SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hart* [2012] QCA 38
PARTIES:	**R** **v** **HART, Armin Rolf** (applicant)
FILE NO/S:	CA No 183 of 2011 DC No 11 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Bundaberg
DELIVERED ON:	6 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	9 February 2012
JUDGES:	Chief Justice, White JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant sentenced to 12 years imprisonment for doing grievous bodily harm with intent – where applicant attacked a sleeping man with an iron bar without provocation leading to severe and life threatening injuries – where applicant also convicted of 13 other counts including burglary with threatening violence, robbery while armed, unlawful assault, unlawful wounding and unlawful deprivation of personal liberty – where offences involved applicant engaging in unprovoked attacks – where a psychiatric report obtained for purposes of assessing soundness of mind used for other purposes – where letter of remorse written three days prior to sentencing – where applicant plead guilty – whether trial judge erred in rejecting applicant's expression of remorse – whether sentence manifestly excessive in all the circumstances *R v Eade* [2005] QCA 148, considered *R v Hasanovic* [2010] QCA 337, considered *R v Mikaele* [2008] QCA 261, considered *R v Mitchell* [2006] QCA 240, distinguished

R v Scheers [2010] QCA 318, considered
R v Sielaff [1995] QCA 606, considered

COUNSEL: The applicant appeared on his own behalf
JA Woolridge for the respondent

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

CHIEF JUSTICE:

Introduction

[1] The applicant seeks leave to appeal against sentences imposed upon him in the District Court on 8 June 2011, following his pleas of guilty the preceding day. They were (with the terms of imprisonment imposed listed in descending order):

Count 1: doing grievous bodily harm with intent, committed upon S J Robertson on 3 April 2010; 12 years imprisonment;

Count 5: burglary of dwelling of P W Cromarty (breaking in) while armed and with intent to commit an indictable offence, and threatening violence and damaging property, on 18 April 2010; 12 years imprisonment;

Count 6: robbery of A C Hilbert while armed with a knife, on 18 April 2010, then using other personal violence against L A Constable; 10 years imprisonment;

Count 7: robbery of K Konig while armed with a knife, on 18 April 2010, then using other personal violence against L A Constable; 10 years imprisonment;

Count 8: robbery of L A Constable while armed with a knife, on 18 April 2010, and then using other personal violence against her; 10 years imprisonment;

Count 2: unlawful assault occasioning bodily harm to T Zorkler while armed with an offensive instrument, on 18 April 2010; five years;

Count 4: unlawful assault upon P W Cromarty, 60 years of age or more, on 18 April 2010; five years;

Count 13: unlawfully wounding J A Burke on 18 April 2010; five years;

Count 14: burglary of the dwelling of B Rae while armed with an offensive instrument, and threatening actual violence, with intent to commit an indictable offence, on 18 April 2010; five years;

Count 3: unlawful assault occasioning bodily harm to C J Evans, on 18 April 2010; three years;

Count 9: unlawfully depriving A C Hilbert of her personal liberty, on 18 April 2010; three years;

Count 10: unlawfully depriving K Konig of her personal liberty, on 18 April 2010; three years;

Count 11: unlawfully depriving L A Constable of her personal liberty, on 18 April 2010; three years;

Count 12: unlawfully assaulting B T Steinhardt, on 18 April 2010; three years.

[2] All of the terms of imprisonment are to be served concurrently. By the time of sentence, the applicant had served 416 days of pre-sentence custody, which was made the subject of a declaration. Because of the 12 year term, the applicant will have to serve 80 per cent of that period (9.6 years) in custody before becoming eligible to apply for parole. As the learned sentencing Judge observed, the maximum penalty applicable to six of the fourteen counts on the indictment was life imprisonment.

Applicant's prior criminal history

[3] The applicant was 30 years old when he committed the offences, and was 31 years old when sentenced. He had prior convictions.

