SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ellison* [2012] QCA 113
PARTIES:	**R** **v** **ELLISON, Morris Shane** (applicant)
FILE NOS:	CA No 322 of 2011 DC No 1863 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	24 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	5 April 2012
JUDGES:	Holmes JA, Mullins and A Lyons JJ 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 – where the applicant was found guilty after trial of one count of assault occasioning bodily harm in company – where the applicant was sentenced to two years imprisonment with a parole release date after 12 months and declaration of 10 days presentence custody – whether the sentence imposed was manifestly excessive compared to the co-offenders – where the co-offenders were sentenced on the basis that they were not the prime instigators but rather the applicant was the instigator – where the applicant was in a position to influence his employees to stop – where the sentencing judge was entitled to view those factors as particularly significant and to view the applicants conduct as particularly serious when compared with that of his co-offenders – whether the sentence was manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS – where the applicant wished to appeal against the sentence on the ground that there was a lack of parity with the co-

accused – whether the role that the applicant played was such that it warranted a sentence of two years when sentences of two and a half years and three years were imposed on his co-accused for the more serious charges – where the applicant was held to be particularly responsible for the prolongation given his more senior role as the employer of the co-offenders – where the applicant was in fact a principal offender – whether the sentence was manifestly excessive

Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, cited
R v Bean [1999] QCA 359, cited
R v Beer & Massey [2002] QCA 397, cited
R v Hilton [2009] QCA 12, cited
R v MAO; ex parte Attorney-General (2006) 163 A Crim R 63; [2006] QCA 99, cited
R v Neivandt [2000] QCA 224, cited
R v Sargeant, Price & Freier (2005) 157 A Crim R 576; [2005] QCA 409, cited
R v Sheret (2002) 129 A Crim R 295; [2002] QCA 162, cited

COUNSEL: K Martinovic for the applicant
S Vasta for the respdondent

SOLICITORS: Nguyen and T Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** I agree with the reasons of A Lyons J and the order she proposes.

[2] **MULLINS J:** I agree with Ann Lyons J.

[3] **ANN LYONS J:** The applicant seeks leave to appeal against the sentence imposed on 24 October 2011 after a three day trial in the District Court at Brisbane. He was found guilty of one count of assault occasioning bodily harm in company and sentenced to two years imprisonment with a parole release date after 12 months fixed at 14 October 2012 with a declaration of 10 days presentence custody.

[4] The applicant had been charged on a two count indictment which contained one count of entering premises with intent and one count of assault occasioning bodily harm whilst armed and in company. He was acquitted of the circumstance of aggravation of being armed and of entering with intent.

The co-offenders

[5] The applicant's co-offenders Reginald Goffe and James Bassett had pleaded guilty on 12 October 2011 before the commencement of the trial. They both pleaded guilty to one count of entering premises with intent and one count of assault occasioning bodily harm whilst armed and in company. They were also sentenced by the trial judge.

[6] An agreed schedule of facts was tendered at their sentencing hearing which indicated that the offences occurred against a background of a home invasion. The

complainant's evidence was that Bassett had first punched him with a closed fist and flipped him off the couch. The couch then landed on top of the complainant and, when it was picked up off him, the three defendants had begun hitting him in the head with closed fists whilst he was in a foetal position trying to protect himself. The defendants kicked and stomped on the complainant's head and body with their feet. The complainant also recalled being hit on the head with the lid of a camp oven a number of times. When the complainant ultimately sat up, Ellison kicked the complainant in the face and the side of the body.

[7] The injuries suffered by the complainant included bruising to his face and bleeding from his mouth and nose. He suffered two fractured ribs and a punctured lung, as well as a lacerated spleen. He also had bruising to his torso.

