SUPREME COURT OF QUEENSLAND

CITATION:	*R v Woodman* [2012] QCA 236
PARTIES:	**R** **v** **WOODMAN, Gregory Herbert** (applicant)
FILE NO/S:	CA No 122 of 2012 DC No 11 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Emerald
DELIVERED ON:	4 September 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 order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where applicant sentenced on one count of entering the dwelling of complainant and assaulting him pursuant to s 419(4) of the *Criminal Code* – where applicant sentenced to 18 months imprisonment with fixed parole release date after six months – whether sentence imposed was manifestly excessive *Criminal Code* 1899 (Qld), s 335, s 419 *R v Blenkinsop; R v Blenkinsop* [2007] QCA 181, cited *R v Boyd* [2009] QCA 8, considered *R v Brelsford* [1995] QCA 594, considered *R v Cockfield* [2006] QCA 276, cited *R v Denham; ex parte Attorney-General (Qld)* [2003] QCA 74, considered *R v Leu; R v Togia* (2008) 186 A Crim R 240; [2008] QCA 201, considered *R v MAB* [2004] QCA 281, considered *R v Wentt* [1995] QCA 613, considered

COUNSEL: J R Hunter SC for the applicant
B J Merrin for the respondent

SOLICITORS: Anne Murray & Co Solicitors for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** I agree that the application should be refused for the reasons given by White JA.

[2] **WHITE JA:** The applicant pleaded guilty in the District Court at Emerald on 10 May 2012 to entering the dwelling of the complainant and assaulting him pursuant to s 419(4) of the *Criminal Code*. The offence was committed at Rubyvale a year earlier. The applicant was sentenced to 18 months imprisonment with release on parole fixed at 10 November 2012, that is, after serving six months.

[3] The applicant was aged 22 years when he committed the offence and 23 at sentence. The complainant was aged 24 years. The applicant had no prior criminal history and was in regular employment.

[4] The applicant's initial ground of appeal was that the sentence imposed was manifestly excessive. In his outline, Mr J R Hunter SC for the applicant, sought to amend the application to add a further ground:

> "The learned sentencing judge impermissibly sentenced the applicant on the basis that he had committed a separate offence that was not charged."

However, at the commencement of the hearing he abandoned the application to amend because he had recently been made aware of certain email correspondence between the ODPP and the applicant's solicitors in April 2012. This can more usefully be discussed after setting out the circumstances of the offending. Those facts were contained in a schedule which was amended in two relatively minor respects at the commencement of the prosecutor's sentencing submissions.

[5] The facts as amended were as follows: on Monday 16 May 2011 the complainant resided in Rubyvale and he and a friend were at the Rubyvale Hotel. Whilst there the complainant's friend became involved in an altercation with a person known as "Charlie". As a result of that altercation the complainant had a verbal argument with Charlie's girlfriend. The complainant and his friend were told to leave by the publican.

[6] The next day, Tuesday 17 May, the applicant with Charlie and another male, Jamie Iser, went to the complainant's house. Iser called out to the complainant, who was down a mine shaft, and then climbed down to speak to him. Iser told the complainant that the applicant and Charlie wanted the complainant to apologise to Charlie's girlfriend arising out of the argument the night before. The complainant reluctantly left the mine shaft, spoke to the applicant and Charlie and told them that he had other commitments. However, fearful of the consequences if he did not go with them, he went with them in their car to a house in the Gemfields area where the complainant apologised to Charlie's girlfriend. The applicant and Iser drove the complainant back to his house. According to the schedule of facts the complainant no longer felt threatened and believed that that was the end of the matter.

[7] However, the following day, 18 May, when the complainant was asleep at home in the evening the applicant and a juvenile came to the complainant's house. The applicant reached in through a broken glass pane on the front door and opened the door. The complainant was wakened by their entry and saw two shadows moving about in his bedroom. The light was turned on and he recognised the applicant and the juvenile. He asked them what they were doing and told them to leave him alone.

