SUPREME COURT OF QUEENSLAND

CITATION:	*R v Whittaker* [2011] QCA 237
PARTIES:	**R** **v** **WHITTAKER, Ziyaad** (applicant)
FILE NO/S:	CA No 170 of 2011 DC No 601 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	District Court at Mackay
DELIVERED ON:	16 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	26 August 2011
JUDGES:	Margaret McMurdo P, Chesterman JA and North J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for an extension of time to appeal against sentence is refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICES OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where the applicant pleaded guilty to doing grievous bodily harm with intent – where the applicant was sentenced to eight years imprisonment with a declaration that the offence was a serious violent offence under Pt 9A *Penalties and Sentences Act* 1992 (Qld) – where the applicant seeks an extension of time to appeal against sentence on the grounds that the sentence imposed was manifestly excessive and did not reflect his post-traumatic stress disorder and other mitigating features – whether the application for an extension of time should be granted *Criminal Practice Rules* 1999 (Qld), r 70(3) *Penalties and Sentences Act* 1992 (Qld), Pt 9A *R v Bruce King*, unreported, District Court of Queensland, Durward SC DCJ, 29 September 2010, distinguished *R v Douglas* [2004] QCA 1, considered *R v Hansen* [2008] QCA 351, cited *R v Nguyen* [2006] QCA 542, considered

COUNSEL: The applicant appeared on his own behalf
D L Meredith for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The applicant, Ziyaad Whittaker, pleaded guilty in the Mackay District Court on 5 November 2009 to doing grievous bodily harm with intent on 8 March 2009. On 3 December 2009, he filed an application for leave to appeal against sentence but on 18 February 2010 he filed a notice of abandonment which was signed by his then lawyer. On 24 June 2011, he filed an application for an extension of time within which to apply for leave to appeal against sentence. That application should be treated as an application to set aside the abandonment and reinstate the application for leave to appeal under *Criminal Practice Rules* 1999 (Qld) r 70(3). The relevant considerations in deciding whether to grant the application are the reason for the abandonment; the reason for the delay in progressing the matter; and the prospects of success of any appeal: see *R v Hansen*.[1]

[2] The applicant is now self-represented. In his signed outline of argument and in his oral contentions, he gave the following reasons in support of his application. His lawyers lodged an application for leave to appeal within time but they were not committed to his interests. His parents were handling his appeal but as they could not afford the quoted cost, he abandoned it. He has only recently received advice that he had promising grounds to appeal. He emphasised that at the time of the offence he was suffering from post-traumatic stress disorder arising out of horrific events during his childhood in South Africa where he was badly bashed. He was treated for this prior to his sentence. His lawyers at his sentencing said they would organise a psychological evaluation but did not. Whilst in prison he had been treated for post-traumatic stress disorder. He believes this disorder was the reason he committed the offence and warranted a much lesser sentence than that imposed. He read out a lengthy statement from his mother giving her view that his post-traumatic stress disorder was the reason for his offending.

[3] If granted an extension of time, his grounds of appeal would be that the sentence was manifestly excessive; the judge did not place sufficient weight on mitigating factors; the judge erred in declaring the offence a serious violent offence under Pt 9A *Penalties and Sentences Act* 1992 (Qld) and did not adequately outline the reasons which justified the declaration.

[4] In order to determine whether there is merit in the application, it is necessary to briefly review the sentencing proceeding.

[5] The applicant was born in Johannesburg, South Africa, and was 21, both at the time of the offence and at sentence. He had a minor criminal history. He was fined without conviction for public nuisance in 2007 and for possession of a knife in a public place in 2008.

[6] The agreed schedule of facts[2] disclosed the following. The complainant was a 30 year old security officer at a Mackay night club. At about midnight on 8 March 2009, the former partner of the applicant's brother and her male friend were at

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1 [2008] QCA 351.
2 Ex 2.

a Mackay bar. The applicant and his brother were also present. The applicant punched the male friend in the face. Security officers ejected the applicant, his brother and the male friend. As the applicant's brother threw a glancing punch at the male friend, security officers allowed him back inside the bar for his own safety. The complainant was a security officer positioned at the front door of the bar. The former partner came outside to talk to the applicant's brother. He pushed her to the ground. The complainant and another security officer came to her aid. The applicant and his brother abused the security guards, calling one a "kiwi cunt" and the complainant a "little fat cunt". During an ensuing verbal altercation, the complainant heard the applicant say "We're coming back to get you. You fat cunt!"

[7] The complainant finished work at about 3.00 am and walked into an alley where his car was parked. The applicant pulled a hood over his head to conceal his identity and followed the complainant into an alley. He rushed up behind the complainant and stabbed him twice in the left upper side of his back with a sharp instrument. The complainant was in enormous pain. He turned and faced the applicant and immediately identified him as the person with whom he had a verbal altercation earlier in the night. The applicant ran from the scene.

[8] Two members of the public assisted the complainant and contacted the police and ambulance. He was taken to hospital where he remained for two weeks. His lung had collapsed and he required surgery.

[9] Two days later, on 10 March 2009, the applicant voluntarily participated in an interview with police. He admitted his involvement but said he could not recall the events of 8 March because he was too intoxicated. He was later arrested and charged.

[10] The prosecution had not obtained any victim impact statement but a witness statement from the Acting Director of Surgery at the Mackay Base Hospital was tendered. It noted that the complainant's post-operative time in hospital was complicated by a recurrence of the pneumothorax and the drain slipping. Once the drain was repositioned, he made an unremarkable recovery. He was seen in outpatients on 6 April 2009 when he was still having trouble with breathing but was making good progress. He was again reviewed on 7 May 2009 when the wounds had healed and he was able to take a full inspiration with no hindrance.

