SUPREME COURT OF QUEENSLAND

CITATION:	*R v Andrews* [2012] QCA 266
PARTIES:	**R** **v** **ANDREWS, Leslie James** (applicant)
FILE NO/S:	CA No 59 of 2012 DC No 3162 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	28 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	18 September 2012
JUDGES:	Margaret McMurdo P, McMeekin and Henry JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence granted.** **2. Appeal against sentence allowed.** **3. Sentence varied by substituting a parole release date of 8 December 2012 in lieu of 8 June 2013.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted of one count of unlawful wounding after a trial – where the sentencing judge ordered the applicant to serve thirty three months imprisonment – where the sentencing judge fixed the parole release date at 8 June 2012 – whether the sentence was manifestly excessive in all the circumstances *Channon v R* (1978) 20 ALR 1; [1978] FCA 16, considered *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45, referred *Muldrock v The Queen* (2011) 244 CLR 120; [2011] HCA 39, considered *R v Clark* [2008] QCA 51, referred *R v Curley* [2002] QCA 140, referred *R v Devon* [2004] QCA 216, referred

R v Friday [2005] QCA 440, referred
R v Grehan (2010) 199 A Crim R 408; [2010] QCA 42, referred
R v James [2000] QCA 477, referred
R v Kent [2004] QCA 83, referred
R v Meehan [1996] QCA 215, considered
R v Mooney [1978] VicSC 272, referred
R v Neumann ex parte Attorney-General (Qld) [2007] 1 Qd R 53; [2005] QCA 362, referred
R v Shev [2005] QCA 278, referred
R v Sokol [2011] QCA 20, considered
R v Tsiaras [1996] 1 VR 398; [1996] VicRp 26, referred
R v Verdins (2007) 16 VR 269; [2007] VSCA 102, considered

COUNSEL: The applicant appeared on his own behalf
D C Boyle for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P**: I agree with McMeekin J's reasons for granting the application for leave to appeal, allowing the appeal and varying the sentence below by substituting a parole release date after nine months.

[2] The unchallenged psychiatric report of Dr T Mark Schramm established that the applicant suffered from chronic untreated schizophrenic illness at the time of the offence and that there was a causal relationship between his illness and his commission of the offence. It followed that principles of general deterrence, retribution and denunciation were lesser factors in sentencing this offender for this offence than otherwise: *Muldrock v The Queen*.[1]

[3] The primary judge also accepted material placed before the court that the applicant was not ordinarily a violent person. He had no prior convictions for offences of significant violence and, despite his long criminal history, in the almost four years between the offence and sentence during which he met his onerous bail conditions, he had not been in trouble with the law. He had been attending counselling and was registered with the Redlands Hospital Mental Health Unit and at Goori House where he was undergoing a therapeutic program for drug, alcohol and mental health issues. These matters suggested that the applicant would not be a significant danger to the community upon his release, especially if he continued in his present programs.

[4] The primary judge's fixing of the parole release date after 15 months of a 33 month sentence did not give proper weight to the applicant's mental health issues. In the unique combination of circumstances here, an unusually early parole release date was required to properly recognise the impact of those issues and to promote both the applicant's rehabilitation and community protection during a substantial parole period.

[5] I agree with the orders proposed by McMeekin J.

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1 (2011) 244 CLR 120, 139 [54].

[6] **McMEEKIN J**: On 9 March 2012 the applicant was convicted by a jury of one count of unlawful wounding following a three day trial in the District Court and sentenced to thirty three months imprisonment with a parole release date set at 8 June 2012 - after 15 months had been served.

[7] The applicant seeks leave to appeal against the sentence imposed on the basis that it is manifestly excessive.

[8] The applicant is unrepresented but I acknowledge the assistance rendered to him by the Caxton Legal Service in the drafting of an outline of argument on his behalf.

