

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Scheers* [2010] QCA 318

PARTIES: **R**  
**v**  
**SCHEERS, Aaron Drew**  
(applicant)

FILE NO/S: CA No 81 of 2010  
DC No 386 of 2007  
DC No 603 of 2007  
DC No 16 of 2009  
DC No 180 of 2009  
DC No 127 of 2010

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Southport

DELIVERED ON: 16 November 2010

DELIVERED AT: Brisbane

HEARING DATE: 26 October 2010

JUDGES: Holmes and Fraser JJA and McMeekin J  
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. Leave to appeal against sentence is granted;**  
**2. The appeal is allowed;**  
**3. The sentence of 13 years for the offence of grievous bodily harm with intent is set aside and a sentence of 10 years is substituted;**  
**4. A period of 1070 days is declared as time already served under the sentence for grievous bodily harm with intent.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant sentenced to 16 years for offences contained in four indictments – where applicant pleaded guilty to grievous bodily harm with intent, assault occasioning bodily harm charges and kidnapping charges contained in indictment 3 – where applicant had cut off one of the complainant’s ears and severed another in the course of an enforcement action for a motorcycle gang – where applicant had, through prison contacts and family members, given the complainant money

inducing him not to give evidence – where applicant pleaded guilty on an ex officio indictment (indictment 4) to the offence of attempting to pervert the course of justice – where applicant pleaded guilty to extortion, assault occasioning bodily harm and wilful damage charges contained in indictment 1 – where applicant pleaded guilty to entering premises with intent to commit an indictable offence, wilful damage and common assault charges contained in indictment 2 – where offences contained in indictments 2 and 3 were committed whilst the applicant was on bail for the offences contained in indictment 1 – where applicant sentenced to eight months imprisonment for contempt of court after refusing to give evidence in relation to indictment 4 at a Crime and Misconduct Commission hearing – where sentence for the grievous bodily harm with intent count structured to reflect the criminality of the remaining, less serious offences – where applicant sentenced to 13 years for the grievous bodily harm with intent count and three years for the attempting to pervert the course of justice count – where applicant argued that the grievous bodily harm suffered, while disfiguring, was not disabling – whether sentence manifestly excessive

*R v Clements* (1993) 68 A Crim R 167; [\[1993\] QCA 245](#), cited

*R v Eade* [\[2005\] QCA 148](#), considered

*R v Keenan* [\[2009\] QCA 236](#), considered

*R v King & Morgan; ex parte Attorney-General of Queensland* [\[2002\] QCA 376](#), considered

*R v Mitchell* [\[2006\] QCA 240](#), considered

*R v Perussich* [\[2001\] QCA 557](#), considered

*R v Wilkie* [\[1997\] QCA 337](#), considered

*R v Worland* [\[2002\] QCA 123](#), considered

COUNSEL: J M McInnes 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] **HOLMES JA:** The applicant was sentenced on 25 March 2010 to terms of imprisonment totalling 16 years on offences contained in four indictments. He seeks leave to appeal against the sentences on the ground that they are manifestly excessive.

### **The offences**

- [2] The applicant belonged to a motorcycle club, and all of the offences were committed in connection with his membership of it and/or in the company of other members. The offences charged on the first indictment occurred in July 2005. One of the applicant's co-accused, Taylor (a member of the motorcycle club), had an interest in a tattooing parlour near which another tattooing business operated in

competition. The applicant, Taylor and two other men went to the competitor business and threatened its owner that if he did not close it down, they would smash the shop and bash him. Taylor and the applicant returned some days later, again with two companions. The complainant, meanwhile, had sought the assistance of the police, and a plain clothes officer was present. One of the four intruders attempted to tip over a counter that the officer was standing behind, while the applicant threw a sign at him. The sign hit him in the head and on the arm, while the counter struck him in the legs, pushing him backwards. The officer suffered some bruising and abrasions, and the sign was damaged. Other police intervened; the applicant fled, but was found hiding nearby.