[8] The applicant was aggressive and yelled at the complainant to get up, directing him into the lounge room where he was told to sit on the couch. The applicant grabbed hold of the complainant's 'hoodie' jumper and pulled the complainant towards him. He punched the complainant to the head four times. The complainant had managed to turn his head away so that the punches grazed the side of his head near his right ear. The juvenile tripped over a computer and fell into the applicant. The complainant managed to get up off the couch and moved to stand in the kitchen. He told the intruders to get away, that he had had enough. The applicant picked up an axe handle and started waving it in front of the complainant's face, threatening that he had "other brothers that are bigger than you. I've been to jail twice before."[1] The applicant dropped the axe handle and punched the complainant to the chin. He grabbed hold of the hood of the complainant's jumper saying, "I'll kill you, I'll kill you if you ever tell anyone about this".[2] The complainant was finding it difficult to breathe as a result of the hold on his jumper. He ripped the front of the jumper which released some of the tension on the string inside the hood after which he could breathe.

[9] The complainant called out to his neighbour and the applicant picked up the axe handle again and told the complainant to "shut the fuck up otherwise I'll whack you with this."[3] The complainant stopped yelling. The juvenile approached the complainant who saw that he had a knife in his hand and that it was pressed against his (the complainant's) stomach. The juvenile walked back into the kitchen and threw the knife into the sink and said, "I could have stabbed you."[4] The applicant said:

> "If you tell anyone I'll kill you, if you're ever digging we can drop a rock on you. I want you to promise that you're not going to tell anyone. If I hear that you've told anyone you're dead."[5]

The applicant and the juvenile then left the complainant's house.

[10] The complainant locked his doors and got back into bed. About half an hour later he heard the sound of a car coming towards his house. He got up, looked out of the front door window and saw four people outside. He told them to get out and asked what they wanted. He saw the applicant holding what appeared to be an axe handle. The applicant approached the front door and reached inside the broken glass and tried to unlock the door. The complainant picked up a piece of wood and used it to hit the applicant's hands away so that he could not open the door. He heard the applicant suggest that the group go around to the back door, at which time the complainant called out to his neighbour. The four people, including the applicant, ran back to the car and drove away.

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1 AR 29.
2 AR 29.
3 AR 29.
4 AR 29.
5 AR 29.

[11] When he was confident that they had left, the complainant rode his push bike to a friend's house about 600 metres away to call the police as he did not own a mobile phone. A short time later police arrived. The juvenile was identified and interviewed by police He confirmed the identity of the applicant. It appears that the juvenile has not been charged with any offence. The applicant participated in an interview with police and admitted to being at the complainant's house but minimised his involvement by saying that he only pushed the complainant and in doing so may have hit him.

[12] The applicant had been charged on an indictment dated 4 April 2012 with entering the complainant's dwelling with intent to commit an indictable offence by means of a break at night and in company. A second count charged him with unlawfully assaulting the complainant and a third count related to the return to the house for which he was charged with entering the complainant's dwelling with intent at night and armed with an offensive instrument. The charges were laid pursuant to: s 419(1), (2), (3)(a) and (3)(b)(iii) (count 1); s 335 (count 2); and s 419(1), (3)(a) and (3)(b)(ii) (count 3). On the basis of counts 1 and 3 the applicant was liable to imprisonment for life.

[13] In a submission made to the ODPP dated 30 April 2012 the applicant's solicitors suggested that there was no necessity for the multiple counts, noting that originally the applicant had been charged with a single count under s 419(4):

> "The gravamen of the [applicant's] conduct can be adequately encapsulated by preferring only the original count and relying on the facts as set out in the schedule compiled by your office. We doubt very much whether the third count on the current indictment is made out on the evidence, but even if it is, the breach is technical in nature and unlikely to result in any additional or significant penalty.
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> If the indictment is amended to only the single count under section 419(4), then we see no difficulty in obtaining instructions to plead guilty to that count …"[6]

The ODPP responded that the submission would be accepted adding:

> "I would, of course, allege the circumstances which currently form circumstances of aggravation – being "by break" "in the night" and "in company", although they won't form part of the indictment."[7]

It was in those circumstances that the amendment to the application for leave to appeal was abandoned.

Submissions below

[14] The prosecutor submitted for a sentence of two years imprisonment to serve a third. He referred to *R v Denham; ex parte Attorney-General (Qld)*[8]; *R v Brelsford*[9]; and *R v MAB.*[10] The prosecution accepted as mitigating factors that the applicant had no criminal history, was young and had co-operated with police and indicated an early plea.

