

SUPREME COURT OF QUEENSLAND

CITATION: *R v Pham & Ors* [2012] QCA 169

PARTIES: **R**
v
PHAM, Dzu Le
(applicant)

R
v
AHMED, Humza Ali
(applicant)

R
v
HIGHAM, Jaymin Ray
(applicant/appellant)

R
v
LEE, Seung Kyu
(applicant)

FILE NO/S: CA No 29 of 2012
CA No 43 of 2012
CA No 52 of 2012
CA No 68 of 2012
DC No 203 of 2012

DIVISION: Court of Appeal

PROCEEDING: Sentence Applications

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 22 June 2012

DELIVERED AT: Brisbane

HEARING DATE: 29 May 2012

JUDGES: Holmes and Gotterson JJA and Philippides J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. In relation to the application by Seung Kyu Lee in
CA No 68 of 2012:**
**(a) The Registrar of the District Court is directed
to amend the court order sheet attached to the
indictment as follows –**
**(i) Amend the order in relation to counts 3
and 4 by deleting the reference to
“2 years” and substituting “three and**

- a half years” for the period in which the applicant must not commit another offence punishable by imprisonment if to avoid being dealt with for the suspended term of imprisonment;
- (ii) Amend the order that the sentence of 18 months be imposed on count 2 by adding that the term be suspended after a period of 12 months imprisonment; and you must not commit another offence punishable by imprisonment within a period of three and a half years if to avoid being dealt with for the suspended term of imprisonment;
- (b) The Registrar of the District Court is directed to amend the verdict and judgment record of Seung Kyu Lee to reflect the amendments in paragraphs 1(a) and 1(b);
- (c) The application is otherwise dismissed.
2. In relation to the application by Jaymin Ray Higham in CA No 52 of 2012:
- (a) The Registrar of the District Court is directed to amend the court order sheet attached to the indictment as follows:
- (i) Amend the notation “Note: record should note that the period of 8 days on remand was taken into account to reduce the sentence from 4 years imprisonment to 18 months” by removing “8 days” and inserting instead “901 days”;
- (b) The application is granted;
- (c) The appeal against sentence is allowed;
- (d) The sentences imposed on counts 1, 2 and 3 are set aside and in lieu concurrent sentences of 6 months, wholly suspended, are imposed for an operational period of 18 months.
3. In relation to CA No 29 of 2012, the application by Dzu Le Pham is dismissed.
4. In relation to CA No 43 of 2012, the application by Humza Ali Ahmed is dismissed.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where offences involved deprivation of liberty, assault occasioning bodily harm whilst armed and in company, assault occasioning bodily harm in company and unlawful assault – where involvement of applicants in the offences varied – where guilty pleas were entered – whether the sentences imposed on the applicants

were manifestly excessive – whether disparity between sentences

R v Blair, unreported, Court of Criminal Appeal, Qld, CA No 49 of 1990, 7 December 1990, considered

R v El-Masri [2003] QCA 52, considered

R v Hsu and Hsu [1998] QCA 257, considered

R v Middleton and Johns (2006) 165 A Crim R 1; [2006] QCA 92, considered

R v Omar [2012] QCA 23, considered

R v Watkins [2003] QCA 437, considered

COUNSEL: S Nguyen for the applicant, Pham
The applicant Ahmed appeared on his own behalf
The applicant/appellant Higham appeared on his own behalf
The applicant Lee appeared on his own behalf
J A Woodridge for the respondent

SOLICITORS: Southside Lawyers for the applicant, Pham
The applicant Ahmed appeared on his own behalf
The applicant/appellant Higham appeared on his own behalf
The applicant Lee appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

- [1] **HOLMES JA:** I agree with the reasons of Philippides J and the orders she proposes.
- [2] **GOTTERSON JA:** I agree with the orders proposed by Philippides J and with the reasons given by her Honour.
- [3] **PHILIPPIDES J:** The applicants, Dzu Le Pham, Humza Ali Ahmed, Jaymin Ray Higham and Seung Kyu Lee, seek leave to appeal against sentences imposed on them following pleas of guilty entered on 7 February 2012. A fifth offender, Hoang Du Lam, abandoned his application for leave to appeal.
- [4] Pham, Ahmed, Higham and Lee were each convicted of committing the following offences against the complainant Hao Duy Tran, who was aged 23:
- Count 1 – deprivation of liberty;
 - Count 2 – assault occasioning bodily harm whilst armed and in company;
 - Count 3 – assault occasioning bodily harm in company.
- [5] Pham and Lee were also, together with Lam, convicted of one count of assault occasioning bodily harm in company committed against the complainant Nickolay Kolomilskov, who was aged 24 (count 4).
- [6] Lee pleaded to a further count of common assault against the complainant Yiih Jann Joel Wee, who was aged 24 (count 5).
- [7] A sixth associated offender, Menshivan Wayne Lay, who pleaded to charges on a separate indictment (which equated to counts 2, 3 and 4), did not seek to appeal against his sentences.

- [8] All the applicants sought leave to appeal on the ground that the sentences imposed were manifestly excessive. Higham additionally raised an issue of parity (which Ahmed also raised in oral submissions).

The circumstances of the offending

- [9] A schedule of facts, as agreed between the parties, was tendered at sentence. The respondent's submissions helpfully summarised those facts as appears below.

The relationships between the offenders and the complainants

- [10] The complainants Tran and Wee were close friends of the complainant Kolomilskov.
- [11] The offender Lam knew all three complainants. He had known Kolomilskov as a friend for approximately eight years. He had been friends with Tran for a couple of years and was acquainted with Wee.
- [12] Higham and Ahmed were friends of the offender Lam and the complainants Tran and Kolomilskov (through Higham's relationship with Kolomilskov's sister).
- [13] Lee had been a work colleague of Kolomilskov "for years", leading to the two becoming friends. The friendship had, however, soured in the months preceding the events the subject of the offences. The other complainants Tran and Wee were also known to Lee through mutual friends.
- [14] Pham was friends with Lee and was acquainted with the complainant Kolomilskov (having met him once in January 2009) but did not know the other two complainants.
- [15] Each of the complainants was also friends with the younger brother of the offender Lay, and knew him through that association.

Background to the offending

- [16] By August of 2009, Kolomilskov owed an amount of money to his friends Higham and Ahmed. Lam and Kolomilskov reached an agreement, whereby Lam loaned the money to repay the loan to Kolomilskov. The loan was secured by a Lexus motor vehicle owned by Kolomilskov. Lam had obtained the money (or some of it) by borrowing it from his brother.
- [17] The offending arose against the background of Lam wanting the money back that Kolomilskov owed him. It was said that Kolomilskov owed Lam \$15,000. Others, including the applicants, involved themselves as friends or associates of those who felt aggrieved by Kolomilskov owing money. Members of the group were unable to contact Kolomilskov in the week leading up to the events the subject of the offences, he having made himself scarce.

Count 1 (start)

- [18] Late on the afternoon of 12 August 2009, Higham and Ahmed telephoned Tran and invited him to the McDonald's restaurant at Woodridge. Tran indicated that he would meet them, however he did not attend.

- [19] Higham and Ahmed then drove to Tran's home. Tran saw them arrive and went outside to their car. Ahmed told the complainant Tran to get into the back seat of the car and he complied out of fear. Another unknown male was also in the back seat.
- [20] Higham and Ahmed then drove Tran to Kolomilskov's home. Once there they spoke to Kolomilskov's flatmates who stated that they did not know where he was. They remained at Kolomilskov's home for a period of time. Tran, who had overheard Higham and Ahmed talking about Kolomilskov's owing them money, was becoming scared about why he was taken to Kolomilskov's home. Tran did not know where Kolomilskov was.
- [21] During the night Ahmed and Higham drove Tran to a Mobil Service Station at Beaudesert, where they waited until Pham and Lee arrived in a second vehicle driven by Lay. Tran remained in the car while the four applicants had a discussion, which included reference to Kolomilskov owing money to friends and his being missing. Other unknown persons were also present.
- [22] Higham and Ahmed then returned to the vehicle and drove Tran to the car park entrance of the Karawatha Forest. A number of cars arrived, including that of Lay (in which Lee and Pham were passengers).