[4] On 22 September 2005 the applicant became aggressive and abusive towards his mother. When she moved away from him, he followed her. He was carrying a machete. He confronted her, then smashed the machete on a fence a number of times. On 29 November 2005 he was ordered to carry out 180 hours community service.

[5] More proximately to the instant offences, on 2 August 2009 the applicant was in the company of another man and a woman as their guest. He argued with the woman, and then she tried to depart his company. He assaulted and threatened her, punching her to the ground. When the man intervened, the applicant punched and kicked him into unconsciousness. The applicant then stole the contents of the woman's bag, and smashed their mobile phones. When the woman tried to stop him, he became more aggressive, kicking her in the stomach and threatening to break her arm. On 25 February 2010 he was ordered to carry out 120 hours community service, and he was placed on probation for a period of 14 months.

[6] The learned Judge observed that the applicant was treated "very leniently" for the latter offending, in light of the level of violence involved. The applicant completed the 120 hours community service on 12 April 2010. He committed the instant offences on 3 April 2010 and 18 April 2010, while subject to the probation order imposed on 25 February 2010, indeed when only two months into its 14 month term. A probation report placed before the sentencing Judge said that when he was assessed on 25 February 2010, the applicant "was actively engaged with community mental health services".

[7] I turn now to the circumstances of the instant offences, all of which were committed in the Bundaberg area.

Circumstances of offences

Count 1

[8] The 24 year old male complainant was asleep in the cabin of his utility truck at night-time in a parking area near Bundaberg. The applicant took an iron bar from

the back of the truck. The applicant smashed the cabin window, dragged the complainant out and punched the complainant's head. He hit the complainant's head with the iron bar. The complainant lost a lot of blood, both inside and outside the cabin.

[9] A paper delivery man later found the complainant at about 5 am. When the police arrived, the complainant's injuries were so severe that it was "difficult to identify any facial features". There was a large open wound to the side of his jaw and face. He was taken to the Intensive Care Unit at the Royal Brisbane Hospital and placed into an induced coma. He had suffered substantial fractures to his nose, top jaw, cheek bones, eye sockets and mandible.

[10] The complainant was operated upon on 4 April, with extensive reconstructive work. He remained in intensive care for 15 days. He underwent a further substantial operation on 12 May 2010. He experienced "ongoing mouth opening issues", and was concerned about the difference in height between the level of his two eyes. He underwent speech pathology and physiotherapy.

[11] The applicant challenges His Honour's characterization of these injuries as "life threatening". The complainant's head injuries were "severe and life threatening", as the Judge observed, absent treatment. The nature of the emergency and sustained medical treatment he required itself confirms that.

[12] A victim impact statement from the complainant's fiancée reveals the impact of the offence on their lives. Having undergone 22 hours of facial reconstructive surgery, the complainant needs more. He is ashamed of the appearance of his face. He experiences pain at work. He has suffered memory loss and diminished eyesight, and experiences anger.

[13] The complainant's mother has suffered post-traumatic stress disorder in consequence of the offence committed upon her son, dating from her having seen him in hospital "beaten beyond recognition".

[14] The applicant committed this offence on 3 April. Eight days later, the applicant telephoned his father and read to him a newspaper report about the discovery of the complainant "unconscious lying on the road with severe head injuries". When the applicant's father queried the relevance of that to the applicant, the applicant disclosed his involvement, saying that he was intoxicated at the time. The applicant's father told him to report the matter to the police. The applicant told his father that he could not do that because he feared going to jail. Eighteen days later, the applicant's father reported the applicant's involvement to the Townsville police.

[15] The applicant had sought medical treatment for himself at the Bundaberg Base Hospital on 3 April 2010 for bruising to his left eye and abrasions to his hands. At the hospital he attributed that to "rolling around last night" after drinking a lot.

