SUPREME COURT OF QUEENSLAND

CITATION:	*R v Amery* [2011] QCA 383
PARTIES:	**R** **v** **AMERY, David Ross** (applicant)
FILE NO/S:	CA No 179 of 2011 DC No 5 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Gympie
DELIVERED ON:	23 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	24 November 2011
JUDGES:	Fraser JA and Mullins and Douglas JJ 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 reducing to seven years seven months the term of imprisonment imposed on the applicant.** **4. The date the applicant is eligible for parole is fixed at 10 April 2014.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to malicious act with intent – where complainant was the applicant's de facto wife –where applicant in breach of temporary domestic violence order returned home, complained to the complainant about the domestic violence order and the complainant laughed – where applicant went out to the yard, got a sledgehammer and hit the complainant's head twice causing lacerations to her skull, a skull fracture and two damaged teeth - where applicant held in pre-sentence custody for 140 days for the offences of grievous bodily harm and breach of domestic violence order and an unrelated common assault – where applicant intended to plead guilty to

charge of grievous bodily harm, but indictment was presented for malicious act with intent – where applicant was proceeding to trial, but sacked his lawyers and entered a plea of guilty to malicious act with intent – where applicant had an extensive criminal history including three offences of armed robbery and a prior breach of domestic violence order – where applicant had remained out of prison since 1996 with a good employment history – whether sentence of eight years' imprisonment without a parole eligibility date was manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 159A

R v Holland [2008] QCA 200, considered
R v Laing [2008] QCA 317, considered
R v Mitchell [2006] QCA 240, considered
R v Murray [2010] QCA 266, considered

COUNSEL: R A East 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] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Mullins J. I agree with those reasons and with the orders proposed by her Honour.

[2] **MULLINS J**: On 11 April 2011 the applicant appeared for himself before the learned District Court judge at Gympie and pleaded guilty to one count of malicious act with intent. He was sentenced to eight years' imprisonment. No parole eligibility date was fixed. The applicant who is now legally represented applies for leave to appeal against the sentence on the ground that it was manifestly excessive.

The applicant's antecedents

[3] The applicant was 47 years old when he committed the offence on 10 July 2009. He has an extensive criminal history that commenced in 1981 with minor drug offences. He committed an armed robbery of a bank carrying a sawn-off shotgun when he was 21 years old for which he was sentenced in February 1984. On an Attorney-General's appeal the sentence was increased to seven years. In July 1984 he was sentenced for a prior armed robbery of a TAB that he had committed when he was 18 years old. He was sentenced to six years' imprisonment. After his release from custody in April 1990 when he was 28 years old, he committed a further armed robbery in company of a newsagency where he was armed with a wooden verandah post. He was sentenced to six years' imprisonment cumulative on the earlier sentences.

[4] In November 1997 the applicant pleaded guilty to a breach of a domestic violence order where the complainant was his de facto wife who was also the complainant for the offence to which the current application relates. The breach of the domestic violence order occurred after police had been called to a domestic disturbance at his house. He was taken to the watch-house and released on condition that he have no

contact with his partner and another female. About 20 minutes after his release, police attended at the home address and observed the applicant shouting outside his house. He was arrested for breaching his release condition by shouting abuse at the complainant and using a screwdriver to puncture the radiator of her car as she drove away from the house. He was fined $100 for the breach of the domestic violence order. He was fined a further $350 for associated offences of assaulting or obstructing police and using threatening abusive or insulting words.

[5] In June 2003 the applicant was convicted in the Magistrates Court for an offence of assault occasioning bodily harm that was committed when he was 40 years old. The applicant was fined $1,200 and ordered to pay $300 in compensation. The victim had been responsible in some way for the theft of the applicant's car or its parts and the prosecution case was that the applicant hit the victim with a baseball bat. (The quantum of the fine and the fact that the sentence was a fine indicates that it was not considered a serious assault.)