- [3] Soon after the presentation of an indictment against him in 2007, the applicant intimated that he would plead guilty to the charges it contained, of extortion, assault occasioning bodily harm in company and wilful damage. He was sentenced to 12 months imprisonment on each of the assault and damage charges, and two and a half years in respect of the extortion. His co-accused, Taylor, similarly received a sentence of a two and a half years imprisonment.
- [4] While on bail in respect of those charges, the applicant committed the offences the subject of the second indictment, again in company with other motorcycle club members. On this occasion, one of his co-accused had been involved, in the early hours of the morning, in an altercation with security staff at a hotel. At 5.00 am, the applicant and his two co-accused kicked open the door to the hotel office where the manager and an employee were counting the day's takings. They shouted at the manager, demanding the name and address of the security officer involved in the altercation. The manager believed the applicant to be holding a knife, but the sentencing judge accepted that it was more likely a mobile telephone. One of the applicant's companions, however, was armed with a stick which the applicant took and used to threaten the manager. The incident lasted about five minutes and came to an end when police sirens were heard and the three ran from the premises. They were apprehended nearby.
- [5] The applicant pleaded guilty to entering premises with intent to commit an indictable offence, for which he was sentenced to two years imprisonment, and wilful damage (to the door kicked open) and common assault, which resulted in sentences of 12 months imprisonment. His two co-accused, who had no criminal history, received sentences of 12 months imprisonment wholly suspended.
- [6] The offences the subject of the third indictment were committed while the applicant was on bail in respect of the charges involved in the first two indictments. These offences were committed against a man, Holmes, who was involved in a drug transaction in which the motorcycle club had lost \$40,000. It was thought that he might have stolen the money. The applicant went with a junior member of the club, one Holland, who was on friendly terms with Holmes, to the latter's house in the early hours of the morning. Holland persuaded Holmes to come outside. The applicant took him by the neck, held a Stanley knife to his throat and threatened to cut it if he did not get into a nearby car. He complied. Once in the car, the applicant taped his hands behind his back. He was driven to a national park where he was ordered to walk up a dirt track, with the applicant walking ahead of him and Holland behind. The applicant told him that a grave had been dug for him further up the track.
- [7] Holmes' recollection was that others joined them but he was not sure when or how many. According to Holland, other members of the motorcycle club were present at

the start of the track and one of them, Benjamin Dehnen, accompanied them up it. Holmes walked for some distance and then was told by the applicant to get on his knees. He refused and was hit by Dehnen in the face with a hard object, knocking him to the ground and fracturing his left zygoma. Holland at this point fled, followed shortly after by Dehnen. The only person now left with Holmes was the applicant, who used a knife to sever one of Holmes' ears and cut off the bottom half of his other ear; then he sliced across his forehead and down his cheek. While this was happening, the applicant was accusing Holmes of having stolen the money from the drug transaction; but he apparently reached a point of accepting his denials. He took him further up the track, applied more tape to him and left him there.

- [8] Eventually, Holmes was able to free himself and make his way down the track. He was taken to hospital where his cheekbone fracture was treated and the wounds to his ears cleaned and stitched. It was not possible to perform any reconstructions of the ears. Holmes did not make a victim impact statement; he told the prosecutor that it was pretty obvious how an injury of the kind would affect someone. He wore his hair long to hide his disfigurement. However, he asked that the court be informed that he had himself been a criminal and that the incident had constituted a turning point in his life.
- [9] As a result of those events, the applicant was charged with and pleaded guilty to kidnapping, assault occasioning bodily harm while armed and in company, and grievous bodily harm with intent to disfigure. His pleas of guilty were entered on the morning that the charges were to go to trial. He subsequently sought to withdraw his plea of guilty to the kidnapping charge, but eventually withdrew that application. He was sentenced to four years imprisonment in respect of the charges of kidnapping and assault, and 13 years imprisonment in respect of the grievous bodily harm with intent. Dehnen was sentenced to three years imprisonment for the assault occasioning bodily harm; he had a minor criminal history which did not include any offences of violence and he had served a little over four months in pre-sentence custody which was not declared but was taken into account in fixing the sentence.
- [10] The applicant was to face a committal for those charges in September 2008, but Holmes advised the police by text message that he would not attend to give evidence and disappeared. However, Holland pleaded guilty and then gave evidence against the applicant at the committal hearing. It transpired that the applicant had paid Holmes not to give evidence, acting through family members and a former fellow prison inmate. But for Holland's decision to co-operate, the charges could not have proceeded. As a result, the applicant was charged with and pleaded guilty on an ex officio indictment to attempting to pervert the course of justice. He was sentenced to three years imprisonment, to be served cumulatively upon the sentence of 13 years imprisonment.
- [11] The applicant was also dealt with for a summary offence of breaching bail by failing to reside at his bail address. For that offence he was sentenced to imprisonment for one month concurrently.

