SUPREME COURT OF QUEENSLAND

CITATION:	*R v Neilson* [2011] QCA 369
PARTIES:	**R** **v** **NEILSON, Ronald Anthony** (applicant)
FILE NO/S:	CA No 116 of 2011 DC No 381 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	16 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	30 November 2011
JUDGES:	Muir JA, Margaret Wilson AJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence granted.** **2. Appeal against sentence allowed.** **3. Sentence varied by deleting the orders that the sentences are cumulative and fixing the parole eligibility date at 9 May 2015.** **4. The date the applicant is eligible for parole fixed at 5 May 2013.** **5. Pursuant to s 159A of the *Penalties and Sentences Act* 1992 it is declared that three days spent in pre-sentence custody between 6 May 2011 and 8 May 2011 is taken to be imprisonment already served under the sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted after trial of grievous bodily harm and armed robbery, in company, with personal violence – where the applicant was sentenced to four years' imprisonment for each offence with the sentences to be served cumulatively – where the applicant was 17 years old at the time of the offences and showed no remorse – whether sentence was manifestly excessive due to weight placed on the need for deterrence

Penalties and Sentences Act 1992 (Qld), s 9

R v Bryan; ex parte A-G (Qld) (2003) 137 A Crim R 489; [2003] QCA 18, considered
R v Price [2006] QCA 180, considered
R v Timoti [2003] QCA 96, considered
R v Tomkins & Gunning [2001] QCA 68, considered

COUNSEL: J J Allen, with J Lodziak, for the applicant
S P Vasta for the respondent

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

[1] **MUIR JA:** I agree with the reasons of Mullins J and with the orders she proposes.

[2] **MARGARET WILSON AJA**: I agree with the orders proposed by Mullins J and with her Honour's reasons for judgment.

[3] **MULLINS J:** The applicant was convicted after trial on 6 May 2011 of one count of grievous bodily harm and one count of armed robbery, in company, with personal violence. He was sentenced to four years' imprisonment for each offence with the sentences to be served cumulatively and a parole eligibility date was set at 9 May 2015.

[4] The applicant applies for leave to appeal against the sentences on the ground that they are manifestly excessive.

The circumstances of the offences

[5] The offences were committed on 4 July 2009 when the applicant was 17 years six months old.

[6] The two complainants for the offences were also 17 years old and were out with friends, walking along a street at Southport at about 9:30 pm. The applicant was with another group of young people. The complainants' group divided, as they noticed the applicant's group approaching.

[7] A common thread in the evidence given at trial was that the applicant's group began grabbing at the bags of the girls in the complainants' group and the complainants began to defend themselves and the girls in their group. Ultimately, the complainant for the count of grievous bodily harm (the first complainant) was struck in the region of his left eye by the applicant wielding what appeared to be a metal pole (from a shopping trolley). He suffered multiple facial fractures. The applicant accepted the injuries amounted to grievous bodily harm on the basis that, without treatment, there would have been some permanent effects from the injuries.

[8] The second complainant was helping the girls, when he was hit and fell to the ground. As the second complainant was getting to his feet, his mobile telephone and wallet were taken by the applicant. The second complainant was able to snatch his telephone and wallet back immediately from the applicant. He was then struck on his right collar bone. That was followed by another strike to his left hand, as he tried to shield his face, which he described as dislocating his hand. The strikes to

the second complainant's collar bone and hand were inflicted by the applicant with what appeared to be the metal pole. Another male in the applicant's group took the second complainant's cap, and the applicant and those in his group ran off.

[9] The applicant gave evidence at the trial in which he admitted being present at the time and place of the assaults on the complainants, but denied that he was the one who had struck the complainants with the metal pole and identified two of his companions as the assailants.

The applicant's antecedents

[10] The applicant was 19 years old when sentenced. Apart from two breaches on 19 and 26 February 2010 of the bail which related to the subject offences and for which no convictions were recorded, the applicant had no relevant prior criminal history at the time of sentencing.

The sentencing

[11] A victim impact statement from the first complainant was tendered at the sentencing. The first complainant was hospitalised after the attack and had surgery for three fractured zygomatic bones, requiring 10 titanium plates permanently in his skull. He experienced much pain during his hospitalisation and recovery and now suffers only from occasional minor pain. He has become cautious of people who are strangers. There was no victim impact statement from the second complainant.

[12] The prosecutor who appeared on the sentencing described the offending as "a serious example of this sort of violence, which unfortunately is becoming prevalent these days." It was submitted that a range of penalty for the totality of the criminality was around the range of four to five years' imprisonment. The learned sentencing judge disagreed with that submission on the basis that range was not appropriate for two separate offences with two separate victims.