The Circumstances of the Offence

[9] On 8 June 2008 a verbal altercation commenced at a hotel between the applicant and the complainant. The altercation concerned the girlfriend of the complainant, with whom the applicant once lived. The applicant appears not to have previously met the complainant but told the psychiatrist that he was related to "the boss", an apparent reference to an employer who the applicant claimed to have had exhibited some violence towards him previously. While there is some conflict as to what occurred, it would appear that the complainant started the dispute. The complainant was loud, threatening and aggressive in his manner towards the applicant for no apparent good reason. Derogatory remarks were made by the complainant to the applicant. It seems common ground that the applicant initially did not respond to these taunts and sought to avoid any conflict.

[10] Some little time later the parties met up at a road side some distance away from the hotel. The applicant's account to the psychiatrist indicated that he had followed the complainant's car from the hotel, initially at least, with some intention of discussing matters. The sentencing judge proceeded on the evidence that suggested that the complainant had, to some extent at least, then pursued the applicant. The complainant left his vehicle and approached the applicant, his words and conduct again suggesting an aggressive intent. At that point the applicant produced the knife and wounded the complainant. While the complainant may well have intended to strike the applicant he had not, to that point, done so. The complainant then punched and kicked the applicant in the head on a number of occasions before departing.

[11] The complainant suffered four cuts – a wound to the left side of his stomach, a small nick to the left side of the groin and two cuts to the left arm. Despite substantial complaint by the complainant in a victim impact statement the wounds do not seem to have had any significant permanent effect. The sentencing judge treated them so and in the absence of evidence was plainly entitled to take that approach.

[12] The jury rejected the defences of self defence and compulsion. The sentencing judge, who had been the trial judge, sentenced on the basis that the use of the knife was a disproportionate response to the complainant's aggressive acts.

Personal Details

[13] The applicant was aged 59 years at the time of the sentence. He is now 63 years old.

[14] The applicant has a long criminal history across three States with periods of imprisonment. He had five prior convictions for violence but all were dated and all apparently relatively minor given the punishments imposed, varying from a fine of $500 to a month's imprisonment. He had convictions in Queensland for possession of a knife in a public place in 2001 and 2006.

[15] A psychiatric report was tendered. The applicant was diagnosed as suffering, possibly for many years, from a "chronic untreated schizophrenic illness with a long term tendency to assume malevolence and vigilance afforded by his extensive traumatic life history". The illness manifested itself in ongoing and persisting ideas that were delusions, and a perception of threats that were auditory hallucinations. As well there was the possibility of some cognitive dysfunction.

[16] Despite the criminal history the sentencing judge accepted that the applicant was not a violent person. His Honour commented on the applicant's behaviour at the hotel where he evidently attempted to avoid further conflict and noted references that were tendered from apparently experienced and independent people that described the applicant as having a "soft and compassionate personality."

Submissions on Sentence

[17] The prosecutor's submission at sentence was that imprisonment for a period of three years was warranted, with parole release date at one half of that head sentence.

[18] The applicant's counsel submitted to the sentencing judge that two to three years imprisonment was appropriate in the circumstances, with a parole release date at a third of the head sentence - the eight to twelve month mark.

The Sentencing Judge's Approach

[19] The sentencing judge expressly referred to several mitigating features of the case.

[20] First, the complainant was plainly the aggressor.

[21] Secondly, the sentencing judge observed that the complainant was taller and stronger than the applicant and as well the applicant was approaching 60 years and significantly older, by over 20 years, than the complainant.

[22] Thirdly, the sentencing judge acknowledged the long period between the commission of the offence and the sentence during which time there had been no re-offending, that the applicant had met all bail conditions and that there was evidence of attempts at rehabilitation including attendance at a therapeutic programme for drug, alcohol and mental health issues.

[23] Fourthly, the sentencing judge noted that the applicant expressed remorse for the stabbing within an hour of the event.