[8] Goffe received a head sentence of three years imprisonment with a parole release date after a period of 12 months, that is, after serving one third of the term. Bassett received a head sentence of two and a half years with a parole release date at 10 months, or one third. Goffe's heavier sentence was because of a more significant criminal record. In particular, there was a prior conviction for a home invasion. Mr Bassett subsequently gave evidence in the applicant's trial

The applicant's sentence

[9] In sentencing Mr Ellison the learned sentencing judge had regard to the schedule of facts tendered in the sentence of the co-offenders. However, his Honour clearly stated that the circumstances of the trial and the verdict meant that when Mr Ellison entered the shed where the complainant was living he did not have an intention to assault him. His Honour therefore dealt with Mr Ellison on the basis that his brutal attack on the complainant was a spontaneous response after Bassett tipped over the couch the complainant was lying on and struck him. On seeing the complainant on the floor, Mr Ellison joined in the attack in the company of Bassett and Goffe. His Honour also indicated that because of the jury's finding he could not be satisfied that he was involved in the use of the camp oven lid as a weapon.

[10] His Honour noted that the sentence was complicated by the fact that his co-offenders had pleaded guilty to a charge of assault occasioning bodily harm in company when armed and of entering the premises with intent. His Honour noted that the jury's verdict meant that they generally accepted the evidence of the complainant beyond reasonable doubt, but considered that he had to sentence Mr Ellison by ignoring the evidence of the complainant about being struck by an assailant who was armed on the basis that he was not in any way involved in the use of the weapon.

[11] His Honour considered that he had to have regard to parity with the co-accused in sentencing Mr Ellison. He indicated that although Mr Ellison did not strike the first blow, his involvement was shameful, particularly when he was the employer of the co-defendants and was someone they looked up to and respected. He considered that he was in the position where he could have told the co-defendants to stop and they probably would have done so. He also indicated that Mr Ellison participated in the attack and took the opportunity to deliver a final cowardly kick to the area of the complainant's head.

[12] His Honour also found that Mr Ellison left the scene because he was fleeing from a crime he was involved in, rather than because he was in fear of his co-offenders,

particularly given he returned to Mr Bassett's house afterwards. He also considered the attack was brutal and prolonged and probably lasted for five minutes.

[13] Mr Ellison was 38 at the time of the offences and 39 at the time of sentence. His Honour took into account a number of factors and noted he had been in a stable relationship with his wife for over 20 years. He was also of good standing in the community and had no relevant past convictions and, as such, he was dealt with on the basis that he had no relevant criminal history. His Honour also considered that Mr Ellison had a good work history

[14] His Honour indicated that the sentences imposed on his co-defendants had been ameliorated by one-third to reflect the remorse at their involvement in the offence and their cooperation with the administration of justice.

[15] His Honour concluded that whilst Mr Ellison had no relevant prior criminal history and no history for offences of this kind, he considered that the applicant had shown no remorse for his part in the offence. His Honour made reference to the decision of *R v Beer & Massey*[1] which involved two young offenders aged 18 and 22. A sentence, after trial, of 15 months suspended after six months with an operational period of two years was not interfered with on appeal. In that case no kicks or stomps were delivered and the complainant was not on the ground when he was assaulted. There was however a degree of pre-meditation. His Honour considered that the case was distinguishable given the youth of the offenders.

[16] The decision of *R v Sheret*[2] where a 12-month sentence was reduced to an intensive correction order was distinguished on the basis that no blow was actually struck by the offender and the injuries were less serious.

[17] Reference was also made to *R v Bean*[3] where a sentence of 12 months fully suspended with an operational period of 18 months was imposed. However, his Honour also distinguished that case as it involved a 21-year-old defendant and was a conviction for assault occasioning bodily harm simpliciter with no aggravating circumstance of being in company. Furthermore, the assault was not protracted or as brutal as in the present case.

[18] In *R v Sargeant, Price & Freier*[4] a sentence of two years imprisonment suspended after four months was imposed. His Honour also distinguished that from the present case as that involved three men, all aged 24, attacking a group of three bouncers at a hotel. In that case a period of imprisonment of two years suspended after four months was imposed. However, his Honour considered it significant that Mr Ellison was a mature offender. He also considered the injuries in that case were not as significant as those suffered by the complainant in this case. His Honour considered that that decision supported a head sentence of two years which was the sentence he intended to impose.

