SUPREME COURT OF QUEENSLAND

CITATION:	*R v Elcheikh* [2012] QCA 189
PARTIES:	**R** **v** **ELCHEIKH, Hamza Nasser** (applicant)
FILE NO/S:	CA No 35 of 2012 DC No 1266 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	13 July 2012
DELIVERED AT:	Brisbane
HEARING DATE:	8 May 2012
JUDGES:	Fraser JA, Fryberg and Martin JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of wounding and one count of assault occasioning bodily harm while in company – where the applicant was sentenced to 18 months imprisonment with a parole release date of 10 August 2012 – where the applicant concedes the head sentence was not manifestly excessive – where the applicant contends that factors in his favour should have been reflected in a non custodial outcome or an earlier parole release date – whether the learned sentencing judge correctly took into account both the favourable and unfavourable circumstances as they applied to the applicant and his co-offender – whether the sentence is manifestly excessive *Green v The Queen; Quinn v The Queen* (2011) 244 CLR 462; [2011] HCA 49, considered *R v Hays; ex parte Attorney-General of Queensland* [1999] QCA 443, considered *R v Mladenovic; ex parte Attorney-General of Queensland* [2006] QCA 176, cited

R v Swayn; ex parte Attorney-General of Queensland [2009] QCA 81, cited
R v Taylor & Napatali; ex parte Attorney-General of Queensland (1999) 106 A Crim R 578; [1999] QCA 323, cited

COUNSEL: D R Mackenzie for the applicant
D C Boyle for the respondent

SOLICITORS: Bartels Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA**: I agree with the reasons for judgment of Martin J and the order proposed by his Honour.

[2] **FRYBERG J**: I agree with Martin J that this application should be dismissed. I agree with his Honour's reasons for that order.

[3] **MARTIN J**: There are two applications before the Court. The first in time is an application for leave to appeal against a sentence of 18 months imprisonment with an order that the applicant be released on parole on 10 August 2012.

[4] The second application is an appeal against conviction. This was filed in error and has been withdrawn.

[5] On 30 January 2012 the applicant pleaded guilty to one count of wounding and one count of assault occasioning bodily harm while in company. On 10 February he was sentenced, on each count, to eighteen months imprisonment with an order that he be released on parole after six months. A co-offender was sentenced at the same time and, so far as is relevant, received the same punishment for the same offences.

[6] It is conceded by the applicant that the 18 months head sentence is not manifestly excessive. Rather, it is contended that the factors in favour of the applicant should have been reflected in a non custodial outcome or a fixed release on parole earlier than the six months which was imposed.

[7] It became apparent during the submissions made to the learned sentencing judge that there was a dispute between the Crown and the defendant as to whether or not the defendant had knowledge of whether another person or persons had knives. The sentencing proceedings were adjourned until 10 February 2012 when her Honour heard evidence with respect to that matter.

The circumstances of the offences

[8] The circumstances of the offences may be briefly outlined as follows. Prior to 3 December 2010 ill-feeling between the applicant and the complainant had arisen as a result of, among other things, comments made on various Facebook pages. On the evening of the incident the applicant sent a message to the complainant on Facebook. There was an online conversation where threats were made to the complainant and he was told by the applicant that he was "fucked" and he should "watch his back". This was followed by a phone call between the two men where

there was an exchange of verbal abuse. Eventually an agreement was reached between the two of them that they should meet at Sunnybank Plaza at 11 pm. The complainant made his way to Sunnybank Plaza with two friends. He explained to them where he was going and why. There were further exchanges and arguments carried on over the telephone between the complainant's brother and the applicant.

[9] In the end, a large group of males, between 15 and 25, came towards a group who had associated with the complainant at the Sunnybank Plaza. A number of the group were armed with metal poles, baseball bats and knives. Abuse was hurled by each group at the other and as they closed in on each other a general melee broke out. The complainant and the applicant confronted each other. As this occurred the complainant was stabbed in the back from behind by another person. The applicant has been charged as a party to that wounding. His plea was accepted on the basis that he and another joined in a common purpose of seriously injuring the complainant.

[10] After the complainant was stabbed, the applicant punched him in the face knocking him backwards. The complainant attempted to retaliate but failed. He was punched a second time by the applicant. Both the applicant and the complainant then wrestled with each other and both fell to the ground. Whilst on the ground, the applicant punched the complainant further a few more times.