[24] Finally, the sentencing judge expressly accepted that at the time of the offence the applicant suffered from a mental illness that reduced his moral culpability for the offence. This would appear to be a reference to the applicant's perception, a delusional one, that the complainant was planning to come and kill him after the altercation at the hotel. It was recognised too that the mental illness was relevant in other ways - as reflecting on the inapplicability of general deterrence as a significant

factor in sentencing, and as having the effect of making any custodial sentence more difficult for the applicant.

Arguments on Appeal

[25] The applicant submits that a sentence of between 18 months and two years imprisonment ought to be imposed with a parole release date set at the six to nine month mark.

[26] The only specific error identified by the applicant was that his Honour failed to refer to the authorities that describe the applicable principles relevant to the significance of the applicant's mental illness. It was submitted that as a result insufficient weight was given by the learned sentencing judge to that illness.

[27] Reference was made to *R v Friday*[2], *R v Kent*[3], *R v Clark*[4], *R v Shev*[5] and *R v James*[6] as demonstrating that an 18 month sentence was within range and a sentence of three years was at the top of the range for offences of this type. It was submitted that a balancing of the relevant factors in this case should result in a sentence towards the bottom of any range – not the top.

[28] The prosecution submitted that the sentence was appropriate given that:

a) the sentence imposed was in accordance with the defence submission below;
b) the applicant had a lengthy criminal history;
c) the applicant introduced a knife with a 12 cm blade into the conflict that thus far had involved no actual physical contact;
d) while the injuries suffered were relatively minor the areas injured – namely the stomach and groin – indicate that the injuries could have been significantly more serious;
e) there was a trial;
f) the sentencing judge took into account all matters relevant in mitigation; and
g) the significance of the applicant's mental state had to be balanced against his continued offending as shown by his criminal history.

Discussion

[29] I reject the criticism that the sentencing judge fell into some error in failing to analyse the authorities placed before him. With respect, the sentencing judge's remarks show very careful attention to the detail of the submissions received. Presumably the reason that the authorities were not analysed was that counsel were agreed as to their effect.

[30] There were two relevant points. The first is that the permissible sentencing range for an offence of this type involving the use of a weapon in a public place was up to three years imprisonment. The second is that the sentencing judge was entitled to bring into account mental illness short of insanity as impacting on the significance of general deterrence, the moral culpability of the applicant, and the potential

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2 [2005] QCA 440.
3 [2004] QCA 83.
4 [2008] QCA 51.
5 [2005] QCA 278.
6 [2000] QCA 477.

additional difficulties of imprisonment. In that regard his Honour was referred to *R v Neumann ex parte Attorney-General (Qld),*[7] *R v Tsiaras,*[8] and *R v Verdins*[9]. There was no debate concerning the relevant principles, his Honour evidently accepted the principles identified and expressly sought to apply them. This distinguishes the case from *R v Grehan*[10] relied on by the applicant.

[31] As to the first point I observe that a sentence approaching three years imprisonment would seem to completely accord with earlier decisions of this Court given the use of a knife on an unarmed man, the multiple stabbing to the torso with the potential for serious injury, the applicant's maturity and his lengthy criminal history. Sentences of three years imprisonment have been imposed and not interfered with on appeal after pleas of guilty, not a trial as here, in factual situations of some similarity.[11]

[32] There are remarks in some of the cases that suggest that a sentence of three years imprisonment is towards the top of any permissible range: see *R v Friday*.[12] I would not accept that such comments necessarily apply here – so much depends on the seriousness of the injury, the criminal history of the offender, the degree of pre-meditation, the proportionality of the offender's conduct to the situation, any ongoing relationship between the attacker and the victim, and the genesis of any dispute. Such remarks can only be of very general assistance as evidenced by the fact that sentences of four years imprisonment have been imposed for offences of unlawful wounding: *R v Curley*[13]; *R v Devon*.[14] Conversely the cases in which sentences of two years imprisonment have been imposed for unlawful wounding involving a weapon, the sentence for which the applicant contends, involve very different circumstances to those here – *R v Sokol*[15] is an example where the offender had no significant criminal history, had struck out with a glass in his hand, the presence of which he was unaware, and there were good reasons to think he was very unlikely to offend again.