[19] His Honour also referred to the decision of *R v Neivandt*[5] where a mature offender was sentenced to 12 months imprisonment with a declaration in respect of 36 days pre-sentence custody and no further period in custody being required to be served. It was noted that a sentence of 12 months suspended after four months had been

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1 [2002] QCA 397.
2 [2002] QCA 162.
3 [1999] QCA 95.
4 [2005] QCA 409.
5 [2000] QCA 224.

imposed with an operational period of two years, however the injuries were clearly less serious and there was no kicking or stomping.

[20] In particular reliance was placed on the decision of *R v Hilton*[6] where Keane JA held:

> "… generally speaking, an offender who is a mature adult should usually expect to serve a term of actual imprisonment for an offence involving deliberate, protracted and irrational inflicting of bodily harm upon another. The decision of this Court in *R v Jones* shows that this is so even in the case of a first offence where the offender has a good work history and has been more co-operative with the administration of justice than the applicant in this case has been."

[21] Keane JA also indicated in that decision that, whilst courts were slow to send offenders to prison for a short time where they have not previously been sentenced to actual imprisonment, considerations of general and personal deterrence will, generally speaking, overcome that reluctance in the case of a mature offender. Keane JA particularly considered that an offence involving persistent personal violence by a mature adult should generally be punished by a sentence involving actual custody.

[22] The learned District Court sentencing judge considered that similar principles applied in the case of Mr Ellison as, whilst he did not enter the premises with intent to commit the assault, he joined in. He noted that the attack was not only persistent and violent but also involved "three men on a man who was relatively defenceless on the ground". His Honour continued, "[f]urthermore, your final act of brutality in kicking him as he describes, in my view, indicates your contempt for him at the time. In the circumstances, I think a sentence of two years is appropriate."

[23] Specific reference was made to the decision of *Postiglione v The Queen*[7] and the need to address both parity and totality. His Honour stated that he was conscious of the need for parity between Mr Ellison's offence and that of his co-offenders. He considered that parity was appropriately addressed by imposing a head sentence on Ellison which was less than the sentences imposed on Goffe or Bassett. He sentenced both Goffe and Bassett on the basis that they were not the organisers of the crime to which they pleaded guilty.

[24] Counsel for the Crown had submitted that a head sentence essentially in the order of two to two and a half years with a parole release date at half of that term was appropriate. The sentence submitted by defence counsel was a head sentence of 12 months to be either suspended after, or parole fixed, at three months. Alternatively, defendant counsel submitted that a sentence of 18 months fully suspended or an immediate parole release order was appropriate.

Grounds of appeal

[25] Mr Ellison's grounds of appeal are essentially that:

(a) the judge gave insufficient weight to the mitigating factors and antecedents of the applicant and an undue weight to the role he played in the offence;

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6 [2009] QCA 12.

7 (1997) 189 CLR 295; (1997) 145 ALR 408 at 417; [1997] HCA 26.

(b) the sentence was manifestly excessive when compared to his co-offenders whose culpability was greater;
(c) the judge erred in the application of the principle of parity giving rise to a justifiable sense of grievance;
(d) the judge was mistaken as to the facts;
(e) the judge considered the applicant was the principal offender when he was a party to the offence;
(f) the judge failed to take into account the jury's findings of not guilty of the other charges; and
(g) the judge erred in apportioning a greater degree of responsibility to the applicant for the offence and imposing more lenient sentences on the co-offenders.

The mitigating factors

[26] In my view the sentencing judge did take into account the mitigating factors. His Honour considered them carefully, particularly his stable relationship and the role he played in his family. He considered that he was previously a person of good standing in the community and that he had a good work history. Whilst it is argued that the financial loss to Mr Ellison's business was not given due consideration, financial loss is an inevitable consequence of incarceration.