### **The applicant's antecedents**

- [12] The applicant was 26 at the time he was sentenced in March 2010. He was 21 when the first of the offences were committed, 24 at the time of the kidnapping and

25 when he committed the attempt to pervert the course of justice. He had criminal histories in Queensland and New South Wales. The Queensland history consisted of four offences dealt with summarily, the most relevant of which was an assault occasioning bodily harm. The New South Wales criminal history consisted mostly of driving offences, but included offences of assault occasioning actual bodily harm and affray, committed in 2005, for which he was placed on a 12 month suspended sentence. He had been at a licensed club where a m el e began after his companion was refused service of alcohol. While being ejected, the applicant grabbed the manager's tie and choked him with it.

- [13] At the time of his sentencing, the applicant was serving an eight months sentence of imprisonment, imposed on 8 March 2010, for contempt as a result of his refusal to answer questions about the bribing of Holmes not to give evidence, put to him in a Crime and Misconduct Commission hearing.
- [14] The applicant had worked intermittently as a labourer since leaving school and had for a period received a disability support pension. At sentence, a psychiatric report was tendered which gave the opinions that he had suffered from chronic depressive dysthymia since childhood because of development difficulties; was alcoholic; was addicted to methylamphetamine and benzodiazepines; and manifested borderline personality disorder and anti-social personality disorder. The reporting psychiatrist observed that offenders like the applicant were likely to mature in their 30s. The applicant, he said, would benefit from training in interpersonal skills and cognitive skills as well as in more practical respects, but psychiatry had little to offer him.
- [15] Defence counsel also put before the court on sentence a letter from the applicant expressing his remorse for the harm done to Holmes and affirming his intention to stay away from motorcycle clubs and to educate himself. Members of his family wrote letters asking for leniency, and a prison chaplain who had dealt with the applicant for two years at a correctional centre wrote describing his openness and recognition of his wrongdoing (omitting, however, any mention of the applicant's attempt to pervert the course of justice during that period).

### **The sentencing**

- [16] At sentence both the prosecutor and defence counsel agreed that the desirable course was for the learned sentencing judge to impose a sentence in respect of the grievous bodily harm with intent count which would reflect the criminality of the remaining, less serious offences and that a cumulative sentence should be imposed in respect of the count of attempting to pervert the course of justice.
- [17] The learned judge took into account the applicant's age and pleas of guilty, noting, however, that the applicant had expressed remorse late in respect of the third indictment. He had indicated, on a number of occasions, an intention to change his plea from guilty to not guilty and to contest the facts alleged by the Crown, contending that he was not the person who had cut the ears of the complainant. His Honour said that he had regard to the applicant's criminal history and the fact that the offences were committed while on bail. The offences on the first and third indictment were in the nature of enforcement activity on behalf of the motorcycle club. His Honour referred to the various sentences imposed on the applicant's co-offenders. After dealing with the circumstances of the first two indictments, he

turned to the count of grievous bodily harm with intent. He described the applicant's conduct as calculated and among the most serious examples of the offence. His conduct in leaving the seriously wounded victim evidenced a lack of remorse and empathy.

- [18] As to the attempt to pervert the course of justice charge, his Honour described Holmes as being "in fear of injury to his family and to himself" as well as being paid for his silence. (The first part of that proposition, however, seems to be an error; the prosecutor had submitted that, although the police had initially understood that Holmes' failure to appear was the result of threats, it had transpired that his motivation was money.) The attempt to pervert the course of justice had almost succeeded and required a salutary penalty. The learned judge recorded the fact that in sentencing for that offence, he took into account that it was "concurrent on the related sentence for contempt and not cumulative". It seems that his Honour meant to convey that the other sentences imposed were concurrent with the contempt sentence, although they might well have been imposed cumulatively.

