SUPREME COURT OF QUEENSLAND

CITATION:	*R v Evans; R v Pearce* [2011] QCA 135
PARTIES:	**R** **v** **EVANS, Chris** (applicant) **R** **v** **PEARCE, Jacob Gary** (applicant)
FILE NO/S:	CA No 14 of 2011 CA No 15 of 2011 DC No 31 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	21 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	2 June 2011
JUDGES:	Margaret McMurdo P, Chesterman JA and Fryberg J Separate reasons for judgment of each member of the Court, Margaret McMurdo P dissenting, Chesterman JA and Fryberg J concurring as to the orders made
ORDERS:	**Applications for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – judge did not place excessive weight on victim impact statement and general deterrence *Evidence Act* 1977 (Qld), s 132C *Penalties and Sentences Act* 1992 (Qld), s 15 *Victims of Crime Assistance Act* 2009 (Qld), s 15 *R v Singh* [2006] QCA 71, considered
COUNSEL:	The applicant Evans appeared on his own behalf D A Funch for the applicant Pearce D R Kinsella for the respondent

SOLICITORS: The applicant Evans appeared on his own behalf
L M Searing of Odens Legal applicant Pearce
S T Gillies of the Department of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** Fryberg J has set out the relevant facts which I will not repeat. The sentence imposed on each applicant, two years imprisonment with parole release fixed after nine months, was not manifestly excessive. It gave proper but not excessive weight to the requirement of general deterrence.

[2] In submitting that the sentencing judge gave too much weight to the victim impact statement, the applicant Pearce's counsel, whose submissions the applicant Evans also relied, emphasised the *ex tempore* dicta in *R v Singh*[1] where Fryberg J stated:

> "In his sentencing remarks the judge referred to the "consequences not only to [the complainant] physically but to his mental and emotional and psychological health and the impact it has also had on his wife and children." The information upon which his Honour made that finding came from a victim impact statement prepared by the complainant. Sentencing judges should be very careful before acting on assertions of fact made in victim impact statements. The purpose of those statements is primarily therapeutic. For that reason victims should be permitted, and even encouraged, to read their statements to the court. However, if they contain material damaging to the accused which is neither self-evidently correct nor known by the accused to be correct (and this includes lay diagnoses of medical and psychiatric conditions) they should not be acted on. The prosecution should call the appropriate supporting evidence. It is unfair to present the accused with the dilemma of challenging a statement of dubious probative value, thereby risking a finding that genuine remorse is lacking, or accepting that statement to his or her detriment."

I agreed with Fryberg J that Singh's application for leave to appeal against sentence should be dismissed but gave separate reasons without joining in Fryberg J's reasons. Williams JA then stated only: "I agree" so that it is not entirely clear that Williams JA was joining in Fryberg J's obiter comments.

[3] Fryberg J's dicta in *Singh* seems to be frequently cited in sentencing courts. I consider it prudent and timely to set out the relevant statutory requirements pertaining to judicial fact finding as to allegations in victim impact statements.

[4] The *Victims of Crime Assistance Act* 2009 (Qld), s 15, allows for victim impact statements to be given to a sentencing court and provides:

> **"15 Giving details of impact of crime on victim during sentencing**
>
> (1) A victim of a prescribed offence is to be permitted to give the prosecutor for the offence details of the harm caused to the victim by the offence, for the purpose of the prosecutor informing the relevant sentencing court.

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1 [2006] QCA 71.

Note—
If the offender's mental condition relating to the offence is referred to the Mental Health Court under the *Mental Health Act 2000*, see section 284 of that Act for the information a victim of the offence may give that court to help it make a decision on the reference.

(2) The prosecutor may continue with the sentencing proceeding without having received details of the harm if it is reasonable to do so in the circumstances, having regard to—
  (a) the interests of justice; or
  (b) whether permitting the details of harm to be given would unreasonably delay the sentencing of the offender; or
  (c) anything else that may adversely affect the reasonableness, or the practicality, of permitting details of the harm to be given.

(3) If details of the harm are given to the prosecutor, the prosecutor is to—
  (a) decide what (if any) details are appropriate to be given to the sentencing court; and
  (b) give the appropriate details to the sentencing court, whether or not in the form of a victim impact statement given under subsection (5).