[27] It was also significant, in my view, that Mr Ellison's minor and dated criminal history was not considered to be relevant.

[28] His Honour then noted that he had sentenced the co-offenders on the basis that they had early pleas of guilty and had therefore shown remorse. His Honour specifically considered that Mr Ellison had shown no remorse and therefore he could not consider that as a mitigating factor. In this regard it is submitted that his Honour did not take into account the fact that the applicant was justified in taking the matter to trial given he was acquitted on Count 1 and found not guilty of the circumstance of aggravation of 'being armed' with respect to Count 2. It is essentially argued that the applicant is being penalised for taking the matter to trial.

[29] It is also inferred that his Honour should have specifically accepted that there was evidence at the trial that Mr Ellison had removed the lid from the hands of one of the co-accused and that this should have been taken into account in the factual scenario upon which he was sentenced.

[30] I do not agree however that the jury's verdict, that they were not satisfied that Mr Ellison was guilty of assault whilst armed with an offensive weapon, meant that this evidence of actual intervention must have been accepted by them. They may well have accepted that he was not aware of the use of the weapon or assisted in the use but they may have rejected the evidence about the intervention by him and the removal of the lid from the hands of one of his co-offenders.

[31] It must be remembered that the applicant gave evidence in his trial and his Honour's sentencing remarks make it clear that his view about a lack of remorse was in fact based on the evidence he gave in his trial. His Honour specifically noted that whilst he could not sentence the applicant on the basis he was armed or went to the premises with intent he considered that generally the jury accepted the complainant's version of events. By inference, the jury did not accept the applicant's version of events that he had tried to stop the attack.

[32] The evidence his Honour relied upon in sentencing the applicant was that the co-offenders had ceased the attack and it was then that Mr Ellison delivered "one final cowardly kick to the area of his head" and said words to the effect, "This is what happens when you fuck with the Broes (sic)".

[33] Furthermore, whilst the evidence given in the trial is not in the Appeal Record Book, I note his Honour's remarks about the true nature of the intervention by Mr Ellison in the following terms:[8]

> "The fact that he was defenceless and, as I say, your recognition when you gave evidence that you were a person to whom the other looked up to and respected and **my belief that if you had intervened as you've described you did in your evidence, but which evidence was rejected beyond reasonable doubt by the jury,** that the injuries suffered by the complainant might have been non-existent or much less than they in fact were." (my emphasis)

[34] Having heard the evidence his Honour was justified in taking the view that he did about his lack of remorse.

[35] Furthermore, in my view his Honour was taking the mitigating factors, such as they were, into account in trying to balance all of the relevant considerations but considered the lack of remorse to be significant.

Was the sentence manifestly excessive compared to the co-offenders?

[36] It is clear that both of the co-offenders Bassett and Goffe pleaded guilty to more serious offences than the offence Mr Ellision was ultimately found guilty of. He was found guilty only in relation to the lesser offence of assault occasioning bodily harm in company.

[37] The agreed schedule of facts in relation to Bassett and Goffe indicated that Ellison had first attended the complainant's residence by himself and had a disagreement with the complainant. There was then yelling and accusations were traded between the complainant and Mr Ellison. At that stage Mr Ellison left. A short time later the complainant was awoken by Bassett and Goffe who arrived at speed in a ute. They were followed by Ellison in his truck. All the co-offenders knew and had worked with the complainant.

[38] Barrett and Goffe were sentenced on the basis that they were not the prime instigators but rather Mr Ellison was the instigator. Clearly, however, the judge acknowledged that the jury considered that Mr Ellison did not enter the house with any clear intent to do harm and that he was not aware of his co-offenders' plan to enter with intent to commit an offence. Mr Ellison was also not found to be a part of the attack on the complainant with the weapon.