Count 2

- [23] Tran got out of the car and was challenged to a fight by Ahmed, who punched Tran to the head. Tran declined to fight and walked away to sit down away from the group of offenders. Ahmed and Higham then punched him around the head and body.
- [24] Approximately five to 10 minutes later, other cars arrived containing unknown males of Lebanese ethnicity, some of whom had their faces covered. Other males from this second group joined in the striking of Tran. They struck him to the head and body with small branches pulled from trees. They also punched him around the head and body. Ahmed and Higham were still involved at this time.
- [25] During the course of the assault on Tran, the applicant Lee joined in by punching Tran.
- [26] The applicant Pham and the offender Lay did not take physical part in the beating of Tran, however, they remained nearby at Lay's vehicle. The Crown case was that "their presence was voluntary, deliberate and supported the actions of those committing the offence through their presence at the time that this assault took place". Lay was sentenced on the basis that he did not have specific knowledge of what was to transpire at the Karawatha Forest prior to his attendance there.
- [27] While Tran was being assaulted, males were repeatedly asking Tran where Kolomilskov was. Tran repeatedly told the group that he did not know. Approximately eight to 10 offenders were involved in assaulting Tran. It is unclear if that was all at once. One of the assailants kicked Tran in the testicles. The assault was protracted and punctuated with pauses between the hitting with the sticks and the punching to the head and body, after which time the assault continued. The assault included hitting Tran while he was on the ground. As a result of this assault, Tran sustained a split lip and bruising and minor cuts to his face and body. There was blood on his shorts.

Count 1 (continued)

- [28] Higham and Ahmed drove Tran to the home of Higham's brother, in Southport. Once there, he was allowed to sleep in one of the rooms.
- [29] The next day they drove Tran to Brisbane. Tran was kept in their company as they drove him around Brisbane, including to a shopping centre where the applicants purchased clothing for themselves. No further threats were made against Tran, however, he remained in their company, complying out of fear.
- [30] While at the shopping centre, Lam attended and spoke with Higham and Ahmed. They again conversed about not having located or contacted Kolomilskov.
- [31] Later, Higham and Ahmed drove Tran to a park near Rocklea. Lay followed in his vehicle (with Pham and Lee), as did Lam. At the park they met with others. Approximately three or four cars were in attendance. By this time it was night time and no one else was present other than those involved in the discussion.

Count 3

- [32] Tran was outside of the car. Pham and Lee punched Tran about the head, Lee telling Tran that he was lying and that he knew the whereabouts of Kolomilskov. Ahmed was also himself physically involved in punching Tran. Tran was on the ground. Other males started punching and kicking Tran. Tran was unable to indicate how many persons assaulted him at any one time but states that there were in total around six to eight assailants. The assault was punctuated with pauses during which he was asked about the whereabouts of Kolomilskov, before the beating recommenced.
- [33] Pham, Ahmed and Lee were sentenced on the basis that they were principal offenders who had themselves engaged physically in the attack on Tran.
- [34] Higham was sentenced on the basis that "though not physically participating in the attack ... [he] is liable [for] aiding and enabling the offence to take place". In particular, he was the person who drove Tran to the park. He then remained present in circumstances where "his deliberate presence is designed to support those attacking Hao Tran", the motivation being to get information from Tran.
- [35] Lay and Lam, who were present but also not physically involved in the assault, spoke out that the group should stop hitting Tran. Lay stated, "he's had enough". The assault, however, continued over their objection.
- [36] Lam was sentenced on the basis that he had not known Tran had been in the presence of Higham and Ahmed at the service station, as Tran had remained in the vehicle. He did not see Tran until they were at the park. Lay was sentenced on the basis that, notwithstanding the protestations that he ultimately made, "his deliberate presence ... could only be seen to be designed to provide some support to those acting as they [did] on that [second] occasion", particularly having regard to his presence during the first assault the subject of count 2.
- [37] The assault on Tran came to an end when the assailants heard that Lam had been successful in contacting and arranging to meet with Kolomilskov in relation to the money that was owed.

- [38] As a result of this assault, Tran suffered further bruising around his face and body (to that already sustained in the first assault upon him the day prior – count 2).
- [39] Counsel for Ahmed tendered photographs of the complainant Tran taken 10 to 11 days after the incident. The record suggests that at that time there was some swelling to the forearm and an injury to his leg, in the process of healing, but no apparent (visible) injuries to his face.

Background to count 4

- [40] Kolomilskov met Lam at about 8.00 pm. Further to discussions between the two, Kolomilskov drove out to a sugarcane field in the Jacobs Well area, following Lam's vehicle to the location.
- [41] In the meantime, Tran had been driven to the same location by Lay (with Lee and Pham).
- [42] When Kolomilskov arrived, a number of other vehicles were already in attendance. They each had their headlights on, directed towards the entrance to the field. Apart from the light from the headlights, the area was dark.
- [43] Lam parked his car in a similar position to where the other cars were parked. Kolomilskov got out of his car and walked towards the car lights.

Count 4

- [44] As Kolomilskov walked into the light, he was punched to the side of the head by someone. This caused him to fall to the ground. A number of young men started to kick and punch Kolomilskov while he was on the ground. While he was being assaulted he was being called names by the assailants.
- [45] Pham and Lee (as well as the offender Lam) were involved in punching Kolomilskov at this time and were each principal offenders. Others were involved in the assault, but it cannot be said how many were involved.
- [46] At some stage during the assault, Lay exited his vehicle and yelled out to the group to stop. In the opinion of Kolomilskov, he would have suffered a more severe beating but for the attempted intervention of Lay. Lay was sentenced on the basis that "despite his protestations that he's attended ... and his ... deliberate presence at those times would be seen by the group to his voluntary support for what they are doing. He had not done enough to withdraw ... that support on each of the occasions, particularly in light of the fact he's turned up and on each occasion these people have been assaulted."
- [47] Kolomilskov stated that at the conclusion of the assault, he was feeling "groggy". He sustained bruising to his face and body.

Count 1 (conclusion)

- [48] Kolomilskov was placed in the back of Lay's vehicle, with Tran. Tran had remained in the vehicle while Kolomilskov was being assaulted, but had witnessed the assault. While they were both in the vehicle they were able to observe each other's injuries and scared demeanour. Lay drove Tran and Kolomilskov back to Kolomilskov's home.

Count 5 (background)

- [49] Kolomilskov had at some stage at the cane fields commented to one or more of the males involved that his friend, the third complainant Joel Wee, was a person likely to have money. From this, some of the group concluded that Wee may be holding the money owed by Kolomilskov.
- [50] As Lam knew Wee, he contacted Wee to arrange a meeting. Later that same night, at approximately 2.00 am, Wee met with Lam at the BP Service Station at Eight Mile Plains. The applicants Higham, Pham and Lee also attended. The group spoke to Wee about Kolomilskov owing money.
- [51] Higham, Pham and Lam (not Lee) then drove with Wee to Wee's home in Higham's car. It was said that they went into Wee's home to see if he was telling the truth about not having Kolomilskov's money. They did not find anything in Wee's home. Higham then drove Wee back to the service station where Wee collected his car.

