SUPREME COURT OF QUEENSLAND

CITATION:	*R v Thomason; ex parte A-G (Qld)* [2011] QCA 9
PARTIES:	**R** **v** **THOMASON, Floyd Samson Henare** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 229 of 2010 DC No 305 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	11 February 2011
DELIVERED AT:	Brisbane
HEARING DATE:	7 February 2011
JUDGES:	Chief Justice, Chesterman and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. The appeal is allowed;** **2. The sentence imposed in the District Court is set aside and in lieu thereof the following orders are made:** **a. The respondent is sentenced to six years imprisonment for the offence of grievous bodily harm;** **b. The respondent is declared to be convicted of a serious violent offence; and** **c. That 71 days spent in pre-sentence custody between 1 July 2010 and 9 September 2010 is declared time already served under the sentence.**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCE – OFFENCES AGAINST THE PERSON – ACTS INTENDING TO CAUSE OR CAUSING DANGER TO LIFE OR BODILY HARM OR SERIOUS INJURY – SENTENCE – respondent attacked stranger from behind in public place with knife – complainant suffered life-threatening injuries – respondent intoxicated with alcohol at the time – respondent continued to harass complainant after attack – respondent left scene and did not surrender to police

– respondent aged 18 at time of incident – respondent pleaded guilty and sentenced to four and a half years imprisonment with parole eligibility after 14 and a half months – whether sentence manifestly inadequate – whether serious violent offence declaration should be made

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEALS BY CROWN – PRINCIPLES TO BE APPLIED BY APPELLATE COURT TO CROWN APPEAL – whether a serious violent offence declaration should be made when it was not imposed by the lower court

Penalties and Sentences Act 1992 (Qld), s 9, Pt 9A

R v Amituanai (1995) 78 A Crim R 588; [1995] QCA 80, cited
R v Bryan; ex parte A-G (Qld)(2003) 137 A Crim R 489; [2003] QCA 18, followed
R v Dietz [2009] QCA 392, cited
R v Eveleigh [2003] 1 Qd R 398; [2002] QCA 219, considered
R v Henriott [2004] QCA 346, considered
R v Honeysett; ex parte A-G (Qld) [2010] QCA 212, cited
R v Johnstone [2004] QCA 12, cited
R v Lacey; ex parte A-G (Qld) (2009) 197 A Crim R 399; [2009] QCA 274, applied
R v Mikaele [2008] QCA 261, considered
R v Nguyen [2006] QCA 542, cited
R v Price [2006] QCA 180, distinguished
R v Taylor and Napatali; ex parte A-G (Qld) (1999) 106 A Crim R 578; [1999] QCA 323, cited
R v Wiggins [2003] QCA 367, cited

COUNSEL: A W Moynihan SC for the appellant
S Ryan for the respondent

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

[1] **CHIEF JUSTICE**: The Attorney-General appeals against a sentence imposed in the District Court on 9 September 2010 for the respondent's offence of unlawfully doing grievous bodily harm. The respondent, who pleaded guilty, was sentenced to four and a half year's imprisonment with parole eligibility set after fourteen and a half months, that is, on 18 November 2011. The maximum penalty for the offence was, and is, 14 years imprisonment. The grounds of appeal are that the sentence imposed failed to reflect the gravity of the offence, did not adequately account for general deterrence, and gave too much weight to factors in mitigation.

[2] At about 2 am on 7 November 2008, two soldiers on leave and their two women companions were walking in the Townsville Central Business District near the bridge leading to Palmer Street. They were in two groups. As the first group

passed the respondent, the woman in that group gave him a "high five". As the second group passed, which included the 21 year old complainant, the 18 year old respondent offered the gesture to him, saying "[h]igh five, brother". The complainant did not return the gesture, and kept walking.

[3] The respondent then verbally abused the complainant, who kept walking. The respondent ran up to the complainant from behind, grabbed his shoulder and spun him around, then stabbed him twice with a "steak knife" with a 15 centimetre blade. The complainant punched the respondent in the head four times and prised the knife from his hand, having thrown him to the ground. The complainant's group moved off with the respondent following for a time, calling out that he had been punched by the complainant, and then the respondent moved over the bridge in the other direction. The complainant was taken by ambulance to hospital.

