SUPREME COURT OF QUEENSLAND

CITATION:	*R v Betts* [2011] QCA 244
PARTIES:	**R** **v** **BETTS, Daniel Patrick** (applicant)
FILE NO/S:	CA No 152 of 2011 DC No 78 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	20 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	2 September 2011
JUDGES:	Muir JA and Margaret Wilson AJA and North J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application 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 – where the applicant pleaded guilty to one count of causing grievous bodily harm – where the applicant was playing golf with the complainant – where the applicant's form was poor and he became agitated – where the applicant slammed the golf club then spun 180 degrees and threw it – where the complainant was struck on the head and knocked out – where the complainant was left permanently and severely disabled – where the case proceeded on the basis of criminal negligence in the handling of the golf club – where the applicant was remorseful and pleaded guilty at an early stage – where the applicant was sentenced to two years imprisonment suspended after six months for an operational period of two years – whether the sentence was manifestly excessive *Criminal Code Act* 1899 (Qld), s 289 *R v Clark* (2007) 171 A Crim R 532; [2007] QCA 168, considered *R v Martin* [2002] QCA 201, considered *R v Wing* [2007] QCA 138, considered

COUNSEL:	S T Courtney for the applicant B J Power for the respondent
SOLICITORS:	Chelsea Emery & Associates for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** I agree that the application for leave to appeal against sentence should be refused for the reasons given by Margaret Wilson AJA.

[2] **MARGARET WILSON AJA**: On 6 June 2011 the applicant pleaded guilty to one count of causing grievous bodily harm. He was sentenced to two years imprisonment suspended after six months for an operational period of two years.

[3] The applicant seeks leave to appeal against the sentence on the ground it was manifestly excessive. He has now served almost three months of the sentence. He asks the court to grant his application, to allow his appeal and to suspend the sentence forthwith.

The facts

[4] The offence was committed on 13 December 2009.

[5] The applicant was playing golf with the complainant, the complainant's father and another man Schultz. The applicant's two small boys were with them. The applicant, the complainant and the complainant's father were drinking alcohol during the round. The applicant's form was poor, and he became increasingly agitated as the round progressed, and he began swearing and banging his club on the ground when he played a bad shot. They reached the sixth hole tee. By this time the complainant had ceased playing because he had lost all his golf balls. Their two golf buggies were parked off to the right-hand side of the tee (facing the pin), the first of them about five metres from the tee and about two metres in front of the second. The complainant was standing on the other side of the buggies, talking to the defendant's children who were seated in the front buggy. The complainant's father was making practice swings to the rear of the tee, with his back to the tee.

[6] The applicant and Schultz were at the tee when the applicant positioned his ball. He struck the ball with a wedge, and yelled, "Fucking hell." He slammed the golf club into the green a couple of times, and then spun 180 degrees and threw it. When he let it go, he was looking towards the bench seat at the rear of the second buggy. The club flew through the air at shoulder height towards the first buggy where the children were sitting. At that moment the complainant was on the other side of the buggy bending over to pick up something beside it. A witness estimated that the complainant was about six metres away from the applicant. The club went over the heads of the children, missing them by about four inches, and struck the complainant on the head.

[7] The complainant was immediately knocked out. His father and the applicant applied first aid while Schultz went for help. Ambulance officers arrived about 10 minutes later and transported the complainant to hospital. He was flown from the first hospital to Royal Brisbane Hospital for specialist treatment.

[8] The complainant was aged 24 when he was injured. He was a qualified carpenter and a qualified chef, working two jobs. His quality of life was very substantially and irreparably diminished by the applicant's conduct. He sustained an extensive traumatic brain injury that was life threatening. The injuries were a depressed skull fracture, underlying intra cerebral contusions, and a traumatic subarachnoid haemorrhage. This in turn caused intracranial pressure. He had to undergo two operations, and was hospitalised for about three months. Despite intensive rehabilitation therapy, he was left permanently and severely disabled. He was unable to read or write, to work, to drive a car or to take part in recreational activities, with little prospect of improvement.

Culpability

[9] The applicant pleaded guilty to the offence of causing grievous bodily harm, which counsel for the respondent correctly described as "an outcome-based offence". In sentencing an offender for such an offence, the Court must assess his or her degree of criminality. Whether the grievous bodily harm was intentionally inflicted or whether it was the result of criminal negligence is very relevant in the assessment of criminality.

[10] The case proceeded on the basis of the applicant's criminal negligence in the handling of the golf club – that he failed to take care in his handling of the club, swinging it with great force and then releasing it in a fit of anger.

[11] Section 289 of the *Criminal Code* provides:-

> "**289 Duty of persons in charge of dangerous things**
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> It is the duty of every person who has in the person's charge or under the person's control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health, of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger, and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty."