Count 5

- [52] The following night, Wee was at home with his father. Pham, as well as Lee (who had not attended the night prior) and other unknown males of Lebanese appearance, attended at the gated complex and called Wee's residence on the intercom. Wee answered the intercom and the males gained entry when a car arrived and accessed the gate.
- [53] The males again asked Wee about Kolomilskov's money. Wee replied that his father was at home, and that he did not have the money. Lee became angry and pushed Wee back into a raised garden bed and back-handed him to the face. The group of males then left the location.

Other statements by offender Lam

- [54] After the offences, Lam attended at the home of the ex-wife of Kolomilskov. He admitted to her his involvement in the assault on Kolomilskov in the cane field. He told her that Kolomilskov was on drugs, that he had taken a lot of money from a lot of people, and that he deserved what occurred.

Submissions made at first instance as to the appropriate sentencing range*The submissions of the Crown on sentence*

- [55] The prosecution contended for head sentences as follows:
- Ahmed and Higham – 3.5 to 4.5 years imprisonment;
 - Pham and Lee – three to four years imprisonment;
 - Lam – 2.5 to 3.5 years imprisonment;
 - Lay – 2.5 to three years imprisonment.
- [56] The authorities relied upon at sentence by the Crown to support the range it contended for were *R v El-Masri* [2003] QCA 52, *R v Blair*, unreported, Court of Criminal Appeal, Qld, CA No 49 of 1990, 7 December 1990 and *R v Watkins* [2003] QCA 437. It was submitted that, if the range contended for by the prosecution for Higham was accepted as being otherwise appropriate, the court

would sentence him to a head sentence of one to two years imprisonment to take into account that period of time spent on remand (901 days) that could not be declared as time served under the sentence.

- [57] The prosecution submission was that each of the applicants be required to serve some actual custodial period as part of the sentence imposed although, in the case of Lay, it was conceded that a term of imprisonment which was wholly suspended was also within range, because of his limited involvement.
- [58] It was submitted that the applicant's pleas could be reflected either by the ordering of an earlier parole release or eligibility date, or a reduction of the head sentence that would otherwise be appropriate to impose.

The submissions made on behalf of the applicants at first instance

- [59] Defence counsel referred the sentencing judge to a number of other authorities including *R v Lofts and A-G (Qld)* [1996] QCA 159, *R v Adams; ex parte A-G (Qld)* [1998] QCA 64, *R v Hsu and Hsu* [1998] QCA 257, *R v Graham* [2006] QCA 106, *R v Middleton and Johns* (2006) 165 A Crim R 1; [2006] QCA 92, *R v Lude; R v Love* [2007] QCA 319 and *R v McGregor and Payne* [2002] QCA 334.
- [60] It was submitted on behalf of Ahmed, that the appropriate range for the head sentence was one of two to three years imprisonment. Given the period of 102 days spent in pre-sentence custody, and his otherwise good character and strong prospects of rehabilitation, counsel urged against returning him to custody.
- [61] It was submitted on behalf of Higham, that the appropriate sentence was one of 2.5 to three years imprisonment, and that given the 2.5 years spent in custody that could not be declared, a sentence of six to 12 months wholly suspended should be imposed.
- [62] On behalf of Pham, it was submitted that the appropriate head sentence on counts 1 and 2 (where he was liable as a party) was one of up to 12 months imprisonment. It was submitted that in relation to counts 3 and 4 (where he was a principal offender) the appropriate head sentence was one of up to 18 months imprisonment. It was submitted that, if it was considered that some actual custody should be served, it ought to be a short period in the order of three to four months.
- [63] Lee's counsel contended for a head sentence of 12 months imprisonment, fully suspended, as appropriate.

Sentences imposed

- [64] Ahmed and Higham were notionally sentenced to the top of the range contended for by the prosecution. Higham received a wholly suspended term, as was urged by both parties as appropriate to reflect the time he had spent on remand. The head sentence of that suspended term was six months higher than that submitted by his counsel as appropriate.
- [65] Pham and Lee were sentenced to the bottom of the range contended for by the prosecution, but higher than the range contended for on their behalf by counsel.
- [66] The sentences imposed were as follows:

Ahmed

- [67] Ahmed was sentenced to an effective sentence of four years imprisonment suspended after serving one year and 102 days imprisonment for an operational period of 4.5 years, with the following sentences being imposed:
- Count 1: Two years imprisonment suspended after one year and 102 days for an operational period of 4.5 years;
 - Counts 2 and 3: On each count four years imprisonment suspended after one year and 102 days for an operational period of 4.5 years;
- A period of 102 days pre-sentence custody (between 29 August 2009 and 8 December 2009) was declared as time served under the sentences.

Higham

- [68] Higham was sentenced on each of counts 1, 2 and 3 to 18 months imprisonment, those terms to be served concurrently. All sentences were suspended forthwith for an operational period of 2.5 years.
- [69] It is apparent from the learned sentencing judge's remarks that her Honour took into account the period of 901 days that the applicant Higham had spent on remand in reducing the sentence from one of four years to one of 18 months. However, counsel for the respondent pointed out that the court order sheet was endorsed incorrectly as follows: "Note: record should note that the period of 8 days on remand was taken into account to reduce the sentence from 4 yrs imprisonment to 18 months." The note that appears on the court order sheet therefore requires amendment to reflect that 901 days (not eight days) was taken into account in reducing the sentence from one of four years imprisonment.

Pham

- [70] Pham was sentenced to an effective sentence of three years imprisonment suspended after serving 12 months imprisonment for an operational period of four years, with the following sentences being imposed:
- Count 1: 12 months imprisonment;
 - Count 2: 15 months imprisonment suspended after 12 months for a period of four years;
 - Counts 3 and 4: On each count, three years imprisonment suspended after 12 months for an operational period of four years.

Lee

- [71] Lee was sentenced to an effective head sentence of three years imprisonment suspended after serving 12 months imprisonment for an operational period of 3.5 years, with the following concurrent sentences being imposed:
- Counts 1 and 5: 12 months imprisonment;
 - Count 2: 18 months imprisonment;
 - Counts 3 and 4: Three years imprisonment.
- [72] Each sentence was ordered to be suspended after serving 12 months imprisonment for an operational period of 3.5 years. A period of eight days pre-sentence custody (between 7 and 14 September 2009) was declared as time served under the sentence.
- [73] It is apparent from the transcript that her Honour corrected an error as to the operational period specified initially of only two years duration, after it was brought

to her attention. However, as counsel for the respondent correctly pointed out, the court order sheet and verdict and judgment record are incorrectly endorsed and do not pick up the correction made by the judge as to the operational period. The verdict and judgment record also does not reflect her Honour's intention, implicit in her orders that all terms be served concurrently, and that the sentences imposed be suspended after 12 months. That is, that the 18 month sentence imposed on count 2 was also to be suspended after 12 months imprisonment. The order reads as if the order of suspension related only to the three year sentence imposed on counts 3 and 4, which would require the applicant Lee to serve a further six months imprisonment than had been intended by her Honour's order. It is therefore necessary to direct that the court order sheet and verdict and judgment record be amended to reflect the order as made and intended by the sentencing judge and additionally, that the order as to the length of the operational period be corrected.

Lam

- [74] Lam was sentenced on count 4 to 15 months imprisonment suspended after serving five months for an operational period of two years. A period of eight days pre-sentence custody (between 7 and 14 September 2009) was declared as time served under the sentence.

Lay

- [75] Lay was sentenced to 12 months imprisonment wholly suspended for an operational period of 12 months for the three charges on the separate indictment.