[4] When the complainant arrived at the hospital, he had no pulse. He had suffered a one centimetre slash wound to the apex of the left ventricle in his heart, producing bleeding which inhibited the contraction of the heart. He underwent surgery which included displacement of the heart. He also suffered a neck wound which required suturing, described by the Prosecutor as "considerably less serious". Counsel for the appellant in his outline says the complainant was in hospital for four days, and that was the oral submission to the learned Judge, although in the victim impact statement the complainant says that he was in hospital for two weeks.

[5] In that victim impact statement, the complainant refers to substantial pain associated with the stabbing and the surgical operation, an adverse itching reaction to the morphine administered to him while in hospital, "[s]hock…and anger about being attacked from behind for no reason", loss of confidence in public, and the presence of "four ugly scars on my chest, two from the stab wounds and two from the surgery". Fortunately the complainant has to date suffered no other residual disability, but says that he "may have problems in the future due to scar tissue on the heart".

[6] It was a serious instance of the offence because of the combination of these features: the respondent was carrying a knife, and used it; he thereby occasioned injuries which threatened the complainant's life; the attack upon the complainant, from behind, was entirely unprovoked; the respondent continued to harass the complainant after the stabbing, and left the scene at a time when he knew he had stabbed the complainant who would require urgent medical attention (the respondent did not surrender to the police, but was identified from CCTV footage and other enquiries); the incident occurred in a public place where citizens should be free to move about securely; and as the victim impact statement suggests, the complainant has been left in an emotionally scarred state albeit he is fortunately not subject to residual physical disabilities apart from the scarring to his chest.

[7] At the time he committed the offence, the respondent was intoxicated. He subsequently had no knowledge of it. Following a full committal with cross-examination of witnesses, the respondent pleaded guilty to the offence a fortnight before the date appointed for the commencement of the trial. The learned Judge said that she gave him "a significant discount", in relation to the head sentence and parole, because the plea indicated remorse, saved resources, and saved the complainant's having to endure a trial.

[8] The respondent had two prior convictions which attracted fines. They were not offences of violence. He was arrested on 9 November 2008. In January 2009, he was ordered to carry out community service in respect of a 2005 burglary. He breached that order and in November 2009 was sentenced to six months imprisonment fully suspended. In June 2010 he was sentenced for motor vehicle, wilful damage and domestic violence offences, which he committed while on bail for the instant offence and the suspended term was activated. These features bear on his prospects of rehabilitation.

[9] The respondent has two children to the same mother, the first born when the respondent was only 16 years of age. The respondent's problems stem from his abuse of alcohol. The sentencing Judge observed that there was "a great deal of hope" for the respondent, principally it seems because he said he had "been trying to do something about the alcohol" and wanted to fulfil a paternal role. There was but limited material before the Judge in relation to those matters.

[10] The learned Judge noted that the respondent had not "armed [himself] looking for trouble": he had taken the knife from the hotel where he had earlier had dinner. The point is, however, that he chose to take the knife from the hotel, carrying it in public in the early hours of the morning.

[11] That the respondent was intoxicated is not a mitigating factor, as has repeatedly been emphasized in this court. In fact it rendered his carrying the knife as he did more potentially risky than were he sober.

[12] Before her Honour, the Prosecutor submitted that the appropriate penalty was six to seven years imprisonment with a serious violent offence declaration, and relied on *R v Bryan; ex parte Attorney-General* [2003] QCA 18 ((2003) 137 A Crim R 489), and *R v Wiggins* [2003] QCA 367 and *R v Johnstone* [2004] QCA 12, pp 4-5 in which *Bryan* was later applied. Counsel for the respondent did not contend for a particular sentence, but emphasized his being "a very young man…not beyond the prospect of rehabilitation", while acknowledging that it was "a very significant example of [gratuitous] street violence". He referred to *R v Price* [2006] QCA 180, *R v Nguyen* [2006] QCA 542 and *R v Dietz* [2009] QCA 392. The learned Judge also had regard to *R v Honeysett; ex parte Attorney-General* [2010] QCA 212 and *R v Amituanai* (1995) 78 A Crim R 588 (as to the significance of the extent of residual disability).