[12] In *R v Clark*[1] Keane JA said:-

> "... a contravention of the duty imposed by s 289 does not depend upon an intention to cause harm: the gravamen of the contravention lies in the failure to use 'reasonable care and take reasonable precautions to avoid' danger to life, safety and health. Whether there has been a failure in this sense on the part of an accused person does not depend upon an intention to cause harm but upon a failure to take reasonable steps to avoid danger. What is reasonable in this context inevitably depends upon the nature of the danger and the extent of the opportunity of the accused person to ensure that the danger does not lead to injury to life, safety or health. In some cases, the danger will be extreme and obvious; in such cases, deliberate and active

[1] [2007] QCA 168, [23].

> diligence will be required to discharge the duty of reasonable care imposed by the section. In other cases, the danger may be relatively slight or remote; in such cases, it may be that only conscious disregard of the danger will amount to a failure to exercise reasonable care worthy of punishment as a crime."

[13] In the present case the sentencing judge said:-

> "It's my view that the degree of negligence here is a high one in that you clearly threw the club with some force in the direction of people. It has obviously had the serious consequences on the complainant that I've described. It seems to me here, the degree of negligence is somewhat less than in *The Queen v. Clark*[2] because of the duty of care that was on that accused in relation to the high risk activity the complainant was undertaking. However, it also seems to me here that actual time in custody is warranted to recognise the serious consequences that your conduct has had upon the complainant."

[14] Clark was an employee of a tour company and the complainant's "guide" whilst she was on a "flying fox" ride operated by the tour company. The rider operated between platforms built around the trunks of high trees in the rainforest. Two steel cables ran between the platforms. Riders slid between the platforms on a sling and pulley mechanism. It was Clark's duty to secure the rider to the running slings by locking a Karabiner clip at the rider's waist. He was responsible for securing the attachment of the complainant's safety harness before she moved off the platform, by ensuring that the lock was closed at her waist before he told her to move off the platform. Clark failed to securely attach her harness to enable her to descend in safety, and she fell from the cables while attempting to slide down from the platform. Her injuries included brain damage and fractures of her ribs and pelvis.

[15] Clark was charged with doing grievous bodily harm on the basis of criminal negligence: that he failed to use reasonable care and to take reasonable precautions in the management of the flying fox to avoid danger to her life, safety or health in that he failed to securely attach her harness to enable her to descend in safety. He was found guilty by a jury. He was sentenced to two years eight months imprisonment and ordered to be released on parole on the date which was effectively half of the sentence. His appeal against conviction and application for leave to appeal against sentence were unsuccessful.

[16] In *Clark's* case the complainant was in the care of the applicant: he was solely and directly responsible for her safety in that it was his responsibility to ensure she was safely buckled up. Keane JA described the nature of his duty in this way:–

> "The complainant was exposed to obvious danger of very serious harm if a simple precaution was not taken for her safety. The appellant was responsible for taking that precaution which was necessary to ensure the safety of the complainant. To say this is not to say that the appellant was under an absolute legal duty to ensure the safety of the complainant. The appellant's responsibility was to exercise reasonable care, but this responsibility was easily discharged so long as he was attentive to it. Reasonable care for the complainant required that he be attentive so as to ensure that she was

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[2] (1989) 44 A Crim R 320, 325-326.

> buckled up. There was no reason at all why he should not have given the complainant the necessary attention: he was not subject to any distractions; and he was under no time pressure in relation to the discharge of his responsibility. In the light of these circumstances, it is simply wrong to say that the appellant's failure was merely the matter of a moment's inattention."[3]

[17] The degree of criminal culpability of an offender must be judged in light of the circumstances of the particular case. Here, the applicant vented his anger and frustration at his own inadequacy without paying any regard to the risk of inflicting injury on those in his golfing party. It was grossly irresponsible and self-indulgent behaviour which caused grave injury to the complainant. I concur with the sentencing judge that the degree of negligence was high.

[18] During submissions before the sentencing judge there was mention of an earlier incident in which the applicant had hit his father with a golf club. But any significance that might have had was diffused by his counsel's description of the incident. The applicant was aged 11 or 12 at the time. He was taking a practice swing when his father walked behind him, and he managed to collect his father without causing any significant injuries.

[19] Had the case proceeded on the basis that the applicant deliberately intended to hurt the complainant, his culpability would have been greater, and he could have expected a harsher sentence.

[20] I do not accept the submission of the applicant's counsel that the sentencing judge gave too much weight to the injuries suffered by the complainant and insufficient weight to the nature of the offending and matters of mitigation. As Keane JA said in *Clark*:-

> "…where culpable negligence has caused grave injury, the function of vindication which the sentencing process performs justifies the imposition 'of real punishment'. Courts cannot and should not ignore the serious harm to the victim and the suffering endured by her family. The gravity of the injury inflicted upon a victim of crime will usually be relevant to the level of sentence; in this case, that consideration was compelling."[4]

Co-operation and plea of guilty

[21] The applicant attempted to minimise what had occurred, initially maintaining that the club had slipped out of his hand. But he admitted to the complainant's father and his girlfriend that he had thrown the club. He participated in a record of interview with police and returned to the scene with them, where he ultimately admitted throwing the club.

[22] The applicant was remorseful for what had occurred. He visited the complainant and apologised to him soon after the incident, although there was little contact between them thereafter.