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6 Affidavit of Paul Patty filed 27 July 2012, Exhibit A.
7 Affidavit of Paul Patty filed 27 July 2012, Exhibit A.
8 [2003] QCA 74.
9 [1995] QCA 594.
10 [2004] QCA 281.

[15] Defence counsel said, without challenge, that the offence was committed because all parties were drinking and "wound each other up". As a consequence they compelled the complainant to apologise. As conveyed by counsel, "more information" came out, and the group of "boys" came to the conclusion that the apology was insufficient leading to the applicant and the juvenile breaking in to the complainant's house the next evening. After further talking and drinking and further allegations being made about the complainant the young men returned to the complainant's house. Defence counsel informed the court that the applicant was the only one charged out of the several episodes. It seems that in the small Gemfields community the complainant had been seen around various places but there was no animosity observed between him and the applicant. The defence sought an order which kept the applicant in the community conditional upon him addressing excessive drinking. This submission, ultimately, became a submission for an intensive correction order for 12 months, or alternatively, an immediate parole release order.

The approach of the sentencing judge

[16] After setting out the facts the sentencing judge noted that in his interview with police the applicant was "dishonest" in as much as he limited his criminal conduct to pushing the complainant, conceding that in so doing he might have hit the complainant. His Honour discussed the case of *Denham* which in turn referred to *R v Wentt*[11] where Thomas J observed that offences involving breaking into homes and threatening the safety of persons therein were regarded as sufficiently serious to demand custodial sentences "even in the case of persons of previous good character". His Honour also noted similar observations in *R v Boyd*[12] where Fraser JA said:

> "[T]he Court must, through the penalties imposed, take a serious stand against home invasions, in respect of which there is a strong need for deterrence."[13]

His Honour referred to similar observations by Helman J in *R v MAB*.

[17] The sentencing judge distinguished *Brelsford*, describing it as more serious but noting that it gave some guidance. He also distinguished *Denham* in that the conduct before him was in company "initially with a juvenile who had possession of a knife, with which he threatened the complainant" and that, on return, the applicant was in company with three others. His Honour noted that although a weapon was not used, the applicant had threatened the complainant with the handle of an axe. He characterised the act of coming back a second time with three others as indicating a degree of persistence in the threats to kill the complainant.

[18] The sentencing judge accepted that the applicant had no prior convictions and a good work history with good prospects of rehabilitation. Nonetheless, his Honour regarded the conduct of sufficient seriousness to require a period of actual imprisonment. He described the conduct as behaving in "a vigilantly [sic] way".[14] He concluded, in an exhortation to the applicant,

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11 [1995] QCA 613.
12 [2009] QCA 8.
13 At [16].
14 AR 25.

> "You will not break into people [sic] houses. You will not threaten to kill them in the way that you did. You will not arm yourself with an axe handle in the way that you did. You will not go there in company with others, whether they have knives or not. Do you understand that?"[15]

Discussion

[19] The applicant submitted that the sentencing judge was unduly influenced by the decision in *Brelsford*[16] which he contended was insufficiently similar to form a useful comparison. His Honour did note that the facts in *Brelsford* were more serious but observed that it gave some guidance "in matters of that sort". The offender in *Brelsford* was aged 27 with previous convictions including for assaulting police but described as "of little real significance" in the present context. He had a serious problem with alcohol and had been drinking when he decided to take the law into his own hands against the complainant whom he accused of being a child molester. The complainant had been convicted of what McPherson JA described as, "a relatively trivial form of the offence", some years previously. The offender drove to the complainant's house and knocked on the door. It was opened by the complainant's wife. He pushed her out of the way with such force that she was thrust against the door handle and sustained a broken rib. He entered the complainant's bedroom where he was in bed. The offender announced that he was going to get a gun with which he would kill the complainant when he returned.