Note—
In sentencing the offender, the sentencing court must have regard to the harm done to, or impact of the offence on, the victim under—
(a) the *Penalties and Sentences Act 1992*, section 9(2)(c)(i); or
(b) if the offender is a child—the *Juvenile Justice Act 1992*, section 150(1)(h).

(4) In deciding what details are not appropriate, the prosecutor may have regard to the victim's wishes.

(5) Details of the harm may be given to the prosecutor in the form of a victim impact statement prepared by—
  (a) the victim; or
  (b) someone else if the victim can not give the statement because of the victim's age or impaired capacity.

(6) The fact that details of the harm caused to a victim by the offence are absent at the sentencing does not of itself give rise to an inference that the offence caused little or no harm to the victim.

(7) To remove any doubt, it is declared that it is not mandatory for a victim to give the prosecutor details of the harm caused to the victim by the offence.

(8) The sentencing court is to decide if, and how, details of the harm are to be given to the court in accordance with the rules of evidence and the practices and procedures applying to the court.

Examples of how details of harm may be given to sentencing court—
• production of victim impact statement to the sentencing court
• victim reading details of harm aloud before the sentencing court.

(9) In this section—

victim impact statement means a written statement that—
  (a) is signed and dated; and

(b) states the particulars of the harm caused to a victim by an offence; and

(c) may have attached to it—

(i) documents supporting the particulars, including, for example, medical reports; or

(ii) photographs, drawings or other images."

[5] The *Penalties and Sentences Act* 1992 (Qld), s 15, relevantly provides:

"**15 Information on sentence**

(1) In imposing a sentence on an offender, a court may receive any information, … , that it considers appropriate to enable it to impose the proper sentence.

… ."

[6] Judicial officers are entitled to act on allegations in victim impact statements in accordance with s 132C *Evidence Act* 1977 (Qld) which relevantly provides:

"**132C Fact finding on sentencing**

(1) This section applies to any sentencing procedure in a criminal proceeding.

(2) The sentencing judge or magistrate may act on an allegation of fact that is admitted or not challenged.

(3) If an allegation of fact is not admitted or is challenged, the sentencing judge or magistrate may act on the allegation if the judge or magistrate is satisfied on the balance of probabilities that the allegation is true.

(4) For subsection (3), the degree of satisfaction required varies according to the consequences, adverse to the person being sentenced, of finding the allegation to be true.

(5) In this section—

allegation of fact includes the following—

…

(c) information given to the court under the *Victims of Crime Assistance Act 2009*, section 15;

… ."

[7] It follows from these provisions that sentencing courts may accept allegations of fact in victim impact statements which are admitted or not challenged (s 132C(2) *Evidence Act*). If the allegation is not admitted or is challenged, the judicial officer may act on it if satisfied on the balance of probabilities it is true (s 132C(3)), the degree of satisfaction varying according to the consequences adverse to the prisoner of finding the allegation to be true (s 132C(4)).

[8] The judge in reading out large swathes of the victim impact statement was, quite properly, seeking to ensure the applicants had some empathy with the victim and understood the effect of their foolish, selfish, drunken, loutish behaviour. The unfortunate complainant, a 33 year old Turkish student who had only arrived in Australia a few days beforehand, could never have guessed that the applicants wanted his jeans and shoes for suitable attire to enter a nightclub. He must have been terrified and understandably afraid that he was about to be sexually attacked by a drunken, violent group of young men.

[9] But as Fryberg J points out in his reasons in the present case, the primary judge erred in inferring from the victim impact statement that the complainant's post

traumatic stress disorder was "quite chronic" and something he was "going to continue to suffer for a long time". That finding was inconsistent with the approach required to be taken by s 132C(3) and (4). Now that the complainant has seen the perpetrators brought to justice, has received their apologies through the sentencing process, and understands that the purpose of the attack upon him was not sexual, there are equally promising prospects that he may enjoy a speedy and full recovery. It certainly cannot be concluded that his condition is chronic and long lasting, although, sadly, that is possible.

[10] Unlike my colleagues, I cannot confidently conclude that this error did not affect the judge's reasons for determining the sentences he imposed. The error requires this Court to re-sentence and in doing so I would impose a different sentence on both applicants than that imposed by the primary judge.

[11] The serious nature of their conduct is self-evident from the physical and psychological injuries suffered by the complainant. No doubt their conduct also frightened other innocent members of the public. Principles of general deterrence and community denunciation were important factors in determining the appropriate sentences.