[13] Her Honour declined to make a serious violent offence declaration, having been referred to *R v Eveleigh* [2003] 1 Qd R 398, saying that the respondent did "not come within that class of dangerous violent offender, having regard to what the Court of Appeal has said from time to time".

[14] The approach which should be taken by the court in the determination of an appeal of this character is set out in *R v Lacey; ex parte Attorney-General* [2009] QCA 274, paras 114ff:

> "This Court in exercising its discretion must have regard to the sentence imposed below, but come to its own view as to the proper sentence to be imposed" (para 147)

and there is

> "not…an overarching rule which operates to require this Court to impose a sentence at the lower end of the available range" (para 153).

[15] Counsel for the appellant relied substantially on *Bryan*, where a six year term was substituted for a four year term which had been suspended after 12 months. In relation to circumstances quite comparable to those of the present case, Williams JA referred to a range of six to seven years as "the minimum that could be considered as the head sentence", and that a serious violent offence declaration if sought could be added (para 35). Cullinane J and I agreed. *Bryan* was decided before the elucidation in *Lacey* of the Court's proper approach to the determination of an Attorney-General appeal, at a time when the Court was substantially influenced by the contentions made at sentence, and if re-sentencing, opted for the lower end of the relevant range.

[16] In relating the circumstances of the instant case to *Bryan*, one acknowledges that the respondent was 18 years of age by contrast with Bryan's age of 21, which is not a great disparity, and as pointed out in *R v Mikaele* [2008] QCA 261, paras 26-7, in relation to crimes of violence, the significance of the youth of the offender has been diminished by amendments made to s 9 of the *Penalties and Sentences Act* 1992. The difference in age between the respondent and Bryan is really in the end without great significance to the sentencing because each was in the category which attracts leniency (*R v Taylor and Napatali; ex parte Attorney-General* (1999) 106 A Crim R 578). The respondent was 20 years old when sentenced.

[17] Counsel for the respondent pointed to some other differences between the instant case and *Bryan's*: for example, that Bryan was "looking for a fight", that Bryan attempted to disguise himself to avoid detection, that Bryan threatened his girlfriend were she to implicate him subsequently, that Bryan used a pocket knife which he carried with him, and that the complainant in *Bryan's* case was left with some residual numbness. I do not consider those matters of detail combine to warrant a substantially different approach in this case from that taken in *Bryan*.

[18] It is useful to set out parts of what Williams JA said in *Bryan*, first at paras 29-30:

> "This was a vicious attack with a weapon upon a stranger. It was gratuitous street violence. It took place in the centre of Brisbane where, particularly on New Years Eve and the early hours of the following morning, it would be customary for people to congregate. However one looks at the circumstances of this case it is one of the worst examples of the offence of doing grievous bodily harm that one could find. Given the nature and circumstances of the crime, deterrence must be the major factor influencing sentencing. Ordinary citizens must be able to make use of areas such as the Mall, even at night, sure in the knowledge that they will not be savagely attacked. The only way courts can preserve the rights of citizens to use public areas in going about their own affairs is by imposing severe punishment on those who perpetrate crimes such as this."

And then at para 35:

> "Given the need to protect the community from offences such as the present one, given that this was an unprovoked, vicious and cowardly attack upon an innocent passer-by in a public street, and given the use of a knife in such a way as to seriously threaten life a sentence in the range six to seven years was the minimum that could be considered as the head sentence. The circumstances here would often justify the making of a declaration that the offence was a serious violent one, but no such declaration was, or is now, asked for."