[20] The offender left in his vehicle and returned, entering the house carrying a baseball bat with which he hit the complainant on and around the head causing bruising to his head, face and back. After a struggle the complainant overpowered the offender. That offender was sentenced to three years imprisonment for one count of entering a dwelling house at night with intent and two counts of assault occasioning bodily harm. He was recommended for parole after 12 months. This court did not regard the fact that the offender had some concern for his three young nephews to whom the complainant had spoken earlier as a mitigating factor. McPherson JA observed:

> "Vigilante action … is notorious for the serious consequences that it often entails. Quite frequently, they are unintended and, on occasions, of course, the wrong person is selected as the target of this kind of rough justice. In any circumstances, attacks of the kind that were carried out here have a potential to inflict serious injuries."[17]

His Honour commented that the offender was fortunate in attracting an early parole recommendation, due to his good work history, his record of working with youth and assisting rugby league playing at Inala:

> "Taking all these matters into account, together with the principles on which we act, which is that we do not sit here to resentence the offender, but simply to see whether the sentence is within the range of sentences for this kind …"[18]

The sentence was not manifestly excessive.

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15 AR 25-26.
16 [1995] QCA 594.
17 At p 4.
18 At p 5.

[21] Mr Hunter referred to *Denham*[19], a decision that was considered by the sentencing judge but which he distinguished on the basis mentioned above.[20] In *Denham*, an Attorney-General's appeal, the offender pleaded guilty to one count of burglary, one count of assault occasioning bodily harm and a summary offence of breach of a domestic violence order. All offences occurred on the one day. He was sentenced to 12 months imprisonment on each of the indictable offences to be served by way of an intensive correction order containing special conditions that he submit to psychiatric and psychological treatment and have no contact with the complainant; was ordered to pay $1,000 to the complainant within three months and in default one month imprisonment; and six months imprisonment wholly suspended with an operational period of three years on the summary offence.

[22] The Attorney-General contended that the judge gave too much weight to the mitigating factors and failed to reflect the gravity of the offence and to take into account general deterrence. The complainant was a 59 year old man and the father of the offender's former partner. They were in conflict over custody and access to their young child. The offender approached the complainant's home and pushed the door open as he was attempting to lock it. In the ensuing struggle the offender hit the complainant on the face four or five times causing his nose to bleed. That conduct was in breach of a domestic violence order. In the course of the altercation, the greater part of which occurred outside, the offender kicked the complainant and held him in a headlock. After the complainant escaped he locked himself inside his house and rang police. The offender threw items of furniture around the yard and into the swimming pool. When located shortly afterwards by police he was agitated and appeared intoxicated. The complainant was admitted to hospital overnight with bruising to his right shoulder, left ribs, tenderness around the kidney region and upper chest and bruising to the right side of his jaw and neck and abrasions to his right ear and knees and tenderness to his back. The offender declined to be interviewed by police. The complainant found the whole incident emotionally distressing and physically uncomfortable. He sustained financial losses including time off work and damage to furniture and solicitor's fees amounting to about $1,000. That offender had prior convictions for some minor street offences and unlawful damage but, more significantly, was sentenced to two months wholly suspended imprisonment some three years before for assault occasioning bodily harm.

[23] The offender, who was 32 at sentence, had been concerned at the risk to his young child from his former partner and her new partner arising out of their unlawful drug consumption. He had a good work history, was remorseful and had achieved proper access to his child through Family Court orders. The court detailed the report from the counselling psychologist who had supervised access between the offender and his son in the face of real difficulties erected by the mother. The relationship with the son was very positive. The President, with whom Jerrard JA and Cullinane J agreed, observed that:

> "The advantage of the orders imposed [on the applicant] is that they not only significantly punish the respondent, but also offer him the opportunity to complete his rehabilitation with the assistance and control of a community corrections officer and ensure that the courts have control over his behaviour for the next three years."[21]

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19 [2003] QCA 74.

20 At [16] above.

21 At reasons [13].

The court was referred to *Brelsford* but noted that that decision had an undesirable vigilante aspect, that the offender was armed, had entered the house twice and did not appear to have the promising rehabilitative prospects of the offender under consideration.

