SUPREME COURT OF QUEENSLAND

CITATION:	*R v Colenso* [2012] QCA 216
PARTIES:	**R** **v** **COLENSO, Jonathan Ian Frederick** (applicant)
FILE NO/S:	CA No 358 of 2011 DC No 197 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	21 August 2012
DELIVERED AT:	Brisbane
HEARING DATE:	8 August 2012
JUDGES:	Muir and White JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal be granted;** **2. The appeal be allowed;** **3. The sentence imposed in respect of count 1 be set aside and a sentence of three years imprisonment with a parole release date fixed at 5 June 2013 (after the applicant has served 18 months) be substituted therefor; and** **4. The sentence imposed in respect of count 2 be set aside and a sentence of six months imprisonment be substituted.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where applicant convicted of unlawful wounding and common assault – where applicant sentenced to four and a half years imprisonment for wounding and three years imprisonment for assault – where sentence imposed with respect to assault was the maximum sentence prescribed for that offence – where parole eligibility was fixed at 5 March 2014 – where applicant had a limited but relevant criminal history – where applicant 'glassed' and punched the complainant in a nightclub – where complainant was left with facial scarring – whether sentence manifestly excessive

R v Bailey [2009] QCA 251, considered
R v Berryman (2005) 159 A Crim R 65; [2005] QCA 471, considered
R v Fookes [1997] QCA 39, considered
R v Hallett [1997] QCA 222, considered
R v Rehavi [1999] 2 Qd R 640; [1998] QCA 157, considered
R v Sokol [2011] QCA 20, cited
R v Toohey [2001] QCA 149, considered
Veen v The Queen [No 2] (1988) 164 CLR 465; [1988] HCA 14, considered

COUNSEL: R A East for the applicant
B J Merrin for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** The applicant was convicted on 5 December 2011, after a trial, of unlawful wounding (count 1) and common assault (count 2). He was sentenced to four and a half years imprisonment for the former and three years imprisonment for the latter. A parole eligibility date of 5 March 2014 was fixed. The applicant applies for leave to appeal on the ground that the sentence was manifestly excessive.

[2] The applicant was 23 years of age at the time of his offending and 26 at the time of trial. He had a good work history and a limited, but relevant criminal history. In 2005 the applicant, then aged 18, pleaded guilty to one count of wilful damage to a motor vehicle, one count of grievous bodily harm and two counts of assault occasioning bodily harm whilst armed. The circumstances of this offending in 2004 were as follows.

[3] The complainant had made threats against the applicant's family, angering him. Immediately before the offending conduct, the applicant had received a telephone call from a friend saying that the complainant was tailgating him and his companions. When the applicant arrived at the scene, he saw the complainant driving "repeatedly around a roundabout in front of [his] group". The complainant then ran out of petrol whereupon the applicant struck the complainant's car with a golf club, breaking the club. The applicant persisted, breaking a window of the car and stabbing the complainant through the hand with the shaft of the broken club. There was also some damage to the shoulder and stomach of the complainant. It does not appear, however, that these injuries were serious or intentionally inflicted. The applicant was sentenced to 18 months imprisonment wholly suspended with an operational period of three years.

[4] The subject offending occurred in a nightclub in Surfers Paradise. The complainant, who was unknown to the applicant, was shoved by the applicant when standing in a queue at the bar. The complainant said to the applicant, "Go to the back of the line" and turned away to speak to the barmaid. The applicant reached out, took a glass from a glass rack and smashed it into the side of the complainant's face. The glass broke on impact. The complainant fell to the floor, where the applicant punched him about the head until forcibly restrained.

[5] The complainant sustained a four centimetre deep wound in the region of the left temple, a three centimetre deep laceration over the left cheek region, a one centimetre superficial laceration near the corner of his mouth and a half centimetre superficial laceration near the lateral corner of the left eye. He was treated at a medical centre where the wounds were sutured. The sutures were removed a week later. The wounds have left some facial scarring and some residual psychological affectation.

[6] At first instance, the prosecutor submitted that the appropriate sentencing range was three to five years imprisonment, but that if a sentence of 18 months to two years imprisonment were to be imposed, it should be accompanied by a serious violent offence declaration. Defence counsel submitted that three and a half to four years imprisonment with a parole release date at the half way point of the sentence was appropriate.

[7] On appeal, counsel for the respondent conceded that she had been unable to find any decision of this Court in which a sentence of four and a half years imprisonment had been upheld for an offence of the subject kind. Her submissions proceeded as follows. Although many cases of "glassing" refer to a range of 18 to 24 months imprisonment being appropriate for standard offences of such nature, this case dictated a higher sentence due to:

1. the applicant's prior offending;
2. the prevalence of such offending and the need for general deterrence;[1]
3. the applicant's persistence; and
4. the residual physical and psychological harm suffered by the complainant.

[8] Counsel for the applicant placed particular reliance on *R v Berryman*;[2] *R v Rehavi*;[3] *R v Fookes*;[4] and *R v Bailey*.[5] In *Berryman* an application for leave to appeal against a sentence of three years imprisonment suspended after 12 months with an operational period of three years was refused. The 24 year old offender, who was intoxicated, lunged at the complainant in a hotel whilst holding a glass which broke on contact with the complainant's face. He then punched the complainant two or three times before being restrained. The complainant sustained no damage to facial nerves, but required plastic surgery and was left with noticeable permanent scarring. For a couple of months, his left lip drooped. He endured severe pain and could not fully shut his left eye for some time. The offender had no prior convictions, but had assaulted his wife causing bodily harm while on bail awaiting sentence. Williams JA referred to the judgment of Thomas JA in *R v Toohey*[6] in which his Honour said:

> "In my experience a range of 18 months to two years is quite common in cases that were referred to by [counsel for the respondent] as 'pub glassings'. It is also my experience that more serious sentences are imposed when further aggravating features

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1 *R v Sokol* [2011] QCA 20 at [9] – [10].
2 [2005] QCA 471.
3 [1999] 2 Qd R 640.
4 [1997] QCA 39.
5 [2009] QCA 251.
6 [2001] QCA 149 at 5.