The circumstances of the offence

[6] The applicant and the complainant had been in a de facto relationship since 1993. They had an argument on the day of the offence about the applicant's older daughter who lived in Melbourne. The applicant used a knife to cut four leather chairs in the house. It was the applicant who called the police about the domestic incident, but that resulted in his arrest. By 10 pm he had been released from custody. A temporary domestic violence order was made against him which was subject to a condition that he not approach within 100 metres of the complainant. Despite the condition, he walked home, entered the house and went into the bedroom where the complainant was lying in bed. He said something to her about not being able to see his daughter, because of the domestic violence incident, and the applicant claimed that the complainant said "good" and laughed. The applicant then went into the backyard and picked up a ten pound sledgehammer and returned to the bedroom. He hit the complainant's head twice with the sledgehammer while she was lying in bed. The second blow caused her to fall from the bed to the floor. He then called 000 and told the police he had assaulted the complainant. The police and an ambulance attended. The complainant was taken to Nambour General Hospital and then transferred to the neurological unit at the Royal Brisbane and Women's Hospital. The complainant had two deep lacerations to her skull, a skull fracture and two damaged teeth.

[7] According to the medical report prepared for the sentencing, the complainant had sustained an open wound to the scalp – midline frontoparietal (3cm x 5cm). A CT scan revealed a depressed left frontal skull with a fragment of the inner table protruding 1cm into the left frontal lobe. The complainant underwent surgery where the bone fragments were removed and a dural tear was repaired. The bone defect was closed using a titanium burr hole cover which was held in place using screws and plates. For the purpose of proving the injury amounted to grievous bodily harm, the prosecution relied on medical opinion to the effect that, if the complainant's injury had been left untreated, the open injury would have been likely to lead to infection (meningitis) which is a life threatening condition.

[8] The complainant made a full recovery from her injuries.

Procedural history

[9] The applicant admitted the attack on the complainant when he was interviewed by the police. Earlier that day, he had been involved in an unrelated incident after

some disagreement with real estate agents. The applicant was charged with grievous bodily harm (for the attack on his de facto wife), breach of domestic violence order (in relation to his de facto wife) and common assault (which related to the real estate agents' incident) and was remanded in custody.

[10] There was a full hand up committal at the conclusion of which the applicant pleaded guilty to the charge of grievous bodily harm. The matter was therefore to proceed as a sentence. The applicant was granted bail at that stage after having been in pre-sentence custody for 140 days on account of all three offences with which he was charged.

[11] When the indictment was presented, the prosecution decided to proceed with the offence of malicious act with intent, rather than grievous bodily harm. On that basis, the matter was listed for trial. When the trial was due to commence, the applicant sacked his lawyers, decided to plead guilty to the offence of malicious act with intent and proceeded to represent himself before the sentencing judge.

Sentencing

[12] At the sentence hearing the prosecutor relied on one comparable authority of *R v Mitchell* [2006] QCA 240 and submitted that a sentence of imprisonment of seven to eight years with a declaration that the applicant had been convicted of a serious violent offence was appropriate. The prosecutor pointed out that, as the applicant had served 140 days in pre-sentence custody that was not able to be declared as time served under the sentence pursuant to s 159A of the *Penalties and Sentences Act* 1992 as the applicant wished to contest the common assault charge, the pre-sentence custody should still be taken into account in determining the sentence.

[13] The applicant informed the sentencing judge of his employment history since being released from prison in 1996. He was involved in the building industry and worked on mine sites and housing subdivisions. He explained that he had become ill and resigned from his employment in the months prior to the offence. He was given medication for his condition that he had been taking in the period leading up to the offence and he considered that the medication had an adverse effect on him. (There was no evidence put before the sentencing judge to support this assertion and it was inconsistent with what the applicant had disclosed to police when he was interviewed after the offence, when he stated that he had not taken any medication in the last 24 hours.) There was reference made in the course of submissions to the applicant's former lawyers having obtained a forensic toxicologist's report for the purpose of the trial that had been supplied to the prosecution immediately before the trial was due to commence, but that was not relied on by the applicant.

[14] The applicant told the sentencing judge that he did not remember a lot about the night of the offence. The applicant expressed regret for his actions. The complainant made a statement to the sentencing judge in support of the applicant, but some of the facts asserted by the complainant were disputed by the prosecution. The sentencing judge did not need to resolve the disputes of fact, as the sentencing judge proceeded on the basis that the complainant was supportive of the applicant and the applicant had expressed remorse to the complainant.

[15] In the sentencing remarks, the sentencing judge noted that the applicant's criminal history was very serious, but the robberies had been committed some time ago and

the applicant had been out of prison since 1996. The sentencing judge referred to the "troubling similarity" of the applicant's breach of a domestic violence condition in November 1997. The sentencing judge did not reject the applicant's claim that he was affected by the adverse reaction he had to medication at the time he committed the offence, but noted that the applicant had to be sentenced on the basis that he had formed the intent to cause grievous bodily harm, even if he could not remember doing so at a later time.