[24] The President referred to the comments of Thomas J in *R v Wentt*[22] which are mentioned above,[23] but added:

> "[w]hilst I heartily endorse those observations, I do not understand them to demand an actual custodial sentence in every case within those parameters."[24]

Her Honour noted that the comparable sentences relied upon by the Attorney-General demonstrated:

> "… that a custodial sentence of 18 months to two years imprisonment suspended after some months to reflect the plea of guilty and mitigating factors was within the sentencing range here. It was not however the only appropriate penalty. Such a sentence would not allow lengthy community supervision, for parole can no longer apply to a sentence of two years imprisonment or less [s 157(2) *Penalties and Sentences Act* 1992 (Qld); s 134(1)(a)(ii) *Corrective Services Act* 2000, but cf s 76 of that Act] and a partially suspended sentence does not involve community supervision."

[25] Mr Hunter submitted that the conduct in *Denham* was more serious than the conduct of the applicant. In the present case there was no victim impact statement. The potential for serious injury was clearly present and two young men apparently drunk and acting in consort, one holding a knife and the other an axe handle, would have been terrifying, particularly as the verbal threats were serious and an actual assault occurred. In *Denham*, in the context of family relations, the fragile programme of access and the development of that offender's responsibility for maintaining the relationship with his child together with the positive programme which had been underway for three months at the time of the hearing, demonstrated that each sentence must be evaluated against its own facts.

[26] *MAB*[25] was relied on below and on this application. The offender pleaded guilty to two counts of common assault which were against the applicant's then de facto wife and her daughter from a previous relationship; one count of assault occasioning bodily harm on the wife's son then aged seven or eight; and a common assault which occurred following arguments between the offender and the woman concerning his suspicion about her relationship with another man. The offender hit the complainant and pushed her over so that she hit her head against a steel cupboard door. The incident ended when she drove away in her car. Police were called. The following day the offender committed the balance of the offences: burglary with a circumstance of aggravation; assault occasioning bodily harm and stealing from the person. He broke in to his former de facto wife's home at night – she was in bed. He sat on top of her, slapping her face using both hands, pulling necklaces and choking her and made off with one of the necklaces. She suffered a fractured little finger, a perforated ear drum, bruising to the neck and face, grazed lips and tenderness of the jaw.

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22 [1995] QCA 613; CA No 440 of 1995, 6 December 1995.

23 At [17] above.

24 Reasons [16].

25 [2004] QCA 281.

[27] The offender was sentenced to imprisonment for three months for each common assault, six months for each assault occasioning bodily harm and for stealing and two years for the burglary suspended after serving six months with an operational period of three years. That offender had no previous convictions. He had been a hard and productive worker in a variety of occupations. Helman J, with whom Davies and McPherson JJA agreed, noted that the court had been referred to a number of cases and said:

> "But of course the circumstances of the cases vary greatly as to the ages of the offenders, their motives, the damage done and injuries inflicted and so on, so there is little utility in a minute dissection of differences. It suffices to say that it is well accepted that custodial sentences have been thought appropriate in many such cases, even when the offender has not previously been convicted of any offence. … The reason for the imposition of such penalties is obvious and needs little elaboration: the courts recognize that people are entitled to feel safe and secure in their homes, and intruders who violate the sanctity of the home must expect severe punishment because of the gravity of the offence and to deter them and others from such conduct."[26]

The court noted that the aggression towards the woman was persistent and increasingly violent and that she had suffered physical injury and a good deal of mental anguish.

[28] In *R v Boyd*[27], another decision relied upon by the applicant, the offender pleaded guilty to one count of burglary with assault and three counts of wilful damage. He was sentenced to two years imprisonment on the burglary count and six months imprisonment on each of the wilful damage counts with a parole release date fixed at eight months from the commencement of his sentence. The application concerned parity with co-offenders. The offender was 24 when he committed the offences and had a criminal history which included two charges of common assault for which no conviction was recorded and fined $750.

[29] The offender and two of his friends were drinking in a hotel where they expressed a common dislike for the complainant. They drove to the complainant's house with the intention of giving him a "touch up". After unsuccessfully attempting to persuade the complainant to come outside they entered the house and tried to pull him out. The offender rushed through the open front door and started swinging punches at the complainant, hitting him a number of times in the face, neck and chest, then, together with a co-offender, pushed the complainant's head into a gyprock wall. The three men kicked the complainant as he lay on the floor. The offender was bare footed although one of the co-offenders was wearing boots. When police arrived the applicant was outside and confessed that he had done everything. Police found and apprehended the other two young men. The offender participated in a record of interview and admitted going to the house, entering without permission and assaulting the complainant. The victim impact statement indicated that the offences had significant emotional, financial and lifestyle impacts on the complainant. There was some element of jealousy in the offender's attack on the complainant. The co-offenders were sentenced to 12 months imprisonment on

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26 At pp 5-6.

