SUPREME COURT OF QUEENSLAND

CITATION:	*R v Green* [2013] QCA 24
PARTIES:	**R** **v** **GREEN, Samuel Mark** (appellant/applicant)
FILE NO/S:	CA No 169 of 2012 DC No 233 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	22 February 2013
DELIVERED AT:	Brisbane
HEARING DATE:	15 February 2013
JUDGES:	Fraser and Gotterson JJA and Dalton J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where appellant was found guilty by a jury of unlawfully doing grievous bodily harm – where an eye-witness identified the appellant as having punched the complainant – where complainant hit his head on the ground after being punched by the appellant – where it was open to the jury to find that the complainant's injuries were caused by the appellant's punch or from the complainant hitting his head on the ground – where the injuries suffered by the complainant have had a permanent effect on his health – where appellant contended he hit the complainant in self-defence and did not intend to cause serious injury – whether conviction was unreasonable CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where appellant sentenced to five years imprisonment with parole eligibility

fixed at halfway through the term of imprisonment – where appellant has a lengthy criminal history including offences with violence – where sentencing judge took into account the appellant's personal circumstances, including his disadvantaged upbringing and problems with alcohol and drug abuse – where the injuries suffered by the complainant have had a permanent effect on his health – whether sentence was manifestly excessive

Criminal Code 1899 (Qld), s 668E(1)
Penalties and Sentences Act 1992 (Qld), s 9(1)(e), s 9(4)(b), s 9(4)(g)

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v D'Arcy [2001] QCA 20, considered
R v Dietz [2009] QCA 392, considered
R v Fernando (1992) 76 A Crim R 58, considered
R v Ford [2011] QCA 208, considered
R v Grimley [2000] QCA 64, considered
R v Katsidis [2003] QCA 82, considered
R v Madden [2005] QCA 439, considered
R v O'Rourke [2003] QCA 220, considered
R v Silvester [1998] QCA 194, considered

COUNSEL: The appellant/applicant appeared on his own behalf
B J Merrin for the respondent

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

[1] **FRASER JA:** After a two day trial in the District Court, on 5 June 2012 the appellant was found guilty by a jury of unlawfully doing grievous bodily harm on 8 December 2010. On 6 June 2012 he was sentenced to five years imprisonment with a parole eligibility date fixed on 2 December 2014, at about the mid-point of the term of imprisonment. That sentence was ordered to be served concurrently with a sentence of six months imprisonment for an assault occasioning bodily harm to which the appellant then pleaded guilty.

[2] The appellant has appealed against his conviction on the ground that the conviction is unsafe and unsatisfactory and contrary to law, and he has applied for leave to appeal against his sentence on the ground that it is manifestly excessive.

Conviction appeal

[3] The appeal invokes the ground in s 668E(1) of the *Criminal Code* that the conviction is unreasonable or cannot be supported having regard to the evidence. The question under this ground of appeal is whether it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.[1]

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1 *MFA v The Queen* (2002) 213 CLR 606; *M v The Queen* (1994) 181 CLR 487.

[4] The complainant, a 30 year old man from Fiji, gave evidence in the Crown case. On 8 December 2010, after arriving home from work, he went to a hotel in Ipswich. After having some beer he met the appellant, an Aboriginal man, and shouted him a drink. The complainant subsequently gave the appellant some money to get more drinks. They, together with a woman the complainant had met outside the hotel, left the hotel and went to another hotel. It was shut and the complainant started looking for a taxi to take him home. The complainant gave evidence that after the woman left, the complainant walked with the appellant for a while. When the complainant realised that the appellant was no longer with him, he kept looking for a taxi. He was walking on the side of Brisbane Street when he heard someone call out. The complainant saw the appellant come across towards him. As the appellant approached, he started throwing punches at the complainant. The complainant protected his face whilst he continued walking. The complainant told the appellant that he did not want to fight but wanted to find a taxi to go home. The appellant apologised and put his arm around the complainant's neck. They stopped at traffic lights. The complainant heard the crossing signal and thought they were going to cross the street. That was all he could remember. The complainant was shown surveillance video footage in which the complainant identified himself, the appellant and the woman.