Count 2

[16] This complainant was a 30 year old German man "backpacking" around Australia. At about 7.45 pm he was seated alone in the driver's seat of his van. The applicant approached and was staring at him, and there was a short exchange. The applicant then moved away, but returned wearing gloves, and proceeded to shatter the cabin

window. The applicant then punched the complainant four times to the face, demanding that he get out of the vehicle. The complainant attempted to start the engine, whereupon the applicant tried to unlock the driver's door, and tried to tear the side rear vision mirror from the van. The applicant was carrying a knife. He continued punching the complainant. The complainant was able to start the vehicle and drove off.

[17] The complainant suffered bruising and swelling of the right cheek and soreness in the right side of his neck. He was treated at the Bundaberg Base Hospital.

[18] There is a disturbing similarity between the applicant's approach in this situation and for count 1.

[19] The applicant was apprehended by the police at about 11.30 pm and he was arrested. He told the police that he had been drinking, and went to "The Hummock" car park (the site of the commission of both counts one and two) to "start a fight with whoever was up there".

Counts 3, 4 and 5

[20] After assaulting the German tourist, the applicant drove to the residence of the complainant Mr Evans. At about 8.10 pm, Mr Evans went downstairs to investigate why his dogs were barking. He saw and challenged the applicant, who responded: "Your dogs are dead, you're dead." The applicant was carrying a large knife, with an eight inch blade. The applicant was about one metre away from Mr Evans, and threatened Mr Evans with the knife. Evans decamped to his neighbour's place, with the applicant running after him repeating the death threat.

[21] Mr Evans's 60 year old neighbour, Mr Cromarty, heard Evans's cries for help. Cromarty heard the applicant threaten to kill Evans. He led Evans into his garage, but the applicant also slid in before the roller door had closed.

[22] Cromarty asked the applicant to leave. Then the applicant threatened to kill Cromarty, and swung the knife at him. There was some wrestling. Evans was in the meantime sheltering behind a security door. Cromarty approached the applicant armed with a spanner. The applicant slashed at him with the knife. Cromarty then sheltered behind another door. The applicant again threatened to kill Cromarty.

[23] Then the applicant tore the security door from its supports. Cromarty went into his downstairs office and called the police. The office door was closed. The applicant then smashed a hole in the office door with the spanner, and entered the office. Cromarty defended himself with a pedestal fan, before fleeing to another neighbour's house.

[24] When apprehended at about 11.30 pm, the applicant told the police that when he had left the German tourist, he was unsatisfied, "as the bloke would not fight him". He went home and obtained the knife and went out again "looking for someone to fight". He admitted terrorizing Evans and Cromarty, and said that he then returned to his own house.

Counts 6-11

[25] The events involved in these counts occurred at about 9 pm on 18 April. The female complainants were three foreign tourists, aged 22, 23 and 30. They were sitting at a picnic table in a park.

[26] The applicant approached them, jumped onto the table, knocked a bottle to the ground, and produced a large knife. When the complainants stood up, the applicant told them to sit down. He demanded their mobile phones and money. One of the complainants, Ms Hilbert, produced a phone and $90 in cash. The applicant destroyed the phone.

[27] The applicant then took the complainant Ms Constable by the hair, pushed her to the ground and threatened her with the knife, producing it in her face. Then he walked around the table, threatening to cut off the complainants' noses. He demanded that the complainant Ms Konig produce her phone and money. The applicant smashed that phone as well. Then he did the same to Ms Constable's phone, and destroyed a credit card.

[28] The applicant demanded that the three complainants then walk in single file to the nearby beach, and "keep walking for 10 minutes". They walked to the beach, and were able to seek refuge at a nearby house. The police were summoned.

[29] When interviewed by the police following his apprehension at about 11.30 pm, the applicant said, of the complainants, that he had "felt like robbing them".

Counts 12 and 13

[30] The applicant then drove to the Bagara Beach Hotel, where he assaulted the complainant Steinhardt and wounded the complainant Burke. Each of those men was 29 years of age.

[31] They were on a veranda having drinks with another man. The applicant approached them and poured out the contents of their glasses. The applicant then produced a large knife which he used to smash the glasses.