[23] He pleaded guilty at an early stage.

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3 [2007] QCA 168, [27].
4 [2007] QCA 168, [46].

Antecedents

[24] The applicant was aged 26 at the time of the offence and 27 at sentence. After leaving school at about 15, he was in full-time employment as a tyre fitter and then a labourer for most of his adult life until sentenced. At sentence he was working three days a week as a gardener at a retirement village.

[25] The applicant had a criminal history consisting principally of minor drug matters, a wilful damage charge and some traffic matters. He had been placed on probation for traffic offences, mainly disqualified driving and driving under the influence of alcohol, on 2 April 2009, and so was on probation at the time of the commission of this offence. A probation and parole officer reported that he had satisfactorily complied with the probation order.

[26] The two young boys were the children of a previous relationship. For the four years leading up to sentence, he had sole care of them and tried to work to support them. They were difficult to control. The sentencing judge was told that his mother, who worked, would look after them if he went to prison. His Honour reduced the time to be served in actual custody in recognition of his personal responsibilities.

Comparable cases

[27] In *R v Martin*[5] the applicant pleaded guilty to assault occasioning bodily harm and was sentenced to 12 months imprisonment suspended after three months with an operational period of two years. The offence was committed at a wedding reception where a physical altercation occurred between the groom and his brother. The applicant was their mother. She was angry with the groom for being involved in the altercation at his wedding. She threw a beer glass towards him. It missed him but hit the complainant, the bride's 24 year old sister and bridesmaid. An appeal against the sentence was allowed to the limited extent of ordering that it be fully suspended. McMurdo P said:-

> "Unsurprisingly, there are no comparable cases to match the peculiar combination of facts here where the applicant, affected by alcohol, in emotionally tense circumstances involving an altercation at the end of her son's wedding night, impulsively threw a glass in the direction of her bridegroom son who was abusing her; she inadvertently hit and significantly injured the complainant."

[28] Her Honour said that the sentencing judge had erred in concluding that an actual prison sentence was mandatory in the circumstances. She considered that the unique facts of the case, combined with the applicant's prior good history and early plea of guilty, warranted a fully suspended sentence.

[29] The present case is more serious than that of *Martin*. The injuries inflicted on the complainant were much more grave. Moreover, it was more than an impulsive act in that the applicant's frustration and anger had been building up as the round progressed.

[30] I have already discussed *Clark's* case. The sentencing judge assessed the degree of negligence in the present case as somewhat less than Clark's. In all the

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5 [2002] QCA 201.

circumstances, that assessment was generous to the applicant. But on the basis of that assessment, his Honour fairly reflected the disparity in the lesser sentence he imposed on the applicant. The effect of the sentence in *Clark's* case was that the offender would have to serve one year and four months before becoming eligible for parole, in contrast to the present applicant, who will have to serve only six months actual imprisonment, with the balance of his sentence being suspended.

[31] In *R v Wing*[6] the degree of criminality was greater than in the present case, but the harm caused by the offending was less. There the offender pleaded guilty to three offences – dangerous operation of a motor vehicle, going armed in public so as to cause fear, doing grievous bodily harm, and unlawful possession of a weapon. He was a 23 year-old man with no criminal history. He drove into a country town with some friends to go drinking with them. There was an old single barrel shotgun in the car, to be used to shoot any pigs or wallabies they happened to encounter on their way. After drinking for several hours, the offender proceeded to execute some "burn-outs" and "circle-work" in the car – which was the basis of the first offence. Hotel patrons watched this, and one of them threw a beer bottle at the car. Thereupon the offender, while outside the car, got the shotgun out and pointed it at the ground, not at anyone in particular. This constituted the offence of threatening violence. Then the offender drove off and parked in front of another hotel a short distance away. Two men and a woman walked towards the car. One of the men saw the shotgun barrel poking out of the driver's window and tried to knock it out of the way. The offender was sitting with his finger on the trigger guard when this happened. The gun discharged and the pellets struck the woman on the thighs. She had to undergo surgery to remove the pellets, followed by skin grafts, and was left with substantial scarring on the inner side of both her legs. The offender pleaded guilty to causing grievous bodily harm on the basis of criminal negligence: he did not deliberately discharge the shotgun, but he was grossly negligent in not taking steps to determine whether or not it was loaded and in the handling of it. A head sentence of four and a half years imprisonment was imposed for the grievous bodily harm, with lesser concurrent sentences for the other offences. His parole eligibility was fixed at one and a half years from the commencement of the sentence. The Court of Appeal refused the offender leave to appeal against the sentence.

[32] In the present case the sentencing judge carefully weighed all of the circumstances in determining the sentence to be imposed on the applicant. I do not think he erred by placing undue weight on the extent of the harm caused by the offending conduct. Nor do I think that the sentence was manifestly excessive.

[33] I would refuse the application for leave to appeal.

[34] **NORTH J:** I agree that the application for leave to appeal against sentence should be refused for the reasons given by Margaret Wilson AJA.

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6 [2007] QCA 138.