### **The submissions on the application for leave to appeal**

- [19] Here, counsel for the applicant argued that the 13 year sentence for the offence of grievous bodily harm with intent was, of itself, excessive. It was significant that Holmes, unlike the victims in other cases referred to by the Crown as comparable, had made a robust recovery and, while he was disfigured, was not in any way disabled. The learned judge's characterisation of the injury as,

"amongst the most serious examples of the offence of grievous bodily harm with intent"

was erroneous. Counsel relied on two comparable decisions, *R v Perussich*<sup>1</sup> and *R v Mitchell*,<sup>2</sup> to argue that a proper sentence would have been nine years imprisonment, with some increase to reflect the other offences for which the applicant was being sentenced, tempered to recognise the fact that those offences would not have carried serious violence offence declarations. The global sentence of 16 years, resulting from the addition of the three year cumulative sentence for attempting to pervert the course of justice, was also excessive. An effective global sentence of 13 years should have been imposed.

- [20] In *Perussich*, a sentence of nine years imprisonment with a serious violent offence declaration was set aside. In that case, the applicant had obtained a gun from his vehicle (showing some premeditation in its use), struck the complainant about the head three or four times with it and then shot him in the leg. He was 40 years old and had a criminal history consisting of two counts of assault and one of intentionally causing injury, all dealt with summarily. The complainant suffered a serious disabling injury and a depressive illness, losing the ability to work in his previous occupation. Those factors called for the imposition of a heavy sentence, but that was, the court said, satisfied by a sentence of nine years imprisonment without any declaration.
- [21] In *Mitchell*, the intoxicated applicant attacked the complainant with an iron bar because she had rejected his advances. She suffered a fractured elbow, a dislocated toe joint, lacerations to her scalp and shins and bruising to her face and shoulder,

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<sup>1</sup> [2001] QCA 557.

<sup>2</sup> [2006] QCA 240.

and was left with some lack of balance and psychological sequelae. The 51 year old applicant was described as having “a relevant and lengthy criminal history, comprising many offences of violence”, the worst of which was a manslaughter conviction. A sentence of seven years imprisonment with a serious violence offence declaration was said to be “a heavy one” but warranted, given the seriousness of the applicant’s conduct and the prospect, in the light of his criminal history, of his repeating it.

- [22] Both counsel referred to *R v Eade*,<sup>3</sup> which had been relied on by the prosecutor below as indicating a nine to 13 year range for sentencing for grievous bodily harm with intent. In that case, the 17 year old applicant and his friends were driving about the streets of a regional city and got into an argument with two men, one of whom dented the door of the applicant’s vehicle in an endeavour to stop its occupants from getting out. The applicant hit him over the back of the right shoulder with a hockey stick and, after he fell, continued to hit him with the stick around the head and upper body area until it broke. Then he and others kicked the man about the head. The applicant returned to his vehicle and reversed it over the victim, then drove forward over him again. The victim suffered a closed-head injury and extensive facial fractures and was left with diminished vision in one eye, scarring, disfigurement and misalignment of his jaw. He had previously worked in the construction industry but was unlikely to be able to return to it, and he was reduced to receiving social security payments. The applicant had a dysfunctional background and no criminal history. The Court of Appeal observed that the rising incidence of street violence rendered deterrence significant and had resulted in the imposition of lengthy sentences, even for youthful offenders. The sentencing judge was correct in accepting a range of between nine and 13 years; the Court declined to interfere with a sentence of 10 years imprisonment.
- [23] Counsel for the respondent pointed out that at least in *Eade* there had been some spontaneity and some element of provocation, whereas the offence here was cold-blooded and not prompted by any encouragement from others. That submission has considerable force; but a further contention, that the types of injuries suffered by the victim in *Eade* were comparable with those in the present case, is, I think, doubtful. The injuries inflicted on the applicant here, while horrific in their cruelty, did not have the disabling consequences of those in *Eade*.
- [24] *R v Worland*,<sup>4</sup> also referred to by both counsel, concerned another serious attack, in circumstances bearing some similarity to the present case. The victim in that case had fallen foul of people who had procured him to undertake a methylamphetamine “cook”. Five people abducted him, took him to bushland, tied him up, cut his throat and chopped off two of his fingers. The man who cut his throat and the man who held his arm while the fingers were chopped off were sentenced, respectively, to 12 years and 10 years imprisonment for attempted murder. *Worland*, who had helped by tying the victim up, taping his eyes and mouth and getting him out of the car and had waited nearby while the assault occurred, pleaded guilty to grievous bodily harm simpliciter and was sentenced to six years imprisonment with a serious violent offence declaration. He was 22 years old, with what was described as a “significant criminal history involving offences of violence”. The case is of relatively minor assistance because the court held that the sentence was not

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<sup>3</sup> [2005] QCA 148.