[33] Absent some specific error this Court can intervene only if the result embodied in the sentencing judge's orders was "unreasonable or plainly unjust": *Hili v The Queen*.[16] The concern that I have, and the real issue on appeal, is not so much that the sentencing judge did not fully appreciate and seek to apply the relevant principles but whether in the exercise of his discretion in setting an appropriate non parole period the learned sentencing judge has given sufficient weight to the special consideration present here - the impact of the abnormal mental condition.

[34] I turn then to that issue. It is necessary to state the principles to which his Honour was taken. They are usefully summarised in *R v Verdins*[17] where the Victorian Court of Appeal, after reviewing many of the authorities concluded:

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7 [2007] 1 Qd R 53.
8 [1996] 1 VR 398 at 400.
9 (2007) 16 VR 269 at [32].
10 [2010] QCA 42.
11 See *R v Meehan* [1996] QCA 215; *R v McDonald* [2003] QCA 439; *R v Crompton* [2009] QCA 19 at [25].
12 [2005] QCA 440 citing *R v Shillingsworth* [2002] 1 Qd R 527.
13 [2002] QCA 140.
14 [2004] QCA 216 at [13]-[15].
15 [2011] QCA 20.
16 (2010) 242 CLR 520 at [58] and see the discussion at [58]-[60].
17 (2007) 16 VR 269 at 276 [32]. I note that the applicability of these propositions was not doubted in this Court in *R v Goodger* [2009] QCA 377.

"Impaired mental functioning, whether temporary or permanent ("the condition"), is relevant to sentencing in at least the following six ways:

1. The condition may reduce the moral culpability of the offending conduct, as distinct from the offender's legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.

2. The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.

3. Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.

4. Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.[40]

5. The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.

6. Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment."

[35] More recently in *Muldrock v The Queen*[18] the High Court considered the effect of a mental disorder on the appropriate sentence. Referring to *R v Mooney*[19] the Court said:

"Young CJ, in a passage that has been frequently cited, said this:

> "General deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality because such an offender is not an appropriate medium for making an example to others."

In the same case, Lush J explained the reason for the principle in this way:

> "[The] significance [of general deterrence] in a particular case will, however, at least usually be related to the kindred concept of retribution or punishment in which is involved an element of instinctive appreciation of the appropriateness of the sentence to the case. A sentence imposed with deterrence in view will not be acceptable if its retributive effect on the offender is felt to be inappropriate to his situation and to the needs of the community."

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18 [2011] HCA 39.

19 [1978] VicSC 272 at 5, cited in *R v Anderson* [1981] Vic Rp 17; [1981] VR 155 at 160.

> The principle is well recognised. It applies in sentencing offenders suffering from mental illness, and those with an intellectual handicap. A question will often arise as to the causal relation, if any, between an offender's mental illness and the commission of the offence. Such a question is less likely to arise in sentencing a mentally retarded offender because the lack of capacity to reason, as an ordinary person might, as to the wrongfulness of the conduct will, in most cases, substantially lessen the offender's moral culpability for the offence. The retributive effect and denunciatory aspect of a sentence that is appropriate to a person of ordinary capacity will often be inappropriate to the situation of a mentally retarded offender and to the needs of the community."[20]

[36] I should record that the psychiatric report tendered to the sentencing judge detailed a sad and tragic background. As mentioned, the psychiatrist thought that the applicant had a chronic untreated schizophrenic illness. He thought that the applicant was psychotic at the relevant time and hence liable to draw "paranoid conclusions". One such conclusion that the applicant apparently did draw was that the complainant was very likely going to kill him and so he was acting to defend his life. His response to that perception was out of proportion to the objective threat, as the jury evidently found, but it was not so out of proportion to the subjectively perceived threat. The psychiatrist concluded that there was "a strong argument that the applicant was deprived of the capacity to know that what he was doing was wrong." These observations justified the sentencing judge's finding that the applicant's moral culpability for the offence was lessened. In justice, these features required some significant amelioration of the sentence that would otherwise apply.