[13] Counsel who appeared for the applicant on the sentencing (who was not counsel who appeared on this application) submitted that the conversion of the property that was the subject of the armed robbery was for a very short time, as nothing other than the cap was missing permanently. Two character references were tendered on behalf of the applicant. The applicant's counsel conceded that the sentencing judge was "entitled to take into account local issues," but submitted that would be covered by an appropriate sentence for the offences.

[14] In respect of the fact that the applicant had to be sentenced for the two offences, the applicant's counsel submitted:

> "It really should be, in many respects, treated as one, even though there are two separate offences. It's one continuing course of conduct, which has a pattern to it. There's no doubt about that. So my submission is that when fixing what you consider to be the appropriate sentence, including the aspects of deterrence, which you're entitled to take into account and should take into account, I would ask your Honour not to, in a sense, use him as too much of an example."

[15] In imposing the sentences, the sentencing judge noted that the maximum sentence for the offence of unlawfully doing grievous bodily harm is 14 years' imprisonment

and the maximum sentence for armed robbery with circumstances of aggravation is life imprisonment.

[16] The sentencing judge rejected the description given by one of the applicant's referees of the applicant as a good and caring young man and observed:

> "You engaged in a savage brutal attack on two young boys who had done you no harm whatsoever. They were going about their lawful business. Members of the community must be protected from people like you. People are entitled to walk along the footpath in Southport at whatever hour they like without being confronted by a group of thugs consisting of yourself and other people. Public places are not your property. They are not to be regarded as unsafe because of people like you."

[17] The sentencing judge referred to the serious injuries caused to both complainants, but noted that they appeared to have recovered from the physical injuries.

[18] The sentencing judge described the applicant's defence as "fanciful" and observed that the applicant had shown no remorse whatsoever. The sentencing judge agreed with the prosecutor's description that "serious violence was involved." The sentencing judge then stated:

> "This type of activity and conduct is far too prevalent on the Gold Coast and Judges must impose sentences which hopefully will deter others from committing such offences."

[19] The fact that the applicant had obtained the second complainant's wallet and mobile telephone for a short time only was, in the sentencing judge's view, "little consolation in all of the circumstances." The sentencing judge repeated the view that he had expressed during submissions that even though the offences occurred within a short space of time and arose out of one incident, there were two victims involved and two offences.

[20] The sentencing judge then quoted from three Court of Appeal decisions that emphasised the importance of deterrence in sentencing for random acts of violence in public places: *R v Mikaele* [2008] QCA 261 at [29]-[31]; *R v Tupou; ex parte A-G (Qld)* [2005] QCA 179 at p 10; and *R v Bryan; ex parte A-G (Qld)* [2003] QCA 18 at [30].

[21] The sentencing judge noted that the principle in s 9(2) of the *Penalties and Sentences Act* 1992 that prison should be regarded as being the last resort and concluded:

> "I consider you should be punished for each offence and I propose to make the periods of imprisonment cumulative and the overall sentence I have arrived at, in my view, takes into account the totality of your offending and I also have regard to your age."

Whether the sentences are manifestly excessive

[22] It was submitted on behalf of the applicant that the sentencing judge placed too much weight on the deterrent effect of the sentence and not enough weight on the youth of the applicant at the time that he committed the offences which was also a relevant consideration, even though s 9(3) and s 9(4) of the *Penalties and Sentences Act* 1992 applied to the offences. It was pointed out that a comparison of

the applicant's effective head sentence of eight years' imprisonment with the comparable decisions that had been referred to the sentencing judge also supported the submission that the sentence imposed on the applicant was manifestly excessive.

[23] One of those comparable decisions was *R v Tomkins & Gunning* [2001] QCA 68 where both offenders had been found guilty after trial of robbery in company and unlawfully doing grievous bodily harm. Both were 24 years old at the time of the offences. As Gunning had a more serious and relevant criminal history, the sentence of Tomkins was the comparable sentence for the purpose of this matter. He had prior convictions for dishonesty and drug offences and had been sentenced previously to short periods of imprisonment. The victim who was much older than the offenders and partially inebriated had been assaulted and badly beaten in an alleyway by the offenders with whom he had been drinking at a nearby hotel. His money and a keycard were stolen. He suffered a number of very bad injuries to the head, including a broken jaw, and was left with a permanent disability as a result of the broken jaw. There was no weapon involved. Tomkins was unsuccessful in seeking leave to appeal against the sentence of five years' imprisonment. Because Tomkins was older than the applicant with numerous prior entries in his criminal history, his offending must overall be viewed as more serious than that of the applicant.

[24] *Bryan* was a much more serious example of the offence of grievous bodily harm than the applicant's offending. The offender was a complete stranger to the complainant who was walking at night in the city centre with his girlfriend when they were targeted by the offender and his friends who followed them and yelled abuse. A fight ensued, but when the complainant seemed to get the upper hand, the offender took out a small pocket knife and slashed the complainant in the chest causing an extensive wound in the lower left chest that extended through skin and muscle and exposed the complainant's heart and lung. The injuries were life threatening and the complainant was left with areas of numbness in respect of his lower arm and back. The offender who was 21 years old at the time of the offence and who pleaded guilty had his sentence on appeal by the Attorney-General increased to six years' imprisonment.