[16] The sentencing judge accepted that "this kind of monstrous act" was unusual for the applicant, when account was taken of what was "objectively demonstrated by all of the criminal history." The sentencing judge noted that, even though it was a late plea, it demonstrated some willingness to facilitate the course of justice and reflected the remorse that had been confirmed by the complainant. The sentencing judge took into account the applicant's good employment history.

[17] The sentencing judge decided in all the circumstances of the applicant's case not to make a declaration that he had been convicted of a serious violent offence and sentenced him to eight years' imprisonment without making any other order. The sentencing judge observed that he had sentenced towards the top of the range that was submitted by the prosecution, but did not make the declaration of serious violent offence. He then stated:

> "I also do not make a parole eligibility date because that is best left to those who conduct that issue. Statutorily I think that you are not eligible for parole until 50 per cent of the eight years. Whether you get out then is a matter for the parole authorities."

[18] The judge did not make any express reference in the sentencing remarks to how he had taken into account the applicant's pre-sentence custody, if at all.

Whether sentence is manifestly excessive

[19] Apart from contending that the head sentence of eight years fell outside the applicable range, counsel for the applicant relied on the failure of the sentencing judge to adjust the sentence for the pre-sentence custody of 140 days and the failure to fix a parole eligibility date as factors that also resulted in the sentence being manifestly excessive.

[20] In *Mitchell* the offender pleaded guilty to doing grievous bodily harm with intent and an associated count of deprivation of liberty. After a contested sentence hearing, the offender was sentenced to seven years' imprisonment with a serious violent offence declaration for the grievous bodily harm with intent. He met the complainant drinking with an acquaintance. After many hours of drinking together, the three of them went to the offender's unit where they continued drinking. The offender made a sexual advance to the complainant which she rejected. He became angry and went to the bedroom and returned with an iron bar that he used to strike the complainant on her head, legs, shoulder and arm. She escaped from the unit by jumping one floor to the ground below, and the applicant attempted to pursue her in the street. The complainant required surgery for a compound fracture of the left elbow and was left with ongoing pain in her elbow and shoulder and psychological effects from the attack. The offender was intoxicated at the time of the offence. He was 50 years old and had a lengthy criminal history including for manslaughter which he had committed 27 years earlier and numerous lesser offences for violence. There were features in *Mitchell* that were more serious than the applicant's offence,

but that has to be balanced with other aspects of the applicant's offending that were aggravating features and, in particular, the fact that the applicant left the house to get the sledgehammer and struck the complainant twice while she was lying in bed and helpless to evade the attack.

[21] Counsel for the applicant relied on *R v Holland* [2008] QCA 200, but that was a less serious example of the offence than the applicant's offending. The offender in *Holland* was convicted of doing grievous bodily harm with intent to do grievous bodily harm after trial. The offence was committed during the operational period of a wholly suspended sentence of 12 months' imprisonment imposed on the offender for an assault occasioning bodily harm. That sentence was activated and the sentence of five years' imprisonment for the grievous bodily harm with intent was ordered to be served cumulative on the activated sentence. The complainant had given some provocation for the attack by ogling the offender's partner. The offender punched the complainant and when the complainant fell down, the offender who was wearing boots kicked the complainant in the head several times. Although Keane JA at [63] stated: "the range of sentence which might have been imposed in a case where grievous bodily harm has been deliberately inflicted by the use of a weapon by a mature offender with a record of personal violence is between four and seven years imprisonment," that was a suggested range for the offending in the circumstances of that offence and the antecedents of that offender.

[22] Another comparable authority relied on by the applicant was *R v Laing* [2008] QCA 317. The offender was convicted after trial of burglary with circumstances of aggravation and doing grievous bodily harm with intent to do grievous bodily harm. He was sentenced to imprisonment of six and a half years for each offence. The offender had previously been in a relationship with the woman whom the complainant had taken up dancing with. The offender had threatened violence towards the complainant, if he did not stay away from the woman. The offender broke into the complainant's house early one morning while the complainant was asleep, struck the complainant with a hammer breaking his kneecap and then, when the complainant woke up, struck him four times on his head. The offender was 62 years old when he committed the offence with a minor criminal history which was largely irrelevant, except for a conviction for assault in 1987 and a breach of a domestic violence order taken out against him by the woman only one month prior to the attack on the complainant. The complainant suffered ongoing difficulties with mobility. There was no remorse shown by the offender. Keane JA (with whom the other members of the Court agreed) considered at [48] that the sentence imposed on the applicant was within range but "distinctly moderate." The criminal history of the offender in *Laing* was not as serious as the applicant's criminal history.