[5] In cross-examination, the complainant denied suggestions put by defence counsel that his evidence differed from his earlier statement to police about a conversation he had with the woman. The complainant also denied the suggestions that he got annoyed by the appellant's failure to shout any drinks, that he had accused the appellant of taking the complainant's lighter, that he had belittled or made fun of the appellant's culture, and that he had wanted to spar or box with the appellant. In the appellant's submissions in the appeal he adverted to some of those topics, but there was no evidence to support the suggestions made by defence counsel.

[6] In further cross-examination, the complainant said that he was so tired that he just wanted to find a taxi home, but the appellant threw a punch at him. The complainant said that he had parried the appellant's punch, which hit the complainant's elbow. The complainant could not remember any punch hitting his head or falling backwards. The complainant adhered to his evidence that he did not start the fight.

[7] Ms Reid gave evidence that she was a retired nurse and she lived in a two storey apartment in Brisbane Street, Ipswich. She identified photographs taken from the second storey of her dwelling showing the road and the footpath, a phone box, shops, and shop windows on the far side of the road. She also identified various photographs, taken from ground level, of the road, adjacent shops and buildings. Ms Reid gave evidence that on the evening of 8 December 2010 she was standing at her kitchen window, having a cigarette and her first drink of the evening, when she heard yelling coming from the street on the same side as her building. She saw two men walking down the road. She described them as "A" and "B". She did not know either of them. She did not recall what time of the evening this was but recalled that the street lights had just come on. She could see everything in Brisbane Street from her window. She heard the men arguing. A walked across the road followed by B. A was walking "fine, straight" and B was stumbling a bit. A and B walked from her side of the road to the other side, to near the phone box. There was a verbal confrontation and A got hit with a "king hit". Before the hit, she saw B pushing A and A "didn't do anything". Ms Reid described a king hit as

being like "a fist to the temple". A "just dropped" and he "passed out and wouldn't get up". Ms Reid saw B looking at A. Eventually B picked A up by his shirt to see if he was awake. Ms Reid then saw a passing vehicle brake, stop and reverse back. Ms Reid went down to the street to make sure that A was alright.

[8] In further evidence-in-chief, the prosecutor played surveillance video footage and Ms Reid identified features she had mentioned in her evidence. She referred to a scene showing A on the ground and B standing over him. Ms Reid also identified the video footage showing the ute pulling up and, subsequently, of herself arriving on the scene. Ms Reid said that A was unconscious: "[A] [w]asn't coherent. He wasn't listening to anyone. He wasn't responding." Ms Reid checked A's pulse and made sure no blood was coming out of his ears or mouth.

[9] In cross-examination, defence counsel put to Ms Reid a version which substantially reflected her evidence-in-chief. She agreed with the suggestion that what she saw on the video showed "the man I'm representing, who is behind me, letting this fellow go and he just flops to the ground the way a person who is unconscious does …". Ms Reid agreed that whatever happened to the complainant to cause him to fall to the ground had happened before the car with the people in it arrived. Ms Reid said that she saw the people in the car "trying to have a go at B …". There followed a passage in the cross-examination which included a question and answer upon which the appellant relied:

> "At B, the man you call B?-- Yeah. I'm sorry, I don't-----
>
> And you don't know why?-- I don't know names, sorry.
>
> No, no, it's okay. Well, you wouldn't know names, you'd never met them before?-- No.
>
> So, B is the man behind me, there's no issue with that?-- Yes.
>
> And A was the man on the ground who was unconscious?-- Yes.
>
> You don't know why or really what the cause-----?-- I don't what the confrontation was over, no.
>
> You don't know, okay. Well, there's no-----?-- No. I just heard a lot of yelling-----
>
> Yes?-- -----between them, but I don't know what it was about.
>
> But the critical thing is I don't want you to guess, I just want to make sure that what you saw is what we see here?-- Yeah. No, I heard yelling, I heard them yelling at him.
>
> Yes. Now, prior to that though, before the DVD picks anything up, you heard this arguing between the two men?-- A and B are you talking about now?
>
> Yes?-- Yes.
>
> **And looked out, and you saw A hit B?-- Yes.**
>
> When you say a king hit, that means different things to different people, what exactly do you mean, if I ask you to give me a, you know, a Macquarie Dictionary definition of a king hit, what would you put in the little - in the-----?—A hit to the temple, a fist to the temple.