[39] It is clear from the exchange with counsel that his Honour accepted that the co-offenders were obviously sentenced for more serious offences. His Honour accepted also that Mr Ellison's actions were impulsive and were not premeditated. He considered however that the real criminality involved being part of a prolonged attack on a man who was on the ground being brutally beaten and in making a decision to join in perpetuating that situation when he was in a position to

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[8] Appeal Record Book at p 75, ll 10-20.

influence his employees to stop. His Honour was entitled to view those factors as particularly significant and to view Mr Ellison's conduct as particularly serious when compared with that of his co-offenders.

[40] I do not consider that this ground has been made out.

Was there parity with the co-offenders?

[41] In my view the real issue is whether the role that Mr Ellison played was such that it warranted a sentence of two years when sentences of two and a half years and three years were imposed on his co-accused for the more serious charges of committing the assaults not just in company but whilst armed and for being involved in the entry of premises with an intent to commit an indictable offence.

[42] In *Postiglione v The Queen*[9] Mc Hugh J summarised the principles of parity as follows:

> "The principle of parity of sentencing between co-offenders is not in terms recognised in the Act but it is a well established principle. In *R v Tiddy*, the Court of Criminal Appeal of South Australia defined the principle as follows:
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> > Where other things are equal persons concerned in the same crime should receive the same punishment; and where other things are not equal a due discrimination should be made.
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> A sentencing judge must give effect to the parity principle in cases to which the Act applies.
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> If a judge wrongly fails to give effect to the parity principle, an appellate court will intervene to correct what is an error in sentencing principle. In *Lowe v The Queen*, Gibbs J, which whom Wilson J agreed, said that an appellate court should intervene where "the disparity is such as to give rise to a justifiable sense of grievance, or in other words to give the appearance that justice has not been done". Mason J stated that an appellate court is entitled to intervene when there is a manifest discrepancy such as to engender a justifiable sense of grievance. Dawson J, with whom Wilson J also agreed, was of the view that "[t]he difference between the sentences must be manifestly excessive and call for the intervention of an appellate court in the interests of justice"."

[43] In the same decision Dawson and Gaudron JJ stated the principle in the following terms:

> The parity principle upon which the argument in this Court was mainly based is an aspect of equal justice. Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them. In the case of co-offenders, different sentences may reflect different degrees of culpability or their different circumstances. If so, the notion of equal justice is not violated. On some occasions, different sentences may indicate that one or other of them is infected with error. Ordinarily, correction of

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9 (1997) 189 CLR 295; (1997) 145 ALR 408 at 417; [1997] HCA 26.

> the error will result in there being a due proportion between the sentences and there will then be equal justice. However, the parity principle, as identified and expounded in *Lowe v The Queen*, recognises that equal justice requires that, as between co-offenders, there should not be a marked disparity which gives rise to a "justifiable sense of grievance". If there is, the sentence in issue should be reduced, notwithstanding that it is otherwise appropriate and within the permissible range of sentencing options.
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> Discrepancy or disparity is not simply a question of the imposition of different sentences for the same offence. Rather, it is a question of due proportion between those sentences, that being a matter to be determined having regard to the different circumstances of the co-offenders in question and their different degrees of criminality. The different circumstances involved in this case, namely, the fact that Savvas was the principal organiser in both conspiracies and that Postiglione rendered significant assistance to police and prosecuting authorities, clearly require that Postiglione receive a markedly lesser sentence than that imposed on Savvas.

[44] It is clear that Mr Ellison was only found guilty of one offence but it was the more serious of the two offences charged on the indictment. He was also clearly sentenced on the basis that he was a principal offender in that actual attack. Furthermore, it was the prolonged nature of the attack which was particularly heinous. His Honour specifically referred to the fact that the attack went on for a long period, probably in the order of five minutes. It was considered by the sentencing judge to be 'brutal'.

[45] Significantly, Mr Ellison was held to be particularly responsible for the prolongation given his more senior role as the employer of the co-offenders. He was also clearly the person who had been earlier offended by the complainant's conduct. Furthermore it was after the others had ceased their attack that Mr Ellison delivered the kick to the complainant's head and said the insulting words.