[19] Comparing this case with *Bryan*, whereas Bryan was in the end sentenced to six years imprisonment, and a declaration could have been added had it been sought below, the present respondent was sentenced, for comparable offending, to four and a half years imprisonment with parole eligibility set after fourteen and a half months, which is after about one-quarter of the overall sentence, in circumstances where the Judge said that she had already moderated the head sentence on account of the plea of guilty. By contrast, Bryan was sentenced on the basis that he would not be eligible for parole until after three years. Whether or not parole is secured depends on the determination of the relevant board. But even in that respect, the treatment accorded this respondent was particularly lenient, suggesting the sentencing Judge was unduly influenced by a perception that his prospects of rehabilitation were promising. In relation to that aspect, there is strength in the appellant's Counsel's submission that his offending subsequently to the commission of the instant offence tends the other way.

[20] Counsel for the respondent particularly submitted that the sentenced imposed in *R v Price* [2006] QCA 180 and *R v Henriott* [2004] QCA 346 especially provided support for the four and a half years imposed on the respondent. The 17 year old Price received a five year term for recklessly injuring a complainant by throwing a pole at him, in the course of gang violence, and leaving the complainant with extremely serious disabilities. Stabbing with a knife at once distinguishes this case from *Price*. Also, that was not an Attorney's appeal. The five year term was not reduced on the prisoner's appeal. In *Henriott*, the four and a half year term was varied on appeal by the addition of suspension after 18 months, apparently to provide certainty of care for that applicant's three teenage sons, of whom the prisoner was the sole carer. Counsel also invoked the principle in *Amituanai*, that generally speaking more substantial residual disability can be expected to result in more severe penalty.

[21] But in the end it is the close comparability between this case and *Bryan* which I consider should determine the outcome of this appeal, that is, that the respondent be imprisoned for six years.

[22] As to the making of a declaration that the respondent has been convicted of a serious violent offence, the Prosecutor asked the sentencing Judge to make such a declaration and her Honour declined. There is nothing in *Eveleigh* which would militate against the making of a declaration. See the summary in para 111 of the judgment of Fryberg J, and his question (p 430) whether "the circumstances of the offence and of the offender warrant the declaration as part of the proper sentence". I earlier set out the combination of circumstances which warrants characterizing this offence as a serious instance of the offence of unlawfully doing grievous bodily harm. It was obviously violent.

[23] That being so, and following *Bryan*, a declaration should be made in this case. (The learned Judge erred if, in what she said at p 1-34, lines l-52[1], she was suggesting the intoxication could be relevant to the question whether a declaration should be made.)

[24] This passage from *Bryan* (para 6) bears repetition:

> "By part 9A introduced into the *Penalties and Sentences Act* in 1997, the legislature clearly signalled a hardened intolerance of serious

[1] RB p 37.

> violent offending which sentencing courts must be astute to acknowledge and respect. In cases like this one, deterrence, punishment and community denunciation (s 9(1)(a), (c) and (d) of the *Penalties and Sentences Act*) will ordinarily assume much greater significance than the personal circumstances of an offender. A declaration would have been warranted."

[25] The only reason a declaration was not added on appeal in *Bryan* was that it had not been and was not sought. Here it was, both before the sentencing Judge and on appeal. *Bryan* clearly expresses that in such a situation, the declaration not having been made below, it should now be added. Doing so is to apply *Lacey*.

[26] Absent correction, the subsistence of the sentence imposed in the District Court would involve erosion of the proper approach to sentencing for this very serious category of crime, an approach described with clarity and authority in *Bryan*. There is no need to reiterate further what was said in *Bryan*, beyond emphasizing the need for close adherence to it.

[27] I would order that the appeal be allowed, the sentence imposed in the District Court set aside, and that the respondent be sentenced to six years imprisonment, with a declaration that the respondent has been convicted of a serious violent offence. Under s 159A *Penalties and Sentences Act* 1992 (Qld), it is declared that 71 days spent in pre-sentence custody between 1 July 2010 and 9 September 2010 is deemed time already served under the sentence.

[28] **CHESTERMAN JA**: I agree with the orders proposed by the Chief Justice, and with his Honour's reasons for making those orders.

[29] **WHITE JA**: I have read the reasons for judgment of the Chief Justice and agree for the reasons which he expresses that the Attorney-General's appeal should be allowed, the sentence imposed in the District Court set aside and that the respondent be sentenced to six years imprisonment with a declaration that he has been convicted of a serious violent offence together with the time served declaration.