[12] But the applicants were young men (Evans was 19 and Pearce 23) and without any significant prior convictions. They cooperated fully with the authorities. The committal proceeding was conducted completely by hand-up witness statements. They pleaded guilty at an early stage. According to their counsel's submissions at sentence, they demonstrated genuine remorse and insight into the wrongfulness of their offending and its impact on the victim. They had solid employment histories and promising rehabilitative prospects, at least if they address the binge drinking which led to them committing this offence.

[13] In my opinion, the applicants' rehabilitation and the community interest would be best served by a short custodial sentence followed by a substantial parole period. I would grant the application for leave to appeal against sentence, allow the appeal and vary the sentence imposed at first instance by deleting the parole release date fixed at 19 September 2011 and substituting a parole release date fixed after five months on 19 June 2011.

[14] **CHESTERMAN JA**: I agree that the applications should be refused for the reasons given by Fryberg J.

[15] I also agree, in particular, with what the President has written about the approach sentencing judges and magistrates should take to information contained in victim impact statements.

[16] Her Honour’s analysis shows that some qualifications are necessary to the remarks contained in *R v Singh* [2006] QCA 71.

[17] Two comments may be appropriate. The first is that it is not clear (at least to me) that the primary purpose of victim impact statements is therapeutic. Such statements may serve other purposes, such as informing the court of “details of the harm caused … by the offence”, which is often a factor relevant to the level of sentence imposed.

[18] The second comment is that there is nothing in the legislative provisions referred to by the President which require a court to be “very careful before acting on

assertions of fact made in victim impact statements." The level of care required is that described in s 132C of the *Evidence Act* 1977 (Qld), and the process described by the President.

[19] There will, of course, be occasions when the caution described in *Singh* will be appropriate. That is not to say the approach should be adopted in all cases.

[20] **FRYBERG J:** On 20 January 2011 each applicant was convicted on his plea of guilty of robbery in company with personal violence. Wall DCJ sentenced each of them to imprisonment for two years and fixed 19 September 2011 as their parole release dates. Each now seeks leave to appeal against that sentence.

[21] The offence occurred at about midnight on 1 May 2010. The victim was walking along Fern Street, Surfers Paradise. The applicants and two other men were travelling by four-wheel-drive vehicle to Surfers Paradise. Their intention was to "go nightclubbing". They were aware that Evans would not be admitted to nightclubs because of the way he was dressed, and decided to rob someone of his jeans and shoes.

[22] In Surfers Paradise they saw the complainant, a 33-year-old Turkish student, walking along Fern Street. He had arrived in Australia only four days earlier. They told the driver to stop the vehicle, alighted with one of the others and approached the complainant. One of them asked him if he knew of an address in Surfers Paradise. He replied that he did not, explaining that he had only recently arrived in the country. The three men continued to walk beside him until one of them pushed him in the back, causing him to fall and hit his head on the footpath. They then restrained him on the ground, one of them using a choke hold around his neck while the other two kicked and punched him in the chest and face. They removed his jeans and shoes. He was very scared by the attack; unsurprisingly, he believed he was about to become the victim of sexual abuse. They stole the jeans, which contained a mobile phone, keys, personal cards and a wallet containing his Turkish ID, licence and $150. They then decamped in the four-wheel-drive, which had been circling around a nearby roundabout.

[23] The attack was witnessed by passers-by who obtained the vehicle number and notified police. The registered owner was identified; he turned out to be the driver of the vehicle at the time of the robbery. Police attended his residence at 4.00 am on 2 May where they found Evans. They conducted an emergent search and found the jeans and shoes, but not the other property. Both applicants were arrested and taken to the Southport watchhouse. There they participated in formal electronic interviews and made admissions regarding their offending.