[46] It is clear that on the basis of that evidence Mr Ellison was in fact a principal offender and his Honour correctly noted that he played a significant role in the offences. That role was rightly taken into account in relation to the sentence imposed. In my view, in this case 'all things were not equal' and due discrimination needed to be made. I consider that due discrimination was made. This ground has not been made out.

Did the sentencing judge misunderstand the facts and not make an adequate concession as to the jury findings of not guilty?

[47] Whilst it is argued that the learned sentencing judge misunderstood the facts I do not accept that that was in fact the case.

[48] In my view his Honour specifically stated that the acquittal on the circumstance of aggravation was either because his actions in assaulting the complainant didn't 'assist' the person or persons who used the weapon within the meaning of s 7 of the *Criminal Code* 1899 (Qld) or that Mr Ellison was not aware when he engaged in the assault that one or other or both of his co-defendants had a weapon.

[49] The learned sentencing judge was well aware of the facts and the relative criminality of each defendant and referred to those distinctions in great detail. Ultimately his Honour took a serious view of Mr Ellison's offending because of the role he played in the continuation of the attack, his position of influence over the co-accused and the final blow which he delivered solely. I do not consider that this ground has been made out.

Were the findings of jury of 'not guilty' taken into proper consideration?

[50] It is clear that Mr Ellison was not being sentenced for an assault with that circumstance of aggravation. He was obviously being sentenced for the lesser offence. He was sentenced for one offence only. I am not satisfied that it can be argued that his Honour did not take those findings into proper consideration. His Honour obviously had to consider Mr Ellison's overall criminality and the true nature of the role he played as well as the actual charge.

Was the applicant treated as the principal offender?

[51] There is no substance to the argument that Mr Ellison was treated as the principal offender in the whole attack. In my view it was clear from his Honour's sentencing remarks that he treated Mr Ellison as the 'instigator' of the return visit to the complainant after Mr Ellison's initial altercation with him and not the 'instigator' of the actual attack. On the facts he had clearly returned in his truck and his employees came in the ute to see the complainant. It is clear, however, that his Honour did not see Mr Ellison as the instigator of the actual attack, noting, as he did, that he did not enter with any intent to commit harm and that he did not attack the complainant with the weapon (the camp oven lid). His Honour made it plain that he viewed Mr Ellison as 'joining in' after the attack was started by the others. Given the basis upon which he was sentenced for the kick to the head the applicant was not simply an 'aider or abetter' in the assault.

[52] It is also clear that when the co-offenders were sentenced they were not sentenced as the main instigators of the whole episode. Whilst it may be argued that they were not actually sentenced as the principal offenders it is also clear that Mr Ellison was not treated as the principal offender in terms of his actual sentence either. He was however correctly termed as the instigator of the sequence of events which resulted in the attack.

[53] I can find no error in the approach of the learned sentencing judge.

[54] Neither do I consider that the sentence was manifestly excessive in the circumstances. His Honour correctly analysed the cases he had been referred to and correctly pointed out that many of those cases involved significantly younger offenders or assaults which were not as prolonged or as severe.

[55] The decision of *R v Hilton*, referred to by the sentencing judge, clearly justified the imposition of a term of imprisonment requiring that a period of actual custody be served given the violence involved resulted in physical harm to the complainant. In *Hilton* a sentence of 18 months suspended after six months for an operative period of two years was imposed in relation to a charge of assault occasioning bodily harm. The defendant was 37 at the time of sentence but the assault was not as prolonged as in the present case and involved some six or seven punches which rendered the complainant unconscious. It did not have the circumstances of aggravation of being 'in company'. Furthermore, it was a plea of guilty.

[56] A sentence of two years with parole eligibility at 12 months is in my view a comparable sentence when all the factors are taken into account even though the defendant in *Hilton* had a previous history of assaults.