> Okay. So, the king hit to you is - is where the hit lands?-- Yes.
>
> And in this case it was to the left-hand side of the temple?—Yes
>
> Okay. And then what, A - A then would have gone down?—He went straight back, yes.
>
> And would have hit his head when he hit the ground-----?-- Yes.
>
> -----from what you could see?-- Yes."

[10] The appellant argued that in the answer I have emphasised Ms Reid gave evidence that it was the complainant (A) who first hit the appellant (B). It seems clear from the context, and from Ms Reid's evidence-in-chief, that defence counsel inadvertently led Ms Reid into error by exchanging "A" for "B" in the emphasised question. That is strongly suggested by the immediately following questions and answers, by Ms Reid's unequivocal evidence-in-chief that B threw the first and only punch, and by defence counsel's approach in cross-examination of putting to Ms Reid a restatement of the version she had given in evidence-in-chief. The jury were in a good position to decide whether, as the context suggests, defence counsel led Ms Reid into error in that way. It was reasonably open to the jury to accept Ms Reid's evidence-in-chief on the point notwithstanding the answer in her cross-examination upon which the appellant relied.

[11] The appellant relied upon the photographs as support for his argument that Ms Reid's evidence was unreliable. He argued that it was not likely that she saw the altercation between the appellant and the complainant reflected in the shop windows on the footpath opposite her apartment. However her evidence, which was consistent with the photographs, was that she clearly saw the assault which she described. It was not suggested to her that she saw the events reflected in the shop windows.

[12] The appellant did not give or call evidence. His version was contained in a recorded police interview which was tendered in the Crown case. The interview occurred on the afternoon of 2 January 2011. The appellant told the police that he had met a Fijian man (admitted to be the complainant) at a hotel and they discussed their respective cultures. They walked together to another hotel but it was shut. The appellant said that he called the complainant "my little warrior" and the complainant reacted angrily. The complainant made very offensive remarks about the appellant's aboriginality, "started snap kicking me in the legs, then he punched me fair in the jaw." The appellant said that he had to defend himself so he hit the complainant back twice. The appellant said that the complainant was then a bit groggy and responded "no" to the appellant's question whether he wanted some more. The appellant then left and went home.

[13] Subsequently in the interview, the appellant said that the complainant "smacked me in the mouth", kicked the appellant's shins, and "punched me in the jaw…and on the mouth". The appellant described an attempt to discourage the complainant from kicking and punching him. The appellant put his hands up to guard himself, pushed the complainant back, asked the complainant what he was doing, and complained that it was hurting him. After the complainant punched the appellant in the mouth the appellant hit the complainant with his left hand and his right hand with closed fists to the complainant's mouth and chin. The appellant described his injuries as

bruises on his left shin and leg and a cut lip. He said that after he hit the complainant the complainant was groggy; "a bit dazed and fuzzied." The appellant said that, after the complainant had fallen to the ground, a car pulled up or slowed down and the occupants of the car asked the appellant what he was doing. The appellant said he was going home. The appellant said that the last image he had of the complainant was when the appellant asked the complainant whether he wanted "some more" and whether the complainant was "right", to which the complainant responded "no, no". The appellant said that the complainant was sitting up when he said that and was groggy. The appellant said that he hit the complainant only in self-defence.

[14] The prosecutor tendered a transcript of a police interview with the appellant on the morning of 2 January 2011 which was admitted by consent. (Experienced defence counsel did not object to the tender or contradict the prosecutor's statement that he tendered the transcript under "s 644(b) [sic] of the Criminal Code…") In that police interview, the appellant attributed the injury to his lip to being hit in a fight at a hotel on a more recent occasion.

[15] The appellant argued that he only hit the complainant in self-defence and he also indicated that he did not intend to cause serious injury to the complainant. The jury were given clear, conventional directions about self-defence and accident. As to accident, on the evidence, the jury could find that the appellant felled the complainant by a very heavy punch to the complainant's head, rendering him unconscious either by the punch or by his head colliding with the ground as he fell. On Ms Reid's evidence, the appellant's subsequent conduct in picking up the complainant by his shirt and then letting him fall back to the ground was not causative of the complainant's injuries; defence counsel put to Ms Reid, who agreed, that what she saw "was consistent with A having hit his head on the ground when he went down and then staying – being unconscious from that moment on…". That was consistent with Dr Hazelton's evidence. He was shown video images of the appellant holding up the complainant in a seated position and then letting him go. Dr Hazelton expressed the opinions that, when the appellant was holding up the complainant, the complainant appeared to be unresponsive, that was consistent with being unconscious, and the subsequent fall when the appellant let the complainant go would be highly unlikely to have resulted in the skull fracture and associated brain injury sustained by the complainant.