[11] The prosecutor at sentence urged the judge to impose a sentence of eight to ten years imprisonment but if less than 10 years a declaration should be made that the offence was a serious violent offence, relying on *R v Nguyen*.[3]

[12] Defence counsel made the following submissions at sentence. The applicant was only 21 years old. His mother was in court to support him. He lived with his parents in Mackay where the family had lived since 2004. The applicant's older brother was married to the woman at the centre of the altercation at the night club. Their relationship had continued since, although at the time of the offence they were having difficulties. The applicant had a steady work history since leaving school and during times of unemployment worked three days a week as a volunteer. The applicant had a life changing event occur in South Africa before he came to Australia. He was attacked on his way to school by three men and stabbed in the face with a broken bottle. He was left with a very large scar down one side of his

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3 [2006] QCA 542.

face and his nose and eye socket were broken. His mother reported that, from that time, he has never been the same. He became broody and angry.

[13] Whilst accepting the agreed schedule of facts, defence counsel noted that there were some racial taunts made towards the applicant. He had consumed alcohol, ecstasy and LSD and this affected his judgment. He pleaded guilty at the committal proceedings which were by way of a full hand up. This showed a high degree of remorse.

[14] Counsel sought to distinguish *Nguyen* by the fact that, unlike Nguyen, the applicant had experienced this life changing event in South Africa. She suggested that the case of *R v Douglas*,[4] where a sentence of six years imprisonment was imposed for the offence of grievous bodily harm with intent, gave a better indication of the sentencing range.

[15] The judge told counsel that she did not consider a six year sentence was sufficient, especially as the applicant returned after two and a half hours specifically to stab the complainant.

[16] In sentencing, the judge emphasised the seriousness of the offence of grievous bodily harm with intent and how fortunate it was that the complainant did not die. General deterrence and denunciation were important considerations in sentencing the applicant, who had armed himself with a knife and stabbed the complainant some hours after the initial incident which upset him. *Nguyen* was a comparable authority. *Douglas* was distinguishable. The judge sentenced the applicant to eight years imprisonment and declared the offence a serious violent offence.

[17] The applicant complained that his lawyers at sentence did not obtain a psychological report about his post-traumatic stress disorder. It seems unlikely that a psychological report would have added anything of weight to the detailed submissions made by his counsel.

[18] In his written and oral submissions to this Court, the applicant put forward a slightly different version to the agreed facts. He claimed the complainant invited him "back to finish it" at 3.00 am and called him a "paki basted" and threatened to come after him. In his intoxicated state it would have taken him a long time to walk home and return. He denied he put a hood over his head just before the attack; it was cold and raining. He did not conceal his identity in any way and the complainant recognised him. These matters do not take away from the serious aspects of the offending identified by the trial judge, and in any case the applicant is bound by the agreed schedule of facts tendered at sentence.

[19] He emphasised that since he has been in prison he has been seeing a psychologist who has identified that when he feels threatened he panics and loses rational thought processes because of what he went through as a young boy. He read out information about the general condition of post-traumatic stress disorder to the Court. He submitted that he was making good progress in controlling his impulses and has kept out of high risk situations and completed many courses. He has commenced a Bachelor of Science with a Psychology major. He hoped to help young adults who suffer from mental illness through his personal experience. These matters which have occurred since the sentence may be relevant to a future parole

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[4] [2004] QCA 1.

application, but they do not demonstrate that the sentence imposed was manifestly excessive.

[20] He referred the Court to a case of *R v Bruce King* before Judge Durward in the Mackay District Court on 29 September 2010. King was sentenced to four and a half years imprisonment suspended after 18 months with an operational period of four and a half years. The difficulty for the applicant is that King pleaded guilty, not to grievous bodily harm with intent which is punishable by a maximum of life imprisonment, but to grievous bodily harm without any element of intent which is punishable by a maximum of 14 years imprisonment. It is not a relevant comparable sentence to the applicant's case.

[21] The applicant has not provided a persuasive explanation either as to why he abandoned his application for leave to appeal, or for the delay in bringing this application to set aside the abandonment. More importantly, his prospects of success in any application for leave to appeal against sentence are not promising. The sentence imposed was a severe one but the offence he committed was deserving of a very significant punishment. The maximum penalty was life imprisonment. The sentence imposed, including the declaration that the offence was a serious violent offence, is supported by *Nguyen*. The sentence adequately reflected the mitigating features: the troubling incident in South Africa and its effect on him, his youth, his plea of guilty at the committal, his remorse and his rehabilitative prospects. It was not manifestly excessive. It follows that the applicant has no prospect of success on an appeal. The applicant has failed to demonstrate that the notice of abandonment should be set aside and his appeal re-instated.

[22] It is commendable that he is making efforts to educate himself and improve his life with a view to helping others in the future. If he can deal with his substance abuse and his post-traumatic stress disorder following an attack on him in his youth in South Africa, and if he continues with his rehabilitation, he will be a promising prospect for release on parole when he becomes eligible.

[23] The application for an extension of time to appeal against sentence must be refused.

[24] **CHESTERMAN JA:** I agree with the President.

[25] **NORTH J:** I agree that the application to set aside the abandonment and reinstate the application for leave to appeal should be refused for the reasons given by the President.