[25] Another comparable decision put before the sentencing judge was *R v Timoti* [2003] QCA 96 where the offender pleaded guilty to robbery with personal violence and causing grievous bodily harm. The offender committed the grievous bodily harm offence while on bail for the other offence. He was sentenced to four years' imprisonment for each offence, suspended after 15 months, for an operational period of four years with the sentences to be served concurrently. He had spent 217 days in pre-sentence custody which could not be declared as time served under the sentence. The offender was 23 years old at the time of the offences. He committed the robbery at a bottle shop. The offender entered the cold room with the 19 year old bottle shop complainant where he punched the complainant in the head with his fist at which the complainant fell to the ground and was unconscious. The applicant took a $10 cask of wine with him and fled. He made admissions to the police when interviewed about the offence. The complainant suffered a non-displaced fracture of the jaw and a significant head injury which left the complainant with headaches, an aching jaw, loss of the sense of smell and some memory confusion. The second offence arose out of the offender being a gatecrasher at a private party where he walked up to the 17 year old complainant and punched him in the face with great force that caused a right skull fracture that

resulted in hearing loss to the complainant's right ear that was likely to be permanent and other residual symptoms such as headaches. The offender's complaint that the sentence did not give him credit for the time spent in pre-sentence custody did make the sentence manifestly excessive. The offender was not as youthful as the applicant and his second offence had the aggravating feature of being committed whilst the offender was on bail for the first offence.

[26] The offender in *R v Price* [2006] QCA 180 committed the second offence of grievous bodily harm while on bail for the first offence of unlawful wounding. Although the offender was 17 years old at the time of both offences and pleaded guilty, the circumstances of the second offence were much more serious than the applicant's offending. In breach of the offender's bail, he continued to associate with the peers who were involved when he committed his first offence. The second offence arose out of the fight between the offender's peer group and another group of youths. The other group was chasing the offender's group throwing bottles, poles and other items at them. The complainant threw a shopping trolley bar at the offender as he fled which missed the offender. The offender then picked it up and ran towards the complainant throwing the bar back at him. The bar hit the complainant in the side of the head causing him to fall and the offender ran away. The complainant suffered a depressed skull fracture that required numerous operations and he spent 18 days in intensive care. The complainant was left with significant cognitive language deficits, loss of some vision and prone to severe seizures. The offender was sentenced to concurrent sentences of two years' imprisonment for the unlawful wounding and five years' imprisonment for the grievous bodily harm and these sentences were not disturbed on the appeal.

[27] Despite the express statement of the sentencing judge that he had taken into account the applicant's age at the date of his offending, the cumulative sentences did not make any allowance for the applicant's age and lack of relevant prior criminal history. The applicant's offending, though serious, was not in the category of offending where age and a lack of prior criminal history would not be mitigating features. As the summary of the comparable decisions shows, an effective head sentence of eight years' imprisonment was not supported by the comparable decisions, even after trial and without any remorse shown by the applicant. It was patently manifestly excessive. As was pointed out by the applicant's counsel on the sentencing, the range of sentences supported by the comparable decisions for offending of the type committed by the applicant took account of the need for deterrence of that type of offending. In the circumstances of this matter, the sentencing judge did not need to go outside the range readily discernible from Court of Appeal authorities to ensure that the sentence met the need for both personal deterrence and general deterrence.

[28] It is necessary to exercise the sentencing discretion afresh. As the two offences were committed in the same incident, an effective head sentence of four years is appropriate. A sentence of four years' imprisonment for each offence is within range for the type of offences and takes account of the applicant's age and the community's interest in encouraging a young offender's rehabilitation, even where deterrence of similar offending is necessary. It follows that the sentences will be concurrent. As the applicant was sentenced after trial, the date for eligibility for parole should be fixed at half-way through the sentence. The respondent's counsel properly drew to the attention of the court that the sentencing judge had not been asked, and did not, make a pre-sentence custody declaration in relation to the three

days that the applicant had been remanded after being found guilty by the jury and before being sentenced.

Orders

[29] The following orders should be made:

1. Application for leave to appeal against sentence granted.
2. Appeal against sentence allowed.
3. Sentence varied by deleting the orders that the sentences are cumulative and fixing the parole eligibility date at 9 May 2015.
4. The date the applicant is eligible for parole fixed at 5 May 2013.
5. Pursuant to s 159A of the *Penalties and Sentences Act* 1992 it is declared that three days spent in pre-sentence custody between 6 May 2011 and 8 May 2011 is taken to be imprisonment already served under the sentence.