<sup>4</sup> [2002] QCA 123.

manifestly excessive and did not state any point of principle or seek to define any appropriate range.

- [25] The last of the cases to which both counsel referred was *R v King & Morgan; ex parte Attorney-General of Queensland*.<sup>5</sup> It involved two applicants, aged 23 and 28 respectively, who began by giving a lift to the female complainant and drinking alcohol with her and then proceeded to assault her at length, punching her repeatedly, choking her and hitting her with a metal torch and a small axe or hammer over a period of some hours and restraining her when she attempted to escape. The complainant was threatened with death and was left unconscious and naked. She required stitches, an operation to repair damage to the tendons in her leg and the replacement of three teeth. Her ear was partially severed and she suffered from what was described as “severe psychological damage”. The applicants were charged with grievous bodily harm simpliciter and deprivation of liberty, as well as other unrelated property offences. Both had extensive criminal histories; King’s included crimes of violence, particularly rape and assault occasioning bodily harm, while Morgan’s was for drug and dishonesty offences. The offenders were sentenced to six years imprisonment; on the Attorney-General’s appeal a serious violent offence declaration was added.
- [26] Counsel for the respondent relied on *R v Wilkie*<sup>6</sup> and *R v Keenan*,<sup>7</sup> each of which involved much more serious harm, for the obvious propositions that the duration and range of offending and its “gangland” context were aggravating features. In the present case, he submitted, there were further aggravating circumstances. The applicant had shown no sign of remorse. The victim’s disfigurement was permanent. The offence of attempt to pervert the course of justice now carried a maximum penalty of seven years imprisonment and it was significant that the applicant had been successful in his aim of preventing Holmes from giving evidence.
- [27] There are undoubtedly a number of features of this case which warranted a very substantial sentence for the offence of grievous bodily harm with intent, particularly given that that sentence had also to reflect the other offences committed by the applicant. The assault was callous and planned and occurred in the context of enforcing the edicts of the applicant’s criminal associates. Although the applicant protested his remorse to the psychiatrist who interviewed him, the learned judge correctly discounted those claims. The applicant’s attempt to avoid responsibility by bribing Holmes, and his continued denial of responsibility for the actual assault until quite late in the chain of events, gave the lie to them.
- [28] On the other hand, the offence, although simply appalling in the cold-bloodedness of its commission, did not have the ongoing consequences for the victim physically or psychologically or in terms of his capacity to earn income involved in other such cases. The applicant, as a man in his early 20s, was relatively young and did not, at the point he began committing these offences, have an extensive criminal history. Notwithstanding the absence of any very compelling sign of remorse, his pleas of guilty on all four indictments were of considerable significance in facilitating the administration of justice; they avoided a series of trials and the exposure of the victims of his conduct to the ordeal of giving evidence.

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<sup>5</sup> [2002] QCA 376.

<sup>6</sup> [1997] QCA 337.

<sup>7</sup> [2009] QCA 236.

- [29] The sentence of 13 years for grievous bodily harm with intent was, in my view, excessive by comparison with the sentences imposed in the cases cited. The sentence of three years imprisonment for the attempt to pervert the course of justice would, ordinarily, be entirely appropriate; but the net result of adding a three year sentence to a 13 year sentence produced, in my view,

“[a] resulting effective sentence ... out of proportion to the combined seriousness of the offences.”<sup>8</sup>

More particularly, it is difficult to see how the mitigating circumstance of the pleas of guilty was properly reflected in a total sentence of 16 years imprisonment.

- [30] I would grant leave to appeal against sentence, allow the appeal and set aside the sentence for the offence of grievous bodily harm with intent. I would substitute a sentence of 10 years imprisonment on that count, but would not interfere with the cumulative three year sentence for attempting to pervert the course of justice. To avoid any doubt, it should be declared that the applicant has served 1070 days of the 10 year sentence of imprisonment for the offence of grievous bodily harm with intent.
- [31] **FRASER JA:** I agree with the reasons for judgment of Holmes JA and the orders proposed by her Honour.
- [32] **McMEEKIN J:** I have read the reasons of Holmes JA and agree with the orders her Honour proposes.

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<sup>8</sup> *R v Clements* (1993) 68 A Crim R 167 at 172.