[23] The offender in *R v Murray* [2010] QCA 266 pleaded guilty to doing grievous bodily harm with intent to do grievous bodily harm at the same time as he pleaded guilty to associated offences involving the same complainant, including two counts of aggravated stalking. The offender had been in a prior relationship with the complainant. The offender was sentenced for the grievous bodily harm with intent to imprisonment for eight years and a declaration was made that he had been convicted of a serious violent offence. The offender had broken into the complainant's house, hid behind the bedroom door, and when the complainant entered, swung a frying pan onto her head. She fell to the ground and the offender hit her at least two further times on the head. He pulled out a knife, tied up the

complainant, and dragged her out to the garage. He was attempting to put her into the car, when the complainant screamed. He then stabbed her in the left side near her armpit and in the stomach on her right side. The attack ended when people responded to the screaming. The complainant was left with loss of mobility in one finger, scarring to her shoulder and stomach and nerve damage to her left arm. The offender was 36 years old and his criminal history included offences of violence and a breach of a domestic violence order. He had psychiatric problems in respect of which psychiatric reports were tendered. The sentence was not disturbed on appeal. The sentence in *Murray* was more severe than imposed on the applicant, because of the addition of the serious violent offence declaration. The offending in *Murray* was more serious than the applicant's offending, but that was mitigated to some extent by the consideration of the offender's psychiatric problems.

[24] The above authorities show that the notional sentence of eight years' imprisonment for the applicant's offending was not outside the appropriate range, in the light of the applicant's age, antecedents, that the use of the sledgehammer was not a spontaneous response to the complainant's comment, and the use of force by the applicant against the complainant was in breach of a domestic violence order and while the complainant was sleeping.

[25] The applicant would not have spent 140 days in pre-sentence custody, if he had been charged with the common assault only. The fact that he spent that time in pre-sentence custody was due to the nature of the offence he committed against the complainant. That period of 140 days has to be added to the eight years to reflect the reality of the sentence imposed by the sentencing judge. In order to reflect fairly the pre-sentence custody, it should be deducted both from the notional head sentence and the time that the applicant serves in prison, before being eligible for parole. One way of achieving that is to take the time in pre-sentence custody into account when determining the parole eligibility date. Because the sentencing judge elected not to set a parole eligibility date, the applicant was given no credit for the period of 140 days spent in pre-sentence custody before becoming eligible for parole.

[26] The reason that the sentencing judge gave for not fixing a parole eligibility date confused the fixing of a parole eligibility date with the decision of the relevant parole authority as to when to grant parole. Even if a parole eligibility date is fixed by a sentencing judge, it remains the decision for the parole authority as to whether or not to grant parole.

[27] Although the notional head sentence of eight years was not outside the sound exercise of the sentencing discretion, the failure to adjust the sentence for the pre-sentence custody of 140 days and the failure to fix a parole eligibility date result in the sentence being manifestly excessive. Counsel for the applicant submitted that the applicant should have been given a parole eligibility date after one-third of the sentence less 140 days for the pre-sentence custody. It was a late plea of guilty, however, where the trial would have been proceeding for the purpose of having the prosecution prove that the applicant had formed the intent that is an element of the offence of malicious act with intent. In the circumstances, appropriate recognition for the pre-sentence custody and the late plea of guilty would be reflected by reducing the head sentence to imprisonment for seven years seven months and fixing a parole eligibility date after the applicant has served three years of that term of imprisonment.

Orders

[28] The following orders should be made:

1. Application for leave to appeal against sentence granted.
2. Appeal against sentence allowed.
3. Sentence varied by reducing to seven years seven months the term of imprisonment imposed on the applicant.
4. The date the applicant is eligible for parole is fixed at 10 April 2014.

[29] **DOUGLAS J:** I agree with the reasons for judgment and orders proposed by Mullins J.