27 [2009] QCA 8.

the burglary charge wholly suspended with an operational period of three years. It seems that the lighter sentence was dictated by the fact that the co-offenders had no previous convictions and that the subject offender was the instigator or motivator for the events that unfolded. The observations of the court about parity are not here relevant.

[30] Ms Merrin, for the respondent, referred to *R v Cockfield*[28]; *R v Leu; R v Togia*[29]and *R v Blenkinsop; R v Blenkinsop*.[30] Of those decisions, the decision in *Leu and Togia* is the most helpful. Fraser JA examined many cases involving home invasions. The offenders were brothers aged 20 and 23 years respectively. Leu had a previous conviction for armed robbery in company with personal violence for which he had received two years probation and community service because of the particular circumstances. The other brother had been fined for stealing and no conviction recorded but otherwise had no prior convictions. The two, after an exchange of mutually threatening text messages with their drug dealer, broke into his house in the early evening armed with a vacuum cleaner pipe and a wooden stake. They chased the complainant into his bedroom demanding money and later, drugs, and punched and kicked him. The complainant's girlfriend was pushed to one side when she attempted to protect the complainant. Property was damaged in the melee. Togia stole some marijuana and money was taken.

[31] The offenders were apprehended the following day. Each made admissions to police, Togia stating that after he overhead the complainant threaten his brother he had the idea of giving him a "touch up". The complainant had sustained relatively minor injuries including contusions to the scalp and shoulder and an abrasion to the face and a facial scar that would fade. Each offender had continuously been in fulltime employment, was involved in community affairs and contributed to the upkeep of their wider family. Each had entered a plea of guilty at the earliest opportunity. Each had been sentenced on the count of burglary by breaking in the night with violence while armed and in company and assault and armed robbery in company with personal violence to five years imprisonment with eligibility for release on parole after three years.

[32] Fraser JA observed that a severe sentence was undoubtedly required because the offending was a premeditated home invasion and assault and robbery in company whilst armed:

> "What Davies JA said [*R v Houghton and Genrich* [1998] QCA 137] of similar offending a decade ago remains true today:
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> > 'The importance of deterrence in cases of this kind in my view cannot be over-emphasised. Judging by the number of cases which come before this Court, offences of this kind appear to be prevalent and, involving as they do the intrusion into the privacy of a person's home, often at night, involving assault of an occupant in his or her home, they are extremely serious; the more so when there are two or more invaders involved.'"[31]

[33] His Honour observed that in a pre-meditated house invasion in company with the use of weapons carrying out a pre-meditated assault which caused bodily harm, the

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28 [2006] QCA 276.
29 [2008] QCA 201.
30 [2007] QCA 181.
31 At reasons [18].

lowest point of the sentencing range "ordinarily would be not less than three years imprisonment".[32] The appeals were allowed and a head sentence of imprisonment of three and a half years was imposed on Togia and four and a half years on Leu with parole eligibility after about one-third in each case.

Conclusion

[34] This court has regularly condemned the conduct of offenders which involved a home invasion, particularly with aspects of self-help or vigilantism. Personal and general deterrence are of particular importance. The number of cases coming before the courts is such that general deterrence continues to be of particular significance even where it is unlikely that the offender will re-offend. The persistence of the applicant who had busied himself in another's slight tended to modify the submission that these were just young men "winding each other up". The forced apology had itself been brought about by a home invasion although not charged as an offence. The comparable sentences in *Brelsford* and *MAB* indicate that the sentence imposed was not outside the range of a sound sentencing discretion even if a different sentencing judge might have fashioned a different order.

[35] I would refuse the application.

[36] **PHILIPPIDES J:** I agree with the reasons for judgment of White JA and with the proposed order.

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32 At reasons [27].