[11] The complainant was treated at hospital. He had a one and a half centimetre wide, four centimetre deep laceration at the level of the second lumbar vertebrae. He had multiple superficial bruising to his upper back and a cut lip.

[12] When the matter first came on for hearing an issue arose as to whether the applicant knew that anyone was armed with a knife. After the evidence was given on that the learned sentencing judge found in the applicant's favour.

The applicant's circumstances

[13] At the time of the offences the applicant was 18 years old and, at sentencing, 19 years old. He had no previous convictions. The applicant was in employment and was the subject of good references.

The sentence

[14] In arriving at the sentence imposed upon the applicant her Honour took the following matters into account. With respect to the offence itself, she referred to the following:

- That the applicant had arranged to meet the complainant at 11 pm at the Sunnybank Plaza Shopping Centre.
- That this was in response to arguments and threats between the two persons.
- That the applicant had arranged a group to accompany him and that the group was of about 15 to 25 people, of which he was in the front at the time of the conflict.
- That the group was armed with metal objects including a crowbar, poles and a knife and that the applicant was aware, apart from the knife, that they were so armed. The applicant was not aware that anyone was carrying a gun.
- That after the complainant was stabbed from behind, he was then assaulted by the applicant.
- Her Honour also took into account the injuries to the complainant (set out above).

[15] With respect to the issue of deterrence, her Honour said:

> "General deterrence is very important in these type of cases. The courts look very seriously at group violence. Group violence in public places is regarded even more seriously. This was not a spur of the moment thing, this was planned, you organised people to come to this area with the idea of fighting this man. It's hardly surprising that having organised such violence people were armed and, again, it's not surprising at all that Mr Vujanic was injured quite badly."

[16] There was no suggestion that the other group was armed.

[17] In the applicant's favour, her Honour took into account:

- His relative youth;
- His lack of criminal history;
- That he had entered an early plea and confessed to his own involvement;
- His good references and his work history.

The submissions on the application for leave to appeal against sentence

[18] The applicant submits that the learned sentencing judge erred in not giving sufficient weight to the mitigating factors. As the co-offender should have received a more serious sentence, insufficient recognition was given to the applicant's youth, absence of a criminal history and confession to police.

[19] The applicant was charged jointly with Muzaffer Burak Tasdivar on the wounding and assault counts. Tasdivar was charged separately with other counts including possession of cannabis.

[20] Tasdivar received the same sentence as the applicant on the wounding and assault counts and two weeks' imprisonment on the drugs charge. He was 21 at the time of the sentence and did have a previous conviction for violence, for which a wholly suspended sentence had been imposed.

[21] It is submitted for the applicant that there is a justifiable sense of grievance on his part in relation to the co-offender's sentence.

[22] The applicant relied upon *R v Taylor & Napatali; ex parte Attorney-General of Queensland*[1] for the principle that the courts have long recognised the desirability of not sending youthful offenders without prior convictions to prison because of the chances of favourable reformation.

[23] He also relied upon *R v Mladenovic; ex parte Attorney-General of Queensland*[2] for an example of a non-custodial penalty being imposed on a principal offender. It must be noted that that decision was from an appeal by the Attorney-General.

[24] With respect to the submissions concerning the co-offender's sentence, the applicant referred to *R v Swayn; ex parte Attorney-General of Queensland*[3] and, in particular, the reasons of Muir JA:

> "[22] *R v Casey* and *R v Kitching* do not support the proposition that the difference in sentences imposed on principal

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1 (1999) 106 A Crim R 578.
2 [2006] QCA 176.
3 [2009] QCA 81.

offenders and those held criminally liable pursuant to s 7(1) of the *Criminal Code* 'is ordinarily small'. Whether such an observation can be sustained would require statistical analysis but little, if anything, would be achieved by the exercise. Sentences imposed on co-offenders must be 'determined having regard to the different circumstances of the co-offenders in question and their different degrees of criminality'.[4]

[23] In support of his submissions, senior counsel for the appellant relied on the following passage from the reasons of Gibbs CJ in *Lowe v The Queen*:[5]

> 'It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal, and such matters as the age, background, previous criminal history and general character of the offender, and the part which he or she played in the commission of the offence, have to be taken into account.'"