[32] The applicant demanded that Steinhardt put down another drink he was holding, holding the knife 12 inches from Steinhardt's stomach. When Steinhardt moved away, the applicant followed him, holding the knife even closer.

[33] Then he approached Burke, slashing the knife at him. Burke blocked the slash with his right hand, which was consequently cut. That comprises the wounding. Then the applicant moved off.

[34] When apprehended later, the applicant said that he had wanted to provoke a fight. When the men would not fight, he slashed Burke out of frustration.

[35] A victim impact statement from Mr Steinhardt disclosed that he has had trouble sleeping, and has been distracted in his business affairs since these events. He has been drinking more than usual, and is fearful that the applicant will upon his release "seek revenge".

[36] The only evidence on the extent of the wounding of Mr Burke was a photograph. There is no suggestion of continuing residual disability.

Count 14

[37] The applicant then drove to Woodgate. At about 11 pm, the applicant walked into the dwelling of Mr Rae, who was 33 years old. The applicant was carrying a large

spanner. When challenged by Mr Raye, the applicant said: "I want you to make me angry so I can crack your skull."

[38] The complainant left to put on some clothes. When he returned, the applicant had left.

[39] When interviewed following his apprehension, when returning from Woodgate in the direction of Bundaberg, the applicant said that by the time he reached Woodgate he had "started feeling a bit mellow". He left the house when the occupant would not hit him with a chair to provoke him into anger and a fight.

Psychiatric evidence and the issue of remorse

[40] The applicant's solicitors obtained a report from a psychiatrist, Dr Ken Arthur. The report is dated 18 January 2011 and was placed before His Honour. The applicant emphasized the circumstances that the report was based on one 90 minute interview only, and was prepared primarily to address the issue of unsoundness of mind and fitness for trial. The report is nevertheless more comprehensive than that. The sentencing Judge referred to it, and he was entitled to do so.

[41] In that report, Dr Arthur referred to the applicant's dysfunctional upbringing. He considered that at the time of the offences, the applicant was suffering from a mood disorder "with elements of social anxiety". He found the applicant's conduct "difficult to understand", and inclined to the view that notwithstanding his denials, he was probably intoxicated at the times he committed the offences.

[42] The applicant refers, by way of mitigation, to "binge drinking which fuelled (his) offending". The court has repeatedly emphasized that intoxication cannot properly be regarded as a mitigating feature in cases of violent crime.

[43] The learned Judge referred to Dr Arthur's statement that the applicant "did not express any particular regret or remorse for his actions nor showed empathy for his victims".

[44] Three days prior to the sentencing, the applicant wrote a letter, addressed to the sentencing court, saying that he was sorry for his actions. The letter is dated 4 June 2011. The Judge dismissed that as "shallow, incredulous and completely disingenuous", and said that he took it "with a grain of salt". The Judge expressed that view having referred to what Dr Arthur said above, and Dr Arthur's statement that the applicant "did not appear particularly concerned by his offences and certainly did not show any remorse or empathy for his victims".

[45] The applicant submitted that the Judge erred in rejecting his expression of remorse. The Judge was however entitled to take that course. The statement of remorse was offered very late in the day. Its proximity to the sentencing hearing would of itself prompt serious enquiry about whether it was sincere. There was no suggestion of any attempt, for example through the Office of the Director of Public Prosecutions, to proffer any apology at an earlier stage to the victims themselves.

[46] The Judge also approached the issue in the context of other matters to which the psychiatrist referred:

> "Your client states he has full recollection of events, did not feel intoxicated, and could not identify any clear psychological

> triggers…[a]lthough your client denied having a short temper, he states once he becomes angry he finds it difficult to calm down and remains worked up for many hours. He unapologetically admitted to violent tendencies and reported, 'I have been called dangerous before.'…There were many aspects of his behaviour for which he was unable to give any reasonable explanation…such as why he carried a knife if his intention was to just engage in fighting, or why he threatened, robbed and assaulted three female backpackers. Your client admits to drinking a moderate amount of alcohol that evening and had been smoking cannabis a few days prior to the event. He claims to have complete recollection of events although acknowledges that he was not thinking rationally or considering the consequences of his behaviour. He had calmed down by the time the police had apprehended him three to four hours later."