[16] Whether the complainant's serious injuries resulted directly from the appellant's punch or from the complainant hitting his head on the ground when felled by the punch, it was open to the jury to find beyond reasonable doubt that a reasonable person in the appellant's position would reasonably have foreseen that a punch of the nature delivered by the appellant would result in serious head injuries amounting to grievous bodily harm.

[17] The appellant's statements in his police interview clearly raised self-defence, but that version was inconsistent with the evidence of Ms Reid. The jury must have found Ms Reid to be credible and reliable. That finding could not be said to be unreasonable: so far as the transcript reveals, Ms Reid presented as an independent and apparently reliable eye-witness of the critical events. Furthermore, the jury could also take into account the inconsistent versions the appellant gave about how he received the injury to his lip.

[18] On the whole of the evidence, it was plainly open to the jury to find that, notwithstanding the appellant's statements to police, the evidence excluded self-defence and accident beyond reasonable doubt; that the appellant caused and was criminally responsible for the complainant's injuries. (The trial judge also referred to provocation, but there was no evidence of any provocation by the complainant.)

[19] As to the element of the offence that the complainant suffered grievous bodily harm, Dr Hazelton gave evidence that the complainant suffered a parietal skull fracture on the right hand side of his head, a frontal contusion on the right hand side of the brain, a small abrasion on the back of the skull, and a subdural haematoma. The frontal contusion implied that force had been applied to the head. It and the linear fracture of the skull were consistent with a blunt force trauma, including by a punch with considerable force or falling from a standing height onto a hard surface. The complainant was treated in the intensive care ward. The complainant suffered a syndrome involving inappropriate anti-diuretic hormone, which resulted in a very low level of serum sodium in his body. This was a dangerous condition, potentially leading to further swelling of the brain, seizures, and loss of consciousness. It was corrected by restricting fluid intake. The amount of fluids given to the complainant was restricted and he was carefully monitored. The complainant suffered from post traumatic amnesia for 15 days. He was given a medication which acted as a mood stabiliser and an anti-epileptic; the complainant was then exhibiting features of "reduced frustration tolerance", which is a common accompaniment of a brain injury. He was left with scar tissue on the brain as a result of the trauma to the brain and bleeding into the brain. The post traumatic amnesia indicated that the complainant had suffered a severe injury to the brain and the scar tissue amounted to a permanent change to the complainant's health in the form of a scar, loss of brain tissue, and predisposition to seizure disorder or epilepsy in the future. Had the injury been left untreated, the complainant might well have died. Furthermore, had the complainant not been kept under observation in hospital, his post traumatic amnesia and associated confusion could have put him into dangerous situations to which he would not know how to respond.

[20] The appellant referred to Dr Hazelton's evidence that when the complainant was transported by ambulance to the hospital the ambulance officers' notes recorded that the complainant was semi-conscious with a "[G]lasgow [C]oma score ranging between 11 and 13…". Dr Hazelton explained that this score was based on a scale of 3 to 15, 15 being conscious and 3 being deeply unconscious. Dr Hazelton described the symptoms of a score between 11 and 13 as "more or less physically moving his limbs in response to command, however, he – at times he was confused and he had incomprehensive verbal output, and with regard to orientation, he was confused and incomprehensive sounds and spontaneous to speech. He was only responding sometimes." The appellant argued in his written submissions that this evidence of the Glasgow Coma score and that the complainant spent only 24 hours in intensive care for monitoring purposes and then was moved into an open ward "makes me wonder about the seriousness of his injuries". The effect of the appellant's oral argument seemed to be that this evidence was consistent with the complainant not being seriously injured and that the appellant had believed when he left the scene that the complainant was not seriously injured.

[21] The appellant's belief is not relevant and, although Dr Hazelton was cross-examined, his evidence of the complainant's injuries was not shaken. Indeed, the cross-examination did not mount any serious challenge to that evidence. The

appellant's argument has no bearing upon the reasonableness of the jury's verdict. On the medical evidence, the jury could readily be satisfied beyond reasonable doubt that the complainant suffered grievous bodily harm as defined in s 1 of the *Criminal Code* (relevantly, "any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health…").