[25] It is important to bear in mind the underlying principle with respect to the conditions concerning parity of sentencing. In *Green v The Queen; Quinn v The Queen*[6] French CJ, Crennan and Kiefel JJ said:

> "[28] 'Equal justice' embodies the norm expressed in the term 'equality before the law'. It is an aspect of the rule of law. It was characterised by Kelsen as 'the principle of legality, of lawfulness, which is immanent in every legal order'. It has been called 'the starting point of all other liberties'. It applies to the interpretation of statutes and thereby to the exercise of statutory powers. It requires, so far as the law permits, that like cases be treated alike. **Equal justice according to law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law**. As Gaudron, Gummow and Hayne JJ said in *Wong v The Queen*:
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> > 'Equal justice requires identity of outcome in cases that are *relevantly* identical. It requires *different* outcomes in cases that are different in some relevant respect.' [Emphasis in original.]'
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> Consistency in the punishment of offences against the criminal law is 'a reflection of the notion of equal justice' and 'is a fundamental element in any rational and fair system of criminal justice'. It finds expression in the 'parity principle' which requires that like offenders should be treated in a like manner. As with the norm of 'equal justice', which is its foundation, **the parity principle allows for**

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4 *Postiglione v The Queen* (1997) 189 CLR 295 at 302 per Dawson and Gaudron JJ.

5 (1984) 154 CLR 606 at 609.

6 (2011) 283 ALR 1.

different sentences to be imposed upon like offenders to reflect different degrees of culpability and/or different circumstances.

[29] General concepts of 'systematic fairness' and 'reasonable consistency' in sentencing, as an aspect of the administration of federal criminal justice, were discussed in *Hili v The Queen*. They apply to persons charged with similar offences arising out of unrelated events. The consistency they require is 'consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence'. That kind of general consistency is maintained by the decisions of intermediate courts of appeal. The consistency required by the parity principle is focused on the particular case. It applies to the punishment of 'co-offenders', albeit the limits of that term have not been defined with precision.

[30] In *Lowe v The Queen* and in *Postiglione v The Queen*, this court was concerned with the application of the parity principle to persons charged with the same offences arising out of the same criminal conduct or enterprise. Those decisions are not authority for the proposition that the principle applies only to persons so charged. The foundation of the parity principle in the norm of equality before the law requires that its application be governed by consideration of substance rather than form. Formal identity of charges against the offenders whose sentences are compared is not a necessary condition of its application. Nevertheless, as Campbell JA recognised in *Jimmy v The Queen*, there can be significant practical difficulties in comparing the sentences of participants in the same criminal enterprise who have been charged with different crimes. The greater the difference between the crimes, the greater the practical difficulties, particularly where disparity is said to arise out of a sentence imposed on a co-offender who has been charged with an offence that is less serious than that of the appellant. The existence of those difficulties may be accepted. So too may the inability of a court of criminal appeal to undertake, under the parity rubric, a de facto review of prosecutorial charging discretions. Those practical difficulties and limitations, however, do not exclude the operation of the parity principle. The effect given to it may vary according to the circumstances of the case, including differences between the offences with which co-offenders are charged.

[31] Because appeals are creatures of statute, the parity principle in appeals against sentence arises in a statutory context. The jurisdictions to entertain such appeals, conferred by statutes on courts of criminal appeal in Australia, are supported by powers to increase or reduce sentences affected by appealable error. In the exercise of those powers in appeals

by convicted persons, and subject to the applicable sentencing statutes, a court may 'reduce a sentence not in itself manifestly excessive in order to avoid a marked disparity with a sentence imposed on a co-offender.' The exercise of the statutory discretion is informed by the common law norm. Gibbs CJ said in *Lowe v The Queen*:'the reason why the court interferes in such a case is that it considers that 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.' The sense of grievance necessary to attract appellate intervention with respect to disparate sentences is to be assessed by objective criteria. **The application of the parity principle does not involve a judgment about the feelings of the person complaining of disparity. The court will refuse to intervene where disparity is justified by differences between co-offenders such as age, background, criminal history, general character and the part each has played in the relevant criminal conduct or enterprise**.