> exist, and lesser sentences are imposed when either less serious circumstances exist or further circumstances of mitigation are shown."

[9] In *Toohey*, McPherson JA agreed with Thomas JA. Holmes J, dissenting, concluded after a review of the authorities that "… a sentence of imprisonment of two years must be considered relatively severe in a case such as this, in which the injury was not a disfiguring facial injury (as is often the case)".[7]

[10] As counsel for the applicant pointed out, the applicant in *Berryman* pleaded guilty to grievous bodily harm for which the maximum penalty was 14 years as opposed to seven years for the subject offence. The injuries, described as causing "serious disfigurement", were also greater.

[11] In *Rehavi*, the 30 year old offender, who was sentenced to five years imprisonment, smashed the glass against the bar before striking the complainant in the face with it. The resulting injury extended through the skin and muscle layers to the jawbone and caused numbness and dribbling from the corner of the mouth, which was likely to be permanent. The Court was required to re-sentence the offender for reasons which are not relevant for present purposes and imposed a sentence of three years imprisonment.

[12] In *Fookes*, a sentence of four years imprisonment suspended after 18 months with an operational period of five years was imposed on the 31 year old offender who had an 11 year old conviction for the rape and indecent assault of an 87 year old woman and a conviction for assault occasioning bodily harm. The offender abused the complainant in the bar area of a nightclub. The complainant "palmed" the applicant in the face causing him to step back. The applicant then deliberately struck the complainant on the left side of the face with a glass causing a number of cuts to the face which resulted in permanent scarring. The attack was described on appeal as "unprovoked and cowardly". Davies JA, with whom the other members of the Court agreed, concluded that the sentence of four years imprisonment was outside the range of a sound sentencing discretion and substituted a sentence of three years imprisonment.

[13] In *Bailey*, a sentence of four and a half years with parole eligibility after 15 months imposed on the 19 year old offender for unlawfully doing grievous bodily harm was set aside and replaced with a sentence of three years imprisonment suspended after nine months with an operational period of three years. The complainant suffered "a large facial laceration through the right eyebrow, across the upper eyelid, along the right inner canthus, along the right lateral aspect of the nose, with a full thickness laceration through the right alar" and "a 3–4 mm round hole in the cartilaginous nasal septum". He underwent surgery and spent several days in hospital. He also had follow up treatment from the Plastics Unit at a Sydney hospital and was left with significant facial scarring which was permanent and disfiguring.

[14] The 37 year old offender in *R v Hallett*,[8] a case relied on by the prosecution on the sentencing hearing, was sentenced to three years imprisonment after a trial for the offence of unlawful wounding. He thrust a broken glass into the face of the

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7 At 12.

8 [1997] QCA 222.

complainant when struggling with him on a bar room floor causing significant wounds including a partially severed lip and ear lobe. His prior convictions included a number of violent offences. The sentence was not disturbed on appeal, but it was observed that the sentence "might well be at the top end of the appropriate range". Counsel for the respondent relied on the fact that the use of the glass took place in the course of a struggle on the ground as a feature distinguishing *Hallett* from the present case. Hallett's offending was thus possibly more spontaneous but a broken glass was used and several blows were struck with it.

[15] The authorities relied on by the applicant offer strong support for his counsel's submissions that the sentence imposed in respect of count 1 was manifestly excessive, particularly when regard is had to the applicant's comparatively young age and good work history. The applicant's employer at the time of sentencing spoke highly of him as an employee. His mother is dependant on him for financial support and he is engaged to be married.

[16] General deterrence, as the sentencing judge recognised, is an important consideration in sentencing for "glassing" offences of the nature of those under consideration. That, however, does not warrant the imposition on the applicant of a sentence substantially greater than that imposed on others for similar offending. Nor does it justify what appears to be a failure to give due regard to the applicant's young age, good work history and the general desirability that he be rehabilitated and reinstated as a useful, productive citizen as soon as is reasonably possible.

[17] Counsel for the applicant also submitted that the punishment for the common assault constituted by the punching of the complainant after he had fallen to the ground was manifestly excessive. It was not contested that there was no evidence that the applicant's blows caused any lasting injury. The sentence of three years imprisonment was the maximum sentence prescribed for common assault by s 335 of the *Criminal* Code. The maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed.[9] The punching of the complainant was plainly not within the worst category of cases. Counsel for the respondent properly accepted that the penalty imposed was not within the proper exercise of a sound sentencing discretion and submitted that a concurrent sentence of six to 12 months was appropriate.

[18] In my view, a sentence of six months imprisonment is appropriate.

[19] For the above reasons I would order that:

1. the application for leave to appeal be granted;

2. the appeal be allowed;

3. the sentence imposed in respect of count 1 be set aside and a sentence of three years imprisonment with a parole release date fixed at 5 June 2013 (after the applicant has served 18 months) be substituted therefor; and

4. the sentence imposed in respect of count 2 be set aside and a sentence of six months imprisonment be substituted.

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9 *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 478.

[20] **WHITE JA:** I have read the reasons for judgment of Muir JA and I agree with his Honour's reasons and with the orders which he proposes.

[21] **PHILIPPIDES J:** I agree with the reasons for judgment of Muir JA and with the proposed orders.