[57] In *Hilton*, as in the present case, there was evidence that the assault was unprovoked and was initiated in his pursuit of a 'grudge'. Furthermore, the Court noted it was of particular concern that the assault continued after the complainant was unconscious. In the present case Mr Ellison continued the assault after the others desisted and when the complainant was helpless and slumped against a fridge.

[58] The factors identified as relevant in that case apply equally here:[10]

> "[21] The question is whether the imposition of a term of actual custody was within the scope of the proper exercise of the discretion of the learned sentencing judge. There can be no doubt that it was reasonably open to his Honour to impose such a sentence in this case. The observations of McMurdo P and Thomas JA in this Court in *R v Yanner & Yanner; ex parte A-G* show that, generally speaking, an offender who is a mature adult should usually expect to serve a term of actual imprisonment for an offence involving deliberate, protracted and irrational inflicting of bodily harm upon another. The decision of this Court in *R v Jones* shows that this is so even in the case of a first offence **where the offender has a good work history and has been more co-operative with the administration of justice than the applicant in this case has been.**
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> [22] Offences involving personal violence raise considerations of general and personal deterrence which may warrant a custodial sentence even for a first offence. The applicant's record of previous assaults suggests that the need for personal deterrence is a consideration of concern in this case. **In the present case, the applicant's assault on the complainant was quite unprovoked; the complainant did not want to fight the applicant, but the applicant persisted in his pursuit of a grudge.** While the courts are slow to send an offender to prison for a short time where the offender has not previously been sentenced to actual imprisonment, considerations of general and personal deterrence will, generally speaking, overcome that reluctance in the case of a mature offender. That this offence, involving as it did persistent personal violence by a mature adult, should be punished by a sentence involving actual custody is hardly surprising.
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> [23] The assault was not an act of youthful misjudgement: the applicant is a mature man, and his attack on the complainant was prosecuted with deliberation and determination. The complainant suffered serious injury. It is a matter of **special concern that the applicant continued his attack upon the complainant by kicking him after he had been rendered**

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10 *R v Hilton* [2009] QCA 12, per Keane JA.

> **unconscious.** It cannot be said that the sentence was manifestly excessive on the material which was before the learned sentencing judge." (my emphasis).

[59] In *R v Sheret* Mullins J[11] referred to the fact that the offence of assault occasioning bodily harm "is committed in a wide variety of circumstances leading to a wide range of outcomes". In that case the sentence was in fact modified to an intensive correction order because of a number of factors including the following:

> "the short period of time to which the premeditation applied, the lack of involvement on the applicant's part in the physical assault, the nature of the actual assault and the relatively good antecedents of the applicant, even allowing for the lack of remorse and the fact that the complainant was an off-duty police officer." [12]

[60] In this case, however, it was a prolonged and brutal attack in which all three men joined in.

[61] In my view a comparison of the relevant cases does not disclose that sentence imposed in this case was not within the appropriate range.

[62] Counsel for the applicant was given leave to adduce further evidence which was not before the sentencing judge. Since the sentencing hearing a letter had been received by the applicant from the Immigration Department giving him a notice of intention to consider cancellation of the applicant's Visa. Counsel for the applicant advised the Court that whilst the applicant had been born in New Zealand he had resided in this country since 2001 and had been a hard working and law abiding citizen during that period The Court was informed that when a person such as the applicant who has been a permanent resident for a period of less than 10 years is convicted in Australia of an offence which caries a penalty of not less than one year the Minister may order the person's deportation. Counsel submitted that the sentence imposed would have this adverse consequence on the applicant.

[63] In *R v MAO; ex parte A-G*[13] the Court held that "it is impermissible for a Judge to reduce an otherwise appropriate sentence to avoid a risk of deportation." Clearly then this material is material which cannot be taken into account by this Court.

[64] The application for leave to appeal should be refused.

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11 [2002] QCA 162, at [50].
12 Ibid, at [51].
13 [2006] QCA 99.