[47] The applicant relied on his pleas of guilty, and his agreement to a "hand up" committal, as a reflection of remorse. But of course those features could also be referable to an acknowledgement of the strength of the case against him.

[48] In light of the callous nature of the offending, and the serious consequences visited upon the first complainant especially, if the applicant had been genuinely remorseful, one would have expected some reasonably substantial evidence of that. An apology expressed so close to the sentencing, about 14 months after the commission of the offences, could not reasonably evidence such remorse, especially where the psychiatrist, in an expression of view which was not challenged at the hearing, referred to absence of remorse and lack of empathy for the plight of the victims.

[49] In his most recent written material, the applicant deals with his approach to rehabilitation while in custody. That will of course be relevant when he eventually seeks release on parole. It would not justify this court's concluding that the sentencing Judge erred in his finding in relation to remorse.

[50] The applicant challenged the Judge's observation that he "seemed to have done very little" to address his mental health problems, and referred to his attendance at the Bundaberg Mental Health Unit and his endeavours to obtain higher order medication. This arose in relation to the issue of community protection. The Judge referred to the applicant's "insight into (his) mood changes and substance abuse". There was limited evidence of the applicant's efforts to secure treatment, and that is presumably what the Judge had in mind when he made that observation.

[51] The applicant also challenged the Judge's statement that the applicant had treated with contempt the probation order to which he was subject when he committed these offences. That observation was obviously warranted by the circumstance that the applicant committed this series of serious offences so early into the term of the probation order: it was that point which the Judge made.

Alleged bias

[52] The applicant relied on the latter matter, and His Honour's reference to the victim impact statements, as providing the foundation for a claim that the Judge was biased against him. There is no substance to that contention.

Pleas of guilty

[53] The applicant's remaining contention is that His Honour made inadequate allowance for the pleas of guilty and cooperation in the administration of justice. If the Judge allowed the conventional one-third reduction in that regard, then he has proceeded from a head term of 18 years imprisonment (as being the sentence which would be imposed following a trial). I note that the Judge was entitled, in setting the penalty for count 1, to take account of the applicant's overall criminality (rather than, as an alternate course, imposing partially cumulative sentences). It was important that the penalty ultimately imposed take account, one way or another, of all this persistent offending. At the sentencing hearing, the Prosecutor suggested a penalty of 10 to 12 years imprisonment, and Defence Counsel submitted for eight or nine years imprisonment. I return to these issues when considering the sentences advanced as being comparable.

Character of offending

[54] I accept the submission for the respondent that the degree of criminality involved in this offending was of startlingly high order, that its persistence was striking, and that the applicant's personal motivation appears to have been confined to the trivial and self-indulgent. It was protracted offending involving a number of victims, all strangers to the applicant, and it was premeditated in the sense the applicant went out armed, or armed himself, "looking for a fight".

[55] The sentencing Judge rightly recognized the importance with this bizarre offending of the criterion of community protection especially, and also deterrence in relation to violent crime generally.

[56] His Honour was entitled to proceed, as he has implicitly done, on the basis that whatever the particular psychological or psychiatric condition from which the applicant suffered, that feature did not justify any particular leniency in determining the penalty imposed, in light of the gravity of the offending and the high need for community protection and deterrence.

Cases advanced as being comparable

[57] Counsel for the respondent referred to four cases which warrant the view that this overall penalty was not manifestly excessive. They are *R v Mikaele* [2008] QCA 261, *R v Sielaff* [1995] QCA 318, *R v Eade* [2005] QCA 148 and *R v Hasanovic* [2010] QCA 337.

[58] Mikaele was sentenced to nine years for doing grievous bodily harm with intent, but he was only 17 years of age. Also, in the present case, more violence was involved and this applicant bore the burden of a significant prior criminal history.