Sentencing remarks

- [76] In her sentencing remarks, the sentencing judge acknowledged the plea of guilty by each of the applicants and the need to balance the gravity of the crimes against the prospects of rehabilitation for the offenders. Her Honour considered that the violent nature of the offences meant that protection of the community must assume greater weight than the personal circumstances of each individual offender. Since the commission of the offence, there had not been any further offending (noting the applicant Higham to have remained in custody over that time). People around the applicants were willing to attest to their good qualities. Her Honour was mindful of the issue of parity in sentencing the applicants.

Ahmed and Higham

- [77] The sentencing judge made the following sentencing remarks:
- “You were the two who took Tran from his home, who presented him to the gang at the meeting points and who kept him captive for two nights. You were also the offenders who threw the first punches in the first assault. You were, therefore, principal offenders in counts 1 and 2.
- You both played a role in the second assault on Tran. You, Ahmed, joined in the violence as the principal offender in count 3. You, Higham, didn't touch Tran, but you encouraged the assault. You brought Tran to the scene and you lent your presence in support of it. Therefore, you are an accessory to count 3. Neither of you were involved in the assault on Kolomilskov.

During the deprivation of liberty you allowed Tran periods of rest and nourishment. You were relaxed enough about his detention to bring him on a shopping trip. Tran, on the other hand, was so fearful that he felt unable to raise the alarm, even when a police officer was nearby.

There was no suggestion that he stayed with you voluntarily; there was no suggestion that you had released him at that time. His compliance then really underscores the fear that he felt and your own confidence in that fear.

The deprivation of liberty may not be in the worst category of its kind, but in my view it was a serious example. You held a man for two days, you kept him for an angry group and you produced him on cue. You left him open to a level of violence that really was beyond your control. As it turned out the physical injuries were very moderate. But any part of the group could have gone much further. You put him in that very real danger.

The risks must have been all too apparent to Tran. He suffered a drawn-out, terrifying ordeal. It was a calculated, organised display of violence loaded with menace. The two of you played a central role in that.”

- [78] In respect of Higham, the sentencing judge took into account his plea and age (23 years old), but noted he had three prior convictions for lower level assaults and had had the benefit of probation and anger management training. A month prior to the offences he had been fined for a drug offence. He had experienced instability and dysfunction in his upbringing, but had reclaimed his faith and had done the remand courses in prison. In imposing sentence, her Honour observed the two and a half years spent in custody which could not be declared was a relevant factor to be taken into account. She stated that but for the time on remand, she would have imposed a sentence of four years imprisonment, to serve 16 months.
- [79] In respect of Ahmed, her Honour had regard to his age at the time of the offending (22 years of age) and that the offences were his first set of significant convictions. He was an apprentice electrician at the time of the offending. He had spent three and a half months in custody on remand where he had been seriously beaten by other inmates. Her Honour had regard to his compliance with his bail (which had a curfew condition) and the positive references tendered. He had voluntarily removed himself from the rest of the group, and did not appear to require the supervision of parole. Her Honour had regard to the pleas and the added difficulties that he suffered during the time in remand custody in formulating the release date.
- [80] Her Honour described Ahmed’s involvement in the offences as marginally more serious than that of Higham, but observed that he did not have any convictions for assault and that there was more evidence of prospects for rehabilitation in his case.

Lee

- [81] The sentencing judge noted that Lee was a party to the detention of Tran and directly involved in all of the assaults. He joined in the group assault on Tran in the forest (count 2) and the following night, with Pham, led the second attack on Tran

(count 3) and was part of the assault on Kolomilskov (count 4). Additionally, he was the one who assaulted Wee. Overall, his conduct was therefore more serious than Pham but not as serious as Higham and Ahmed.

[82] Her Honour noted Lee had no relevant criminal history. Her Honour also had regard to the psychological report of Mr Hatzipetrou, which detailed his personal circumstances. Lee had demonstrated himself to be a hard worker and had a supportive family. The sentencing judge had regard to references describing him as good to his family and generous to others and that the episode was completely out of character. At the time of the offences, he was mixed up with groups of Asian and Lebanese youth and drugs. His failure to be forthcoming to police was to be seen in the light of his having been attacked in 2010, sustaining a facial fracture and some impairment to his sight, which he considered to be an act of reprisal for what he had told police. Lee was left with signs of post-traumatic stress as a result of that attack and continued to fear the assailants, who were connected with his co-offenders.

[83] Taking into account the additional factor of the assault on him in 2010, a head sentence of three years was imposed which equated to Pham's head sentence, whose offending was less serious, but who was older.

Pham

[84] In respect of Pham, the sentencing judge noted he became a party to the detention of Tran in count 1. He was said to be on the periphery because he was not motivated by the search for money but acted out of some misguided support for his friend.

[85] He attended the beating in the forest (count 2), standing "about 10 metres away in support". The next night, together with Lee, he led the second assault against Tran in the park (count 3). He also joined in the group attack on Kolomilskov (count 4).

[86] Her Honour observed that he was not as involved as either Higham or Ahmed, but that his offending spanned the two nights in question. He was not physically involved in the armed assault, but at 33 years of age, he was the oldest offender and had allowed himself to be drawn into the group.

[87] Pham had no relevant criminal history. He was a self-employed cleaner with ambitions for a large scale expansion and his girlfriend said that he was good to his family.

Lam

[88] The sentencing judge considered that Lam's offending fell into a different category from Higham, Ahmed and Pham because it was significantly more contained (a single assault on Kolomilskov). He was not involved in the detention or assaults upon Tran, nor had he seen Tran on the first night. Although he was in the park on the second night when Tran was assaulted, he had tried to stop it.

[89] Her Honour observed that he did, however, play the pivotal role in the offence against Kolomilskov because he "orchestrated it". He induced Kolomilskov to meet in a secluded cane field, where he knew the others would assemble, and was part of the group that assaulted him. The worst aspects of the offence were "the psychological impact it must have had at the time and the risk inherent in group violence in such a remote area".

- [90] Her Honour observed that Kolomilskov owed him \$15,000, which he apparently did not intend to repay, and accepted that he became involved out of frustration and stress, but did not accept it was an excuse for what he did.
- [91] Lam was one of the youngest offenders (22 years old) and the offending was his first conviction for violence. It was committed in breach of a probation order for a multitude of property offences, including engaging in a professional system of stealing valuables from gym lockers. Lam had made some admissions and offered to plead guilty prior to the trial date. The offence was out of character, a product of stress, and he was remorseful.

Lay

- [92] The sentencing judge considered Lay's conduct to be distinguishable from the other offenders. While there were parallels with Lam, his criminality was less. He did not deliver any blows. He was a party by virtue of his involvement with the group, but it was clear there was a level of reluctance. Although he did not know the specific plan, he attended on the occasion of the first assault on Tran and his presence lent support for the assault (count 2).
- [93] In relation to the second assault (count 3), he was again present and his deliberate presence encouraged or supported that initial assault, although he voiced protest as it continued. He was present in support of the assault on Kolomilskov (count 4). He voiced protest to the extent of the assault, which Kolomilskov considered had saved him worse injury.
- [94] Her Honour had regard also to the opinion of Mr Stoker, a psychologist, that the offending was a result of a depressive illness and cannabis abuse. Soon after the offences, Lay completed a drug diversion program. He was 29 with a good work history and his involvement was out of character. He was genuinely remorseful and was the first of the offenders to plead guilty.

Grounds of appeal

- [95] As mentioned, the applicants seek to set aside the sentences imposed as being manifestly excessive. That ground is dealt with below. In addition, the applicants raised the errors in the sentencing process.