[37] There are the further mitigating features that denunciation and general deterrence, which normally are prominent features in stabbing cases, have only a restricted part to play here. Finally there was the additional consideration that the applicant's time in prison was likely to be more arduous for him given that mental illness.

[38] In my view these factors required significant recognition.

[39] In balancing the various considerations I cannot see that the sentencing judge's view of the appropriate head sentence was not within the appropriate range. Even allowing for the mental health issue, I would reject the submission that the case falls into a category that merits a head sentence significantly less than that imposed. The statement made by Demack J in *R v Meehan*[21] that "the courts have indicated the use of a knife is something that, in itself, requires condign sentence" has often been repeated and applies with some force here. The applicant's lengthy criminal history, his continued habit of carrying a knife despite previous convictions, and the continued likely existence of the mental illness each suggested that the applicant presented a risk to the community and each suggested a need to deter the applicant from like conduct. Brennan J's remarks in *Channon v R*[22] are apposite here:

> "Psychiatric abnormality falling short of insanity is frequently found to be a cause of, or a factor contributing to, criminal conduct. The sentencing of an offender in cases of that kind is inevitably difficult. The difficulty arises in part because the factors which affect the sentence give differing significance to an offender's psychiatric abnormality. An abnormality may reduce the

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20 *Muldrock v The Queen* [2011] HCA 39 at [53]-[54] citations omitted.

21 [1996] QCA 215.

22 (1978) 20 ALR 1 at 4-5.

> moral culpabilty [sic] of the offender and the deliberation which attended his criminal conduct; yet it may mark him as a more intractable subject for reform than one who is not so affected, or even as one who is so likely to offend again that he should be removed from society for a lengthy or indeterminate period. The abnormality may seem, on one view, to lead towards a lenient sentence, and on another to a sentence which is severe."

[40] It would seem evident that the sentencing judge intended some small discount both in the head sentence and in the non parole period from what might otherwise have been seen as appropriate to allow for the factors that were in the applicant's favour.

[41] There were a number of such factors and his Honour did not overlook any one of them – the applicant's attempt to avoid the conflict, the persistence of the aggressor in pursuing the fight, the disparity in size and age, the expression of remorse soon after the event, the view that this offence was out of character given the references tendered and the absence of offences of serious violence in 40 years of adult life, the four years of good conduct between the offence and sentence and the good efforts at rehabilitation. These factors alone would have justified some amelioration of sentence and I think that was accorded in the setting of the sentence. If that is all there was in the case I would not interfere.

[42] But a relatively small reduction in the head sentence and usual non parole period is not, in my view, a sufficiently substantial recognition of the mental health issue. It is a matter of judgment and I acknowledge that the sentencing judge's discretion is a wide one in this regard[23] and deserves considerable respect given his comprehensive and careful approach to the fixing of the sentence. But in my view, in the peculiar circumstances of this case, community protection and personal deterrence can be achieved by a shorter term of actual incarceration and a longer period of parole supervision. I conclude that the sentence was manifestly excessive.

[43] While minds might well differ, I have come to the view that a parole release date set after nine months has been served meets the interests of justice in this case.

[44] I would grant the applicant leave to appeal against sentence, allow the appeal and order that the sentence below be varied by substituting a parole release date of 8 December 2012 in lieu of 8 June 2013.

[45] **HENRY J:** I agree with the reasons of McMeekin J and the orders proposed by his Honour.

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[23] *Postiglione v The Queen* (1997) 189 CLR 295 at 336 per Kirby J; *Hili v Queen* (2010) 242 CLR 520 per Heydon J at [76].