actual imprisonment is not mandated, it will ordinarily be within the proper exercise of a sentencing discretion."

[44] In my view the sentence of 18 months imprisonment to serve nine months before parole was too severe. I would allow the application for leave to appeal against sentence, allow the appeal, set aside the sentence imposed and order that the applicant be sentenced to 12 months imprisonment with a parole release date set at six months.

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17 Supra at [39].