[22] In the appellant's written and oral submissions he referred to an earlier trial in which the jury did not agree upon a verdict. That has no bearing upon the reasonableness of the verdict at this trial. The appellant referred also to what he described as the "victims mindset" and to asserted changes between the complainant's testimony at the first trial and his testimony at the second trial. There was no evidence to support those submissions. The appellant argued that his intention was merely of self-preservation and self-defence. As I have indicated, it is evident that the jury rejected that view and it was reasonably open on the evidence for the jury to exclude it beyond reasonable doubt. The appellant also argued that the evidence revealed that he showed remorse because he "stay[ed] around". In fact, the evidence was to the effect that the appellant left after unsuccessfully attempting to rouse the complainant. In any event, this argument has no bearing upon the reasonableness of the guilty verdict. The appellant also advanced an argument which seemed to be to the effect that he did not have sufficient time to discuss his trial with defence counsel. There is no indication of that in the record, there is no evidence to support it, it is not the subject of a ground of appeal, and the appellant's argument was unpersuasive.

[23] The evidence as a whole was sufficient to justify the jury in being satisfied of the appellant's guilt beyond reasonable doubt. The appeal against conviction should be dismissed.

Sentence

[24] The appellant was 39 years old at the time of the offence and 40 years old when sentenced. The trial judge took into account that that the appellant had a very disadvantaged background and upbringing. He had lengthy problems with drug and alcohol abuse, and the consumption of alcohol featured in the facts of this matter.

[25] The appellant had a concerning criminal history. It commenced in 1989 when he was 17. The appellant's numerous previous offences included offences of violence. In April 1990 the appellant was sentenced to three years probation and 240 hours community service for many offences, including stealing with actual violence whilst in company committed in March 1989. In November 1990 the appellant was sentenced to two months imprisonment, to commence at the end of a previous sentence, for an assault occasioning bodily harm which he committed in October 1990. In November 1991 the appellant was sentenced to 18 months imprisonment and other, concurrent terms for offences of unlawful assault and assault occasioning bodily harm committed in March 1991 and for other offences committed in May 1991. In December 1991 the appellant was sentenced to a cumulative term of three months imprisonment for an offence of assaulting police in March 1991.

[26] In April 1995 the appellant was convicted of stealing with actual violence whilst armed with an offensive weapon and in company and then using personal violence, and grievous bodily harm, both committed in June 1994. He was given an effective sentence of 11 years imprisonment with a recommendation that he be considered for parole after serving five years imprisonment. The appellant served the whole term

of that sentence. In January 2007 the appellant was convicted of a common assault committed in December 2005, for which he was sentenced to six months probation. He breached the terms of that probation order by committing some relatively minor offences and, in September 2007, he was sentenced to six months imprisonment for unlawful stalking. That imprisonment was wholly suspended for a period of two years.

[27] In October 2008 the appellant was convicted of offences committed in May 2007 of attempted burglary, wilful damage, burglary and two counts of serious assault. He was given an effective sentence of two years six months imprisonment, with an early parole release date on the date the sentence was imposed. In July 2009 the appellant was sentenced for offences committed in March 2009, including common assault, and he subsequently committed a variety of offences, mostly concerning him being intoxicated in a public place. In February 2012 the appellant was sentenced to six months imprisonment, suspended for three years, for offences of indecent treatment of children committed in December 2010. Whilst the appellant was on bail for the subject grievous bodily harm offence, he committed the offence of assault occasioning bodily harm to which he pleaded guilty on 6 June 2012.

[28] The appellant gave an interview in the prison in which he referred to appalling circumstances of his upbringing once he was removed from his mother's care at the age of five years; she was incarcerated for murdering the appellant's stepfather. The appellant described many very traumatic events in his subsequent life. The appellant also referred in that interview, and again in submissions in the appeal, to a relationship he had formed with a woman; it seems to have helped him at times to stop using amphetamines and in attending Alcoholics Anonymous.