Matters relied on by Pham

- [96] From the written submissions made on behalf of Pham, the following matters may be discerned as being raised in contending that the learned sentencing judge erred in the exercise of her discretion:
- (a) the judge did not show any engagement in evaluating or analysing the comparable cases raised by counsel, nor cite any decisions as part of her judgment;
 - (b) insufficient regard was had to the plea, which ordinarily warranted a discernible reduction in the custodial sentence by about one third;
 - (c) the judge did not take into consideration the relatively minor injuries inflicted upon the complainant;
 - (d) the appropriate range of sentence is "significantly set" by the extent of the resultant injuries;
 - (e) the lack of clarity as to the number of blows delivered led to a greater need to consider and evaluate the extent of the injuries inflicted;

- (f) the judge either failed to consider, or otherwise failed to give sufficient weight to the good work history of the applicant;
- (g) the judge drew an erroneous similarity between the terms “friends” and “associates” on the one hand and a “gang” on the other;
- (h) the learned sentencing judge erroneously placed heavy weight on the applicant’s age;
- (i) the sentence imposed had no regard to and was not consistent with the range suggested by the comparative authorities, and was manifestly excessive having regard to the range suggested by the authorities put forward by the applicant at sentence.

[97] In respect of (a), as counsel for the respondent submitted, the concern of the court on this application is whether the applicant has demonstrated that the sentence, in all the circumstances, was manifestly excessive, or that the sentencing process was vitiated by error. That is not demonstrated to have occurred merely because the sentencing judge did not, as part of her sentencing remarks, cite or analyse the authorities which had been referred to her. Furthermore, the transcript of the sentencing submissions and the exchanges with counsel indicate that her Honour had regard to the authorities put before her. Consequently, this ground of complaint must fail.

[98] In respect of (b), the respondent acknowledged that a plea of guilty should be reflected in the sentence imposed in some discernible way, whether by a reduction of the actual custodial component of the sentence (by one third or some other amount), or by some other means, such as reduction of the head sentence. In the present case, the sentencing remarks clearly indicate that the judge took into account the plea by suspending the head sentence of three years imprisonment after 12 months. As the respondent pointed out, while the sentence on count 2 was one of 15 months suspended after 12 months, that result arises as a consequence of the applicant being required to serve 12 months of the longer concurrent head sentence imposed on counts 3 and 4. This complaint also fails.

[99] As to (c), at sentence, defence counsel argued and the Crown conceded that the injuries sustained by the complainants were not at the highest end of seriousness of bodily harm. The sentencing judge also remarked upon it in the course of argument and was clearly cognisant of the level of injury sustained. She observed that the physical injuries sustained by the complainant Tran in count 2 were surprisingly mild, consisting of some bruises and cuts about the face and body. Her Honour did not make any further comment as to specific injury occasioned to Tran in count 3. Her Honour’s description of Kolomilskov as being “groggy and bruised” as a result of the assault was correct (count 4). There is no substance in this ground of complaint.

[100] In respect of (d), although the level of injury in fact occasioned is a relevant factor to the exercise of the sentencing discretion (*R v Amituanai* (1995) 78 A Crim R 588, 598; [1995] QCA 80), it is not the solely determinative factor in coming to the appropriate sentence to impose in any particular case. The risk of further potential harm (than what was in fact occasioned), the psychological impact that the offending must have had, and the risk inherent in group violence in such a remote area, were also relevant matters which her Honour did and was entitled to have regard to.

- [101] Concerning (e), Pham was sentenced on the basis that he was criminally liable as a party to count 2, which involved a protracted assault on Tran by up to eight to 10 offenders, with Tran being punched and kicked to the head and body and which continued whilst he was on the ground, with sticks used as weapons. As for counts 3 and 4, Pham's liability was as a principal offender in that he led the second assault on Tran (count 3) and participated in the group attack on Kolomilskov (count 4). Neither the applicant, nor the other offenders, was sentenced on the basis of having themselves inflicted any particular number of blows. The circumstances thus did not require a further analysis of a likely number of blows, nor was any such analysis or enquiry likely to be fruitful.
- [102] In respect of (f), there is nothing to indicate that her Honour failed to have proper regard to Pham's work history. While her Honour did not refer to the entirety of what was placed before her in the course of submissions, she did mention the applicant being a self-employed cleaner with ambitions of a large scale expansion. Her Honour also observed that the applicant had no relevant criminal history which, as counsel for the respondent pointed out, was likely to be of more significant weight in assessing his prospects of rehabilitation than his good work history alone.
- [103] As to (g), in addition to the complaint concerning the use of the term "gang", the applicant complained that the sentencing judge failed to appreciate the relationship between the parties and the offenders themselves. It was further submitted that the judge failed to appreciate that the only person the applicant had a close association with was Lee. All of the offenders were acting independently of each other and in their own interests. The "interpretation" of the learned sentencing judge was highly prejudicial to the applicant. These complaints are not made out.
- [104] I accept the submission made by the respondent that, when her Honour's comments were viewed in context and consideration was given to the factual basis on which the offenders fell to be sentenced, her Honour's comments as to the differing terminology between "friends and associates" and "gang" not being one of substance, was a legitimate assessment of the reality of the situation. Some of the references to the group as a "group" appear in the opening remarks of her Honour prior to embarking on the enunciation of the features relevant to each individual offender. Her Honour was clearly not seeking to make any positive finding of fact. Her Honour correctly articulated the basis on which Pham became involved in the offending, consistent with what was submitted on his behalf, that is that he, in effect, acted out of misguided support for a friend. This ground must fail.
- [105] Concerning the matter raised in (h), it was also argued that, while Pham was the oldest in the group, it could not be said that he exerted any influence or control over the other offenders or the complainants and no higher culpability arose due to Pham's age. It was entirely orthodox for the sentencing judge to have regard to the age of Pham, and her observation that all of the applicants, other than Pham, were very young men was directed at a relevant consideration (the age of an offender). There was nothing in the sentencing remarks that suggests that undue weight was placed on that factor. As the respondent noted, given the parity considerations that were relevant to the exercise of her Honour's sentencing discretion, it was pertinent that comparison be drawn between the relevant personal circumstances of each applicant, as her Honour did, including their respective ages. Consequently, there is no substance in this ground.
- [106] The remaining grounds relating to whether the sentence was manifestly excessive is dealt with below in relation to all applicants.

Matters relied on by Lee

- [107] A number of complaints were raised on behalf of Lee, some of which were common to those relied upon by Pham. The complaints made were that the sentencing discretion of the court miscarried because the learned sentencing judge erred in:
- (a) not accurately taking into consideration the level of injuries sustained by the complainants;
 - (b) not taking into account that it was not clear how many punches the applicant had thrown against the complainant;
 - (c) accepting and considering misleading and mistaken submissions by the Crown:
 - (i) in relation to the applicant's statement and interview to police being of no assistance to the investigation;
 - (ii) in implying or stating that the complainant Kolomilskov was forcibly taken to a remote location;
 - (d) not giving any significant weight to the timely plea made by the applicant;
 - (e) not giving any significant weight to the report itself or to the recommendations made in the psychiatric report submitted on behalf of the applicant;
 - (f) not giving any significant weight to the references submitted on behalf of the applicant that illustrate these actions were completely out of character;
 - (g) finding that the complainant, Kolomilskov was "one of the group";
 - (h) referring to the group as a "gang" and finding that their actions were "gangster like violence":
 - (i) The learned sentencing judge erred in drawing similarities between the relationship of the offenders and that of a "gang" as well as describing their actions as "gangster like violence";
 - (ii) In taking into account and placing "greater weight" on protecting the community from "gangster like violence" the learned sentencing judge erred as it seems this was an aggravating factor in her Honour's mind which was not present in the material before the court;
 - (i) imposing sentences that were reflective of comparable cases where much more serious injuries were sustained by the complainants. In that light, the sentences imposed are manifestly excessive in regards to the circumstances.
- [108] The matters in (a) and (b) reflect those raised on behalf of Pham and have already been dealt with.
- [109] In relation to the matters raised in (c), the tenor of the submissions made before the sentencing judge was that, having made statements to the police, Lee was subsequently assaulted and that he perceived that was the result of some statements he may have made. It was not made apparent in submissions on behalf of Lee whether and to what extent any statement made would have been of assistance to the Crown case and the Crown submission was that the statement was not one which could have assisted the Crown at trial. Nor was it suggested that Lee had inculpated himself directly in the offending.
- [110] In relation to the other matter said to be an error in the Crown submission, that Kolomilskov was forcibly taken to a remote location, the Crown submission was that, "there's little to be made of the difference between invading someone's home or taking them forcibly or taking them to remote locations for the purpose of assaulting them". The prosecutor was apparently placing the position of Kolomilskov in the latter category and in the context of his being lured to a remote

location, albeit that he drove to that location himself following Lam. That is made clear by the statement that followed the extracted comments, namely, “The victims in this case are in that, if I can use the term, heightened position of vulnerability in the location that they were taken to.”