[24] The complainant suffered bruising to the forehead, chest, face, nose, right side of the head, left side of the neck and shoulder and knees, and a swollen lip. He was subsequently diagnosed by a psychologist as suffering post-traumatic stress disorder as a result of the attack. In a victim impact statement made the day before sentencing (most of which was quoted by the sentencing judge), he wrote:

> "***EMOTIONAL IMPACT***
>
> Due to the incident, I have been experiencing difficulties with sleeping, feeling unmotivated, I have nightmares, I fear! I have difficulty with concentration during my classes and my daily

> interactions. My attitude is changed to be more pessimistic towards life and I have difficulty enjoying my daily routine. I can't walk on street at night time because I fear bad things. I went to Griffith University's psychologist, Torgeir Solemdal, and he decided I have post traumatic stress disorder. Sometimes I am hearing ringing to my brain and I am afraid for that time of incident. Offenders took my jeans and that time I was so scared because I thought I was going to be sexually abused by them. I was very scared, very very.
>
> ***PHYSICAL IMPACT***
>
> After the incident I experienced blood in my urine and I still experience a ringing in my ears and occasional dizziness.
>
> ***SPECIAL CARE***
>
> I have been seen by Dr Gretchen Hitchin. Who gave a report 25 June 2010. Also I have been seen by psychologist, Torgeir Solemdal. He gave me a report as well. I went to Queensland X-ray and I have brain CT X-ray.
>
> ***IMPACT ON THOSE CLOSE TO THE VICTIM***
>
> My parents live in Turkey. I told everything to my father but I could not to say my mother. My father is very very sad. He called Turkish Embassy. Turkish Embassy said 'We can't do nothing! But please trust Australia's law". He is worrying about me very much. I met a man in Gold Coast who is President Australian Turkish Association. He knows everything about me and he is very sad too. He wrote a letter to the Australian Turkish Association about this incident.
>
> ***LIFE STYLE FINANCIAL LIFE***
>
> I become total stranger to myself and I feel the whole incident effect my physical ability as well as my emotional stability. I payed (sic) a lot of money for my language school but I couldn't go to my class. I tried to find get a job but I could not. I repeat myself but I have become someone that cannot recognize anymore. I had a dream and I had a goal about Australia but such unfortunate became an event."

[25] Both applicants demonstrated a willingness to co-operate in the administration of justice. Evans made full admissions, implicating both himself and his co-offenders. Pearce claimed to be unable to remember details of the offence due to extreme intoxication (he vomited during the interview) but it was unclear whether the intoxication resulted from drinking after the offence. They were committed for trial in the Magistrates Court on 18 August 2010 after a full handup committal. An indictment was first presented towards the end of 2010 and with the consent of the applicants, the matter was immediately listed for sentence. Their pleas of guilty were accepted by the Crown as early pleas.

[26] Evans was aged 19 at the time of the offence. He had no prior convictions, but on 6 December 2010 was convicted in the Magistrates Court for an offence of stealing committed a month earlier. Since leaving school he had been in consistent full-time employment as a roof tiler. He was said to have been grossly intoxicated at the time

of the offence. He wrote a letter to the presiding judge in which he indicated that he would like to apologise to the victim. He expressed his shame and remorse. A character reference from his grandmother evidenced the uncharacteristic nature of his offending.

[27] Pearce was aged 23 at the time of the offence. He had been found guilty of committing a public nuisance (in 2006) and of contravening a direction (in late 2007). He had been in consistent full-time employment since the age of 15, working for the same company. He too was said to have been extremely intoxicated at the time of the offence. He also wrote to the presiding judge stating that he would love the opportunity to apologise to the victim. He expressed his sorrow for his conduct and the humiliation and shame which it had brought him. Three character references from close friends and family evidenced the uncharacteristic nature of his offending.

[28] The judge accepted that the offences were quite out of character for both applicants and that their letters indicated remorse. He wrongly held that each had apologised to the victim. In fact neither had done so in the eight months between their arrest and sentencing; they had simply expressed a wish to do so in letters written to the judge the day before the sentence was passed. Neither had made restitution to the victim for the unrecovered property, although their counsel told the court that they wished to pay compensation. The judge found them both to be of good character with good prospects of rehabilitation. As already noted, he quoted at length from the victim impact statement and relied upon it. He referred to the need for a sentence which would act as a general deterrent to others, having found (as indeed was conceded by the defence) that this type of offending was prevalent on the Gold Coast and that general deterrence was an important factor in sentencing for such offences.

[29] The applicants accepted that the head sentence was within the range of the sentencing judge's discretion and that it was also within range to require them to serve some period of actual incarceration. They submitted that the sentence was manifestly excessive in that the parole release date selected was not early enough in the term. That date was eight months into (being one-third of the whole of) the head sentence. They submitted that this outcome was the result of the judge placing excessive weight first, on the victim impact statement and second, on the need for general deterrence, and his placing insufficient weight on the mitigating factors.