[59] Sielaff, again, was a much younger offender, 20 years of age, and notwithstanding his callous subsequent conduct, committed only one assault. He was sentenced to 10 years imprisonment for doing grievous bodily harm with intent.

[60] Eade committed a most serious assault whilst in company, including driving twice over the complainant's supine body, and he was sentenced to 10 years imprisonment for grievous bodily harm with intent. But he was only 17 and a half years old at the time. In this case, by way of further contrast, there were two sets of serious offending. Also, Eade had no prior criminal history.

[61] Hasanovic, sentenced to nine years imprisonment with a serious violent offence declaration, was only 19 years of age when he committed the offences, and although he was involved in a gang attack on two complainants, the largely cosmetic residual injury was much less serious than those to be endured by the first complainant here; and in addition, there was more repetition and persistence in this applicant's violent offending.

[62] Those were all cases where the offender pleaded guilty. They support the 12 year term imposed here, allowing for the points of contrast to which I have referred.

[63] In his first outline, the applicant referred to two cases, *R v Scheers* [2010] QCA 318 and *R v Mitchell* [2006] QCA 240.

[64] Scheers pleaded guilty to doing grievous bodily harm with intent, and other offences. On appeal, the sentence for grievous bodily harm with intent was reduced to 10 years. He was 24 years old at the time of committing the offence, a point to which the court referred in reducing the sentence, and the court referred as well to the absence of ongoing consequences for the victim in relation to his capacity to earn income. The court was also influenced by the circumstance that the applicant had to serve a cumulative three year term for attempting to pervert the course of justice.

[65] The applicant especially referred to the conclusion that Scheers lacked remorse: he also had offered apologies, but their effect was countered by the attempt to pervert the course of justice. That did not occur here, but there was other sufficient justification for the learned Judge's scepticism in relation to a late expression of remorse.

[66] Mitchell was sentenced to seven years, with a serious violent offence declaration, upon pleading guilty to doing grievous bodily harm with intent. While intoxicated, Mitchell struck the female complainant with an iron bar, whereupon the complainant fled the scene. She suffered lacerations, bruising and a fractured elbow. That 51 year old offender had an extensive criminal history. The case is immediately distinguishable because it involved only one incident, and a comparatively brief one. The circumstance that Mitchell had a substantially more serious criminal history than the present applicant's, upon which the applicant relied, does not "outweigh" the other points of distinction between the applicant's situation and that of Mitchell.

[67] In his later outline, the applicant referred additionally to *R v Melissant* [2003] QCA 122, *R v Lyon* [2006] QCA 146, *R v Wilson* [2001] QCA 215, *R v Anderson* [2004] QCA 287 and *R v Woodman* [2009] QCA 197. He has sought to draw detailed comparison and contrast between the circumstances of those cases and his own.

[68] That approach is generally not appropriate at this stage. Where penalties imposed in comparable cases such as those advanced before His Honour, and for the respondent in this court, sit with reasonable comparability with the sentences under review, it is not helpful to multiply instances of supposedly comparable cases. The sentencing process is not mechanistic and is not directed towards ensuring the sentences imposed exhibit perfect proportionality with others.

Conclusion

[69] The penalties imposed were not manifestly excessive. I would refuse the application.

[70] **WHITE JA:** I have read the reasons for judgment of the Chief Justice and agree with those reasons and the order proposed by his Honour.

[71] **ATKINSON J:** I have had the benefit of reading the reasons of the Chief Justice. I agree that the application should be refused for the reasons given by his Honour.

[72] The sentence imposed in this case was a heavy one. It must be considered be at the top of the possible range taking into account his plea of guilty. It could not however be said to be manifestly excessive given his age and criminal history; the fact that the offences were committed while he was subject to a probation order; the persistent and repeated nature of the extremely violent offences on members of the public, selected apparently at random; the number of victims; the very serious injuries inflicted, particularly on the victim of Count 1; and the applicant's lack of remorse.