- [111] As regards (d), (e) and (f), which concern contentions that the sentencing judge failed to give appropriate weight to Lee’s plea and mitigatory factors in his personal circumstances, I do not consider this is made out. As with the head sentence imposed on Pham of three years, the sentencing judge suspended the sentence after 12 months and, although it was not explicitly stated, it is abundantly clear that the plea was taken into account. Her Honour referred in some detail to matters raised in the report of Mr Hatzipetrou. Her Honour also made specific reference to references tendered on behalf of Lee, including that the episode was seen as completely out of character for him. There is no substance in these complaints.
- [112] In respect of (g), the reference to Kolomilskov having been “one of the group” was consistent with the matters set out in the agreed schedule of facts and was simply intended to make the point that he was a good friend of Tran, and thus loosely associated with members of the group involving the complainants and defendants.
- [113] As to the matters raised in (h), that her Honour erred in referring to the group as a “gang” and finding their actions were “gangster like violence”, that complaint reflects the complaint made by Pham, and indeed the other applicants, and has already been addressed. In written submissions for Lee, reference was made to *Hsu and Hsu*, but I do not think it has any significance for the present case. In *Hsu and Hsu*, the sentencing judge was found to have erred in sentencing on the basis of a finding that there was “a gangster style raid” on the club in the circumstances of the offending. The offending occurred spontaneously and, while it could have been described as “gangster-style behaviour”, there was no basis for the finding made. In the present matter, the sentencing judge was simply using the term as a descriptor and used the term “group” interchangeably with it.

Matters relied on by Ahmed

- [114] Ahmed relied on the following matters (in addition to contending that the sentence was manifestly excessive, having regard to the comparatives put before the sentencing judge) in contending that the sentencing discretion miscarried:
- (a) the judge erred in characterising the group as “a gang” and in attributing additional significance to that in fixing the appropriate sentence. This matter has already been addressed;
 - (b) the sentencing judge erred in finding that the complainant Tran was “scared” and “fearful”. I cannot see any basis for that complaint given that it reflected the agreed schedule of facts;
 - (c) her Honour erred in referring to Ahmed and Higham as “principal offenders” in counts 1 and 2. The complaint here appears to have proceeded on the basis of a misapprehension as to the meaning of the term “principal offenders”. It was a reference to them having actually participated in the offences as principals;
 - (d) the sentencing judge failed to have proper regard to Ahmed’s rehabilitation prospects, including that he distanced himself from his friends and associates, did not reoffend and complied with his strict bail conditions. I do not consider that there is any substance to this ground. Her Honour made specific reference to those matters and particularly mentioned that in Ahmed’s case there was “more evidence of prospects for rehabilitation” than in Higham’s case.

- [115] The further complaint made orally, that Ahmed's sentence was disproportionate when compared with his co-offenders (other than Higham), is dealt with below.

Matters relied on by Higham

- [116] Higham's notice of appeal, as mentioned, raised the issues of the sentencing discretion miscarrying because it was manifestly excessive, having regard to the comparatives, and because it was disproportionate compared with the sentences imposed on the co-offenders (matters addressed below). In addition, Higham in oral submissions adopted the further complaints raised by Ahmed, which have already been dealt with.

Comparatives

- [117] Before this Court, in addition to the authorities referred to the sentencing judge, the respondent relied on *R v Omar* [2012] QCA 23. Ahmed also cited *Omar* in contending that the sentences imposed were manifestly excessive, while also referring to *Blair*, *El-Masri*, *Hsu and Hsu* and *Middleton and Johns*. Pham also largely relied on *Middleton and Johns* and the cases examined therein.

- [118] In *Hsu and Hsu* the two offenders (aged 20 and 26 and with no prior criminal history) pleaded to two counts of assault occasioning bodily harm whilst armed against two complainants (aged 16 and 19) and were sentenced to two years imprisonment with a recommendation for parole after eight months. The offending occurred against a background of family feuding between the families of the offenders and complainants which erupted over a dispute that took place at a hotel. The older offender lifted his clothing to reveal a revolver and his brother picked up an empty beer bottle and struck the back of the head of one of the complainants, which smashed, causing bleeding. The complainant was then set upon by three or four others and kicked and punched. More glass was broken over him. He sustained bruising to the eye and wounds requiring stitches. The other complainant was struck with the butt of a gun by one offender, and with a glass by the other, resulting in a 15 centimetre graze to the back of the head and multiple abrasions requiring stitches. Because of the error made by the sentencing judge, to which reference has already been made, the sentencing discretion was required to be exercised afresh by the Court of Appeal. The younger offender was sentenced to 12 months imprisonment suspended after four months for an operational period of two years. The other offender was sentenced to 18 months imprisonment suspended after six months for the same operational period. The violence involved in that case was clearly more serious than the present case, but it broke out spontaneously in circumstances where the offenders had gone to the hotel with no intention of causing trouble. Unlike the present case, it did not involve the pre-arranged gathering of a group for a particular purpose (of coercing information).

- [119] Cases such as *Watkins* and *Middleton and Johns* concerned victims being assaulted in a home invasion type situation and involved burglary (which attracts a heavier maximum sentence than that of deprivation of liberty).

- [120] *Watkins* concerned offences of burglary, assault occasioning bodily harm whilst armed and in company, all arising out of the same incident. *Watkins* was sentenced on his plea to two years and nine months on the burglary and 12 months for the other offences, all to be served concurrently. The offending involved a home invasion arising out of a debt being owed. The applicant accompanied the

co-defendant to an address to extract the money, being aware that the co-defendant was armed with a baseball bat. Watkins was armed with a curtain rod. Watkins had no personal interest in recovering the debt owed to the co-defendant. The co-defendant assaulted the occupants (whose premises had, as it turned out, been mistakenly identified as that of the debtor). Watkins refused to assault one of the victims when directed to do so by the co-defendant. The only time that he acted was in retreat, when he pushed one of the victims, and swung his rod (but missed) at another victim who, armed with a bat himself, struck Watkins in the leg. By his presence and encouragement, Watkins was taken to have participated in the home invasion. Watkins had a criminal history but one which did not involve any offences of violence. The sentence of two years nine months imposed, after taking into account the plea and with no recommendation being made was upheld on appeal.

- [121] As regards *Middleton and Johns*, Middleton (aged 20) and Johns (aged 19) pleaded to unlawful assault occasioning bodily harm in company. They had gone to the complainant's house, together with others, believing that he had stolen something from them. The group of five or six sprayed him with a mace-like substance, punched him and kicked him. The complainant suffered multiple abrasions and bruising over his torso and arms and possible concussion. He had been forewarned and had armed himself with a knife which he used to stab Middleton. Johns was sentenced to six months imprisonment to be followed by three years probation, and Middleton to three months imprisonment to be followed by three years probation. Neither had criminal convictions of any significance, both had good employment histories and rehabilitation prospects. In respect of Middleton, although some actual imprisonment was found to be justified, the six month term was held to be too high for an applicant of his age with sound future prospects. Johns had been on bail pending appeal and it was held that, in the circumstances, the case was a marginal one in which it was preferable not to return the young offender to prison for a short period. The sentence in each case was varied by admitting them to probation immediately, some four weeks after they had been sentenced, with Johns serving 11 days imprisonment. After reviewing relevant authorities, Jerrard JA observed at [39] that they made it:

“... clear that even for offenders aged 18, this Court will uphold sentences resulting in actual custody for first offenders with no prior convictions who plead guilty to assault occasioning bodily harm, where there are aggravating circumstances. Those can include the motive for the assault, its severity, or the circumstances of being armed and in company. While actual imprisonment is not mandated, it will ordinarily be within the proper exercise of a sentencing discretion.”

- [122] The cases of *El-Masri* and *Blair* concern offences of assault occasioning bodily harm occurring in conjunction with the deprivation of liberty or, in the case of *Omar*, in circumstances where the victim was kidnapped.
- [123] *El-Masri's* case concerned two incidents involving the same complainant who owed the offender a drug debt. El-Masri was sentenced on his plea for offences of deprivation of liberty and assault occasioning bodily harm in company committed in late 1999 (when the complainant was deprived of his liberty in a car and assaulted). He was also sentenced to deprivation of liberty, kidnapping for ransom (which carried a higher maximum penalty than kidnapping) and assault occasioning bodily

harm in company committed in early 2000. El-Masri was sentenced on the basis that he was a party to the conduct of two other men who assaulted the complainant with an iron bar and a baseball bat, tied him up in a way that placed him at risk of choking, blindfolded him and struck him several more times before putting him in the boot of a car. They threatened to shoot him. The two abductors took the complainant to El-Masri, who punched and kicked him in the head and neck, and asked how he would get his money. The complainant sustained fractures to the cheeks, as well as cuts and bruises. The complainant asked to call his mother and during the course of that conversation El-Masri told her she had until 9 o'clock to get the money or he would be dead. El-Masri was aged 22 at the time of the offences, and he had a troubled background as an immigrant. He was sentenced to five years imprisonment for the kidnapping for ransom and to three years imprisonment for the other offences, all to be served concurrently. (The unexpired portion of an intensive correction order that was breached was also ordered to be served concurrently.)

- [124] *Blair* concerned a confrontation between four offenders (Blair being the oldest at 26) and three complainants. The motivation for the offending appeared to be a determination that the complainants, who were riding motorcycles on property which the defendant's family had some connection with, were doing so improperly and illegally, disturbing stock and damaging fences. The offences arose out of one incident. Blair was sentenced after trial to four years imprisonment on three counts of assault occasioning bodily harm whilst in company, with concurrent sentences imposed of two and a half years for deprivation of liberty and nine months for the offences of discharge of a firearm.
- [125] The counts of unlawful assault in company with each other, thereby doing bodily harm as particularised, related to punches and kicks delivered to the heads and bodies of the three complainants while they were sitting on their motorcycle helmets outside a shack. Blair was less involved than the other offenders in actually carrying out the assaults and not himself involved in any assault of one of the complainants. The assaults involved punching, kneeling and kicking. Various complainants were taken to a creek, pushed in, told to start swimming and shots were fired in their direction. A complainant's head was pushed under the water and held there. While firearms were discharged, they were not involved in the assault occasioning bodily harm in company. At different stages, two of the co-offenders (brothers of Blair) dragged one complainant towards the creek with a rope around his neck. They tied another complainant to a horse float and shots were fired in his direction. When he freed himself, they grabbed him and had his hair cut off with a knife (as they had done to the other), his jeans were cut through in the vicinity of his groin and he was threatened to be castrated. A complainant was pushed into a fireplace and restrained, while a burning stick was thrust near his face. That continued for some six hours and while Blair was generally present. He was found to have played the role as investigator, accuser and prosecutor. It was open to conclude that he was the leader of the pack. The complainants suffered "relatively minor injuries" consisting of bruising, with one also sustaining a fractured nose. Blair had a criminal history which included convictions for violence (assault occasioning bodily harm whilst armed with an offensive weapon while in company for which he was sentenced to nine months' imprisonment).
- [126] In *Omar*, the offender pleaded to burglary with violence while armed and in company and kidnapping (for which he was sentenced to four years) and to assault

occasioning bodily harm (for which he was sentenced to 18 months). All sentences were imposed concurrently. Pre-sentence custody of 380 days was declared with parole fixed at the one third mark. Two co-offenders were sentenced to two and a half years for the first two offences and 12 months for the third (with a declaration as to 23 and 27 days served) and immediate parole. Omar was 21 and the co-offenders 17 at the time of the offences. The 18 year old complainant had been in a relationship with Omar. One of the co-offenders coaxed the complainant into letting her into her unit by telling her that Omar had a gun. The second co-offender gained access, followed by Omar, who had a gun in his hand (in fact a replica). The complainant and Omar were involved in a struggle (which left her with bruising and scratches) when she tried to disarm him and he tried to take a phone off her (she had called her boyfriend). Omar then left the unit. The co-offenders followed, taking the complainant with them to the car. The complainant was then taken to bushland. Omar's grievance against the complainant was that he understood she was going to testify against him. At one stage, Omar asked one of the co-offenders for his gun, which was then loaded with ammunition. The complainant attempted to get out of the car but was prevented because the car doors were locked. The car was parked in bushland for some hours. During the ordeal, Omar pointed the gun in the complainant's face saying, "Do you think that I'm fucking around?" He repeatedly questioned her about the pending court case. Omar had a criminal history including for offences of violence, but had not served a custodial sentence. He had a troubled upbringing and psychiatric issues. Leave to appeal on the basis that the four year sentence imposed on Omar was manifestly excessive and because of disparity with the sentence imposed on the co-offenders was refused.

Were the sentences imposed manifestly excessive?

- [127] On behalf of Pham it was submitted that, having regard to the authorities, particularly *Middleton and Johns* and the cases referred to therein, what was contended for on his behalf at sentence was within range. They suggested that a head sentence of two years was at the high end of the appropriate range. They also suggested the sentence should be "significantly ameliorated" by the term being ordered to be suspended, either wholly or after a short term of imprisonment, in the order of four to six months. It was thus submitted on behalf of the applicant that a head sentence of 18 months imprisonment suspended after serving 3.5 months should be imposed. That was also the sentence that Lee contended for.
- [128] No specific submission was made by Ahmed or Higham as to the sentence that ought to have been imposed, in respect of the contention that the sentences imposed were manifestly excessive.
- [129] The respondent adopted the submissions made by the Crown prosecutor below, that the circumstances of the offending called for condign punishment, signalling the court's disapproval for those who take vigilante action, where they feel they or their friends and associates have been wronged. In the present case, it was the debt owed by Kolomilskov which gave rise to the motivating sense of grievance, and the complainants Tran and Wee were innocent parties used in the attempts to recover the debt. Tran in particular was directly targeted simply because of his known association with Kolomilskov. The co-ordinated nature of the enterprise, suggesting some planning, involving groups of people attending remote locations at night and committing protracted assaults on the complainants was a significant and unusual feature to be considered when determining the appropriate sentencing range. The

respondent submitted that, while the injuries ultimately sustained by the complainants were not particularly significant, the circumstances of the assaults were undoubtedly terrifying. In respect of the offence of deprivation of liberty, it was accepted that there may be examples of deprivation of liberty which involve some more serious aspects not present in the current case, such as tying up or restraining of a victim. Moreover, the offence of deprivation of liberty in this case was not secondary to or incidental to the course of offending being considered by the court. The deprivation of Tran was integral to the overall enterprise. It was thus submitted that the sentence ranges, as contended for by the Crown prosecutor at first instance, for each of the applicants were appropriate in all the circumstances.

Conclusion

- [130] None of the authorities referred to were entirely apposite by way of comparatives. None concerned offences of assault occasioning bodily harm combined with deprivation of liberty of a similar nature to the offending in this case.
- [131] The applicants' contentions that the sentences imposed were manifestly excessive were primarily directed to the sentences imposed for counts 2, 3 and 4. The applicants' submissions were concerned to demonstrate that the authorities put forward involved more serious examples of assault occasioning bodily harm, some combined with deprivation of liberty or kidnapping or burglary, and that, given the sentences imposed in those cases, the sentences imposed on the applicants were outside the proper exercise of the sentencing discretion.
- [132] While the assaults involved in cases such as *Middleton and Johns* and *Watkins* were accompanied by acts of violence more serious than the present offending, those comparatives are of limited assistance, given the differing factual context in the present case. And although *Omar* did concern offences of assault occasioning bodily harm combined with kidnapping, and involved the use of a replica gun to terrorise the complainant, which was a serious aspect of that case not present in the offending by the applicants, it did not involve the premeditated and orchestrated group dynamic in which the assaults occurred in the present case. That may also be said of *Blair* (which also featured the use of firearms) and *El-Masri*.
- [133] The offending in the present case, in respect of the assaults on Tran and Kolomilskov, occurred in the context of them being taken or lured to isolated or remote areas, leaving them particularly vulnerable. There was also, in respect of all complainants, the additional feature that the assaults occurred where a group dynamic was in play with the potential for the escalation of violence. That, as it fortunately turned out, none of the complainants suffered serious injury, was simply a factor that was also to be considered in imposing sentences.
- [134] Although the head sentence of four years imposed on Ahmed for counts 2 and 3 and used as a starting point for the sentence ultimately imposed on Higham was at the upper end of the permissible range, it was not manifestly excessive. Both applicants, in addition to taking Tran away from his home and holding him for two nights (the subject of count 1), were involved in driving Tran to assembly points where carloads of associates converged in relation to the locations of counts 2 and 3. They threw the first punches, the subject of count 2, and were sentenced as principal offenders in that regard. Ahmed joined in the second assault on Tran (count 3), and Higham was a party to that assault.

- [135] Higham's wholly suspended sentence of 18 months imprisonment took into account all of the non-declarable pre-sentence custody at the first opportunity, as was appropriate. However, it failed to recognise the disproportionate time actually spent in custody. As mentioned, the sentencing judge indicated that but for the time spent on remand, she would have only required 16 months of a four year sentence to have been served. Higham in fact spent considerably longer (30 months) in custody. Imposing a sentence of 18 months, albeit wholly suspended, was in the circumstances manifestly excessive. The sentencing discretion must be exercised afresh. In my view, it is appropriate to recognise the time spent on remand by commencing with a notional head sentence of three years and, taking into account the 30 months spent on remand, to impose a sentence of six months, wholly suspended for an operational period of 18 months.
- [136] In relation to Pham, in addition to his criminal culpability as a party to the detention of Tran (count 1) and the first assault on Tran (count 2), he led the second assault on Tran in conjunction with Lee for which he was sentenced as a principal offender (count 3), in addition to his conduct in participating in the group attack on Kolomilskov (count 4), for which he was also sentenced as a principal offender. A matter of significance was that, unlike Higham and Ahmed, his offending spanned the two evenings in question. In those circumstances, the sentences imposed cannot be said to have been manifestly excessive. In particular, the head sentence of three years for counts 3 and 4, while onerous, was not outside the permissible sentencing range.
- [137] Lee was a party to the detention of Tran and directly involved in all of the assaults the subjects of counts 2, 3 and 4. He joined in the first assault on Tran (count 1) and was part of the assault on Kolomilskov (count 4). With Pham, he led the second attack on Tran (count 3) and was also the person who assaulted the third complainant Wee (count 5). Although he was younger than Pham, the sentencing judge was correct to view his overall conduct as more serious. The sentences imposed on Lee, including as it did the same head sentence of three years for counts 3 and 4, were not manifestly excessive.
- [138] It may have been open to have imposed lesser sentences on each of the applicants, Ahmed, Pham and Lee, but that does not result in the sentences imposed being manifestly excessive and I do not find that they were.

The issue of parity

- [139] In respect of the complaint concerning the issue of parity raised by Ahmed, that his sentence was disproportionate when compared with his co-offenders other than Higham, I do not consider that it is made out.
- [140] It was the Crown's submission at sentence that Ahmed, along with Higham, were the "pre-eminent force" behind the course of events the subject of the offenders. As counsel for the respondent submitted, that was not disputed by their counsel below and no submission was made challenging the proposition that they be dealt with on the basis that they should receive a higher sentence than that sought to be imposed on their co-offenders. Rather, the challenge was to the sentencing range contended for by the prosecution.
- [141] I do not consider that it has been demonstrated that her Honour erred in considering that there were significant differentiating features between the culpability of Ahmed

and that of Pham and Lee in respect of counts 1, 2 and 3. And whilst Ahmed was not involved in count 4, as Pham was, their involvement in count 1 was correctly seen by the sentencing judge as significant, by comparison to the other offenders. Ahmed was also the first person to become involved in count 2, remaining involved after others joined in the assault. Ahmed's involvement was properly seen as somewhat more serious in that he was physically involved in, and not just a party to, the second assault on Tran (count 3).

[142] In my view, no sense of grievance can justifiably arise in respect of the sentences imposed upon Ahmed on the basis of issues of parity. Nor can there be any complaint concerning parity in respect of the sentence which I consider should be imposed afresh on Higham.

Orders

[143] I would make the following orders:

[144] In relation to the application by Seung Kyu Lee in CA No 68 of 2012:

1. Direct the Registrar of the District Court to amend the court order sheet attached to the indictment as follows –
 - (a) Amend the order in relation to counts 3 and 4 by deleting the reference to “2 years” and substituting “three and a half years” for the period in which the applicant must not commit another offence punishable by imprisonment if to avoid being dealt with for the suspended term of imprisonment;
 - (b) Amend the order that the sentence of 18 months be imposed on count 2 by adding that the term be suspended after a period of 12 months imprisonment; and you must not commit another offence punishable by imprisonment within a period of three and a half years if to avoid being dealt with for the suspended term of imprisonment;
2. Direct that the Registrar of the District Court amend the verdict and judgment record of Seung Kyu Lee to reflect the amendments in paragraphs 1(a) and 1(b);
3. That the application otherwise be dismissed.

[145] In relation to the application by Jaymin Ray Higham in CA No 52 of 2012:

1. Direct the Registrar of the District Court to amend the court order sheet attached to the indictment as follows:
 - (a) Amend the notation “Note: record should note that the period of 8 days on remand was taken into account to reduce the sentence from 4 years imprisonment to 18 months” by removing “8 days” and inserting instead “901 days”;
2. The application be granted;
3. The appeal against sentence be allowed;
4. The sentences imposed on counts 1, 2 and 3 be set aside and in lieu concurrent sentences of 6 months, wholly suspended, be imposed for an operational period of 18 months.

[146] In relation to CA No 29 of 2012, the application by Dzu Le Pham be dismissed.

[147] In relation to CA No 43 of 2012, the application by Humza Ali Ahmed be dismissed.