[30] In support of the first submission they relied upon dicta in *R v Singh*[2]. In that case all members of the court agreed on the following statement:

> "In his sentencing remarks the judge referred to the 'consequences not only to [the complainant] physically but to his mental and emotional and psychological health and the impact it has also had on his wife and children.' The information upon which his Honour made that finding came from a victim impact statement prepared by the complainant. Sentencing judges should be very careful before acting on assertions of fact made in victim impact statements. The purpose of those statements is primarily therapeutic. For that reason victims should be permitted, and even encouraged, to read their

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2 *Ibid.*

> statements to the court. However, if they contain material damaging to the accused which is neither self-evidently correct nor known by the accused to be correct (and this includes lay diagnoses of medical and psychiatric conditions) they should not be acted on. The prosecution should call the appropriate supporting evidence. It is unfair to present the accused with the dilemma of challenging a statement of dubious probative value, thereby risking a finding that genuine remorse is lacking, or accepting that statement to his or her detriment."

[31] Two points should be made about that statement. First, it neither asserts nor implies that a judge may not act on facts asserted in a victim impact statement. It states that before doing so sentencing judges should be very careful. That means that the judge should consciously consider the facts asserted and assess them with care. Second, the statement was intended to operate to prevent injustice or unfairness to an accused. It was not intended to relieve counsel of their duty to prepare and advocate their client's case. In the absence of an application for an adjournment, the court will assume that counsel on both sides are properly prepared for and ready to proceed with sentencing. That implies that they have made themselves aware of the facts which their opponents will assert and have made a judgment about how to deal with each fact. If defence counsel believes his client is exposed to unfairness of the sort referred to, it behoves him or her to speak to the prosecutor before the day of hearing and request that the Crown provide appropriate supporting evidence in conformity with what was said in *Singh*. If that is not done the sentencing judge should be made aware of any dilemma which the prosecution's approach poses to the defence.

[32] A difficulty with the submission in the present case is that the evidence that the victim had been diagnosed with post-traumatic stress disorder as a result of the attack did not come only from the victim impact statement. It was contained in the schedule of facts tendered without objection by the prosecutor. That statement was not challenged by the defendants below. The victim impact statement enlarged upon it, but only by spelling out that the victim had suffered in a way commonly encountered among victims of that disorder. Self-evidently, it was likely to be correct. Moreover the statement asserted that the victim had been given reports by a doctor and by the psychologist. Given the prosecution's reliance on the fact of the diagnosis, the defence was entitled, if it wished, to see these reports in order to evaluate whether to challenge the existence of the diagnosis or the extent of the symptomatology. There is no reason to think that they would not have been made available to the defence had they been asked for. They were not sought. One can only infer that the defence accepted the schedule and the impact statement as correct, without the need to check them. This is not a case where the defendants were put in the unfair position referred to in *Singh*.

[33] After quoting at length from the victim impact statement, Wall DCJ said:

> "[J]udging from his victim impact statement, [the victim] is going to continue to suffer for a long time. His condition would appear to me, judging from that statement, to be quite chronic."

It was submitted that this conclusion was unsupported by the evidence. That submission is correct. There is a limit to the extent to which judges can draw on their own experience, in other cases or elsewhere, to reach conclusions of fact for

the purpose of sentencing. Moreover, in this case it was probably too early for any such prognosis to be attempted. However I am satisfied that this error made no significant difference to the sentence which his Honour imposed. In any event, if I were obliged to resentence the applicants, I would not impose a sentence any less severe than that imposed by his Honour.

[34] Nor do I think the judge gave undue weight to considerations of general deterrence. The applicants accepted his finding that the offence was prevalent and that general deterrence was an important factor in sentencing for such offences. They were right to do so. Notwithstanding the age and lack of substantial criminal history of the applicants, his Honour made no error in this regard.

[35] The respondents submitted that the applicant was simply asking this court "to take a different construction of the various competing considerations" from the sentencing judge. That submission is correct. In effect the applicant seeks only to vary the period to be served before release on parole by four months in a two year sentence. Even if that is capable of being sufficiently long to make the sentence manifestly excessive, excess has not in fact been shown in this case. The mitigating factors were recognised by release on parole one-third of the way through the period of the sentence. The factors were substantial but in my judgment recognising them as Wall DCJ did fell within the ambit of his Honour's discretion.

[36] An appeal would have no prospects of success. The applications for leave should be refused.