[29] In sentencing the appellant, the trial judge referred to the permanent consequences of the complainant's injuries; they had reduced his ability to work, had made him more aggressive, meant that he had to have lifelong consequent medication, and had consequently put a burden on his wife and family. The trial judge accepted that the appellant did not intend to cause that serious an injury and that he was sorry for it. The trial judge referred also to the appellant's extensive criminal history as indicating that the appellant was capable of acting like a brutal, violent thug. The trial judge regarded the present offence as particularly serious because there was no provocation or justification for it and it occurred in the main street of Ipswich at night. Both general and personal deterrence were important features in sentencing, as were the devastating consequences of the injury for the complainant and his family.

[30] The trial judge referred to *R v Dietz* [2009] QCA 392 and *R v Madden* [2005] QCA 439. In *Dietz* the court refused an application for leave to appeal against a sentence of six years imprisonment with parole eligibility after serving half that period. That offender punched the complainant's head and as a result the complainant fell to the ground and hit his head on bitumen. That complainant suffered injuries which were more serious than those suffered by the complainant in this matter. Muir JA referred to some of the adverse affects upon that complainant: "epilepsy, short-term memory loss, high blood pressure and depression…lost…sense of smell…cognitive language deficits and reduced coordination and…lost full vision in the top left-hand corner of his eye…". On the other hand, that offender was a young man (he was 20 at the time of his offending), he had no prior criminal history, he had a good work history with promising prospects, and he was in a long-term relationship. In *Madden*, the offender was sentenced to six years imprisonment in an offence which

was also similar to the present. That offender struck the complainant to the head, causing him to fall to the ground where he struck his head and fractured his skull. The consequences for that complainant were again much worse than those for the present complainant. That complainant was left with what the Chief Justice described as "permanent, massive brain damage". The offender lacked remorse, but on the other hand his criminal history was much less serious than the appellant's. The Chief Justice, with whom the other members of the Court agreed, observed that "there could be no sensible suggestion that imprisonment for six years for this offence was manifestly excessive". The sentence imposed upon the appellant is consistent with the decisions in *Madden* and *Dietz*.

[31] In *R v Ford* [2011] QCA 208, the court refused an application for leave to appeal against a sentence of six years imprisonment with the parole eligibility date fixed after two years. That was another case in which the offender delivered a heavy punch which felled a complainant. That complainant's injuries were also more serious that than those sustained by the complainant here. The sentencing judge described the injuries as "terrible and permanent". On the other hand, that offender was only 18 years old at the time of the offence and 19 when sentenced, he had no criminal history, he was genuinely remorseful, he was a promising subject for rehabilitation, and he co-operated with the authorities and pleaded guilty. The President observed (at [22]) that if that offender had gone to trial and lacked his many matters in mitigation, a sentence in the range of seven or even eight years would have been warranted. The decision in *Ford* makes it difficult to accept that the sentence imposed upon the appellant was not within the sentencing judge's discretion. That sentence is also consistent with the analysis of comparable sentences by Dalton J in *R v Parker* [2011] QCA 198 at [26]-[37].

[32] The appellant argued that the sentence was excessive having regard to: *R v D'Arcy* [2001] QCA 20; *R v Grimley* [2000] QCA 64; *R v O'Rourke* [2003] QCA 220; *R v Silvester* [1998] QCA 194; *R v Katsidis* [2003] QCA 82. The decisions to which the appellant referred are readily distinguishable. In *R v D'Arcy*, the offender was sentenced to three years six months imprisonment. In that case the injury suffered by the complainant was described as a fractured ulna and a laceration to the skull and there is no indication that the complainant suffered any permanent ill-effects from those injuries. Similarly, in *R v Grimley*, in which a sentence of two years six months imprisonment was reduced to one year eight months imprisonment on appeal, the complainant suffered two fractures to his jaw and there was again no suggestion of any permanent consequences of the injury. The injuries were also far less serious than in the present case in *R v O'Rourke* (three years imprisonment, in which the complainant sustained a fractured cheekbone and lower facial fractures and an undisplaced fracture of the temporal bone above his left ear) and *R v Silvester* (one year six months imprisonment, in which the complainant's jaw was broken in two places and she continued to suffer paraesthesia to the lower face and lip and a permanent alteration to her appearance). *R v Katsidis*, in which two years imprisonment suspended after eight months for three years was imposed, was another case in which the complainant suffered a broken jaw. In that case the complainant's jaw remained disfigured and he suffered from a loss of confidence in his work. However, the court took into account in the sentence that the complainant