[32] A court of criminal appeal deciding an appeal against the severity of a sentence on the ground of unjustified disparity will have regard to the qualitative and discretionary judgments required of the primary judge in drawing distinctions between co-offenders. Where there is a marked disparity between sentences giving rise to the appearance of injustice, it is not a necessary condition of a court of criminal appeal's discretion to intervene that the sentence under appeal is otherwise excessive. Disparity can be an indicator of appealable error. It is also correct, as Mason J said in *Lowe*, that logic and reality combine to favour the proposition that discrepancy is a ground for intervention in itself. Unjustifiable disparity is an infringement of the equal justice norm. It is appealable error, although it may not always lead to an appeal being allowed. If an appeal is allowed on the ground of disparity, a court of criminal appeal in re-sentencing is not required to achieve identity of punishment. It must have regard to the sentence imposed on the co-offender and give it appropriate weight. In such a case, an appeal to this Court on the question whether a disparity identified in a court of criminal appeal was unjustifiable and called for intervention by that court would also involve review of a qualitative and discretionary judgment.

[33] There is a question whether a sentence which would otherwise be appropriate *can* be reduced on the ground of disparity to a level which, had there been no disparity, would be regarded as erroneously lenient. In *Lowe* that question was answered explicitly in the affirmative by Mason J and less explicitly but to like effect by Dawson J, with whom Wilson J agreed. It has also been answered in

> the affirmative in a number of cases in the Court of Criminal Appeal of New South Wales. On the other hand, as Simpson J correctly pointed out in *R v Steele*, the existence of a discretion, where unjustified disparity is shown, to reduce a co-offender's sentence to one which is inadequate does not amount to an obligation to do so. Certainly, the discretion of the Court of Criminal Appeal to reduce a sentence to a less than adequate level would not require it to consider reducing the sentence to a level which would be, as Street CJ put it in *R v Draper*, 'an affront to the proper administration of justice'. Moreover, if the relevant sentencing legislation, on its proper construction, does not permit an inadequate sentence to be imposed, there can be no discretion on appeal to impose one. Whether or not the discretion to reduce a sentence to an inadequate level is available, marked and unjustified disparity may be mitigated by reduction of the sentence appealed against to a level which, although lower, is still within the range of appropriate sentences."
> (footnotes omitted, emphasis added)

[26] In this case, the disparity complained of is not that the sentences were different but that they were not sufficiently different. In other words, that the culpability of the applicant and other mitigating circumstances were such that he should have had that recognised by, at least, an earlier parole release date.

[27] These matters were taken into account by the learned sentencing judge and she acted on the basis that the applicant had a higher degree of culpability than that of his older companion. Although Mr Tasdivar was physically involved in the violence, the applicant was the principal protagonist in these matters.

[28] It must also be taken into account that this court has often remarked on the need for general deterrence in cases of this type. In *R v Hays; ex parte Attorney-General of Queensland*[7] Davies JA and Jones J reviewed the cases on this issue and said:

> "[22] A review of these cases shows, in our view, that **this Court has considered general deterrence of such importance in cases of this kind as to require that a term of imprisonment be imposed even where, as in this case, the conduct was unpremeditated, the offender is young and he has not previously been sent to gaol.** However, the respondent's conduct appears to be a little less serious than that in each of these cases and his previous good character, his plea of guilty and his remorse require considerable mitigation of the sentence which might otherwise be imposed."

[29] The evidence before the learned sentencing judge was:

- That the applicant had procured others to be involved in the commission of offences of serious violence;
- That the offences were committed for his benefit;

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7 [1999] QCA 443.

- That he physically led the armed group into the confrontation;
- That the applicant was aware that weapons were brought to the fight;
- That he participated as a principal offender in the assault on the complainant after the complainant had been stabbed.

[30] In arriving at the sentences imposed on the applicant and his co-accused, the learned sentencing judge correctly took into account both the favourable and unfavourable circumstances as they applied to the applicant and his co-offender and in balancing those found a higher degree of criminality in the applicant than in his co-accused. Given the different histories of the co-accused, it was appropriate to impose the same sentence on each offender.

[31] The applicant has failed to demonstrate any error in the sentencing process. I would refuse leave to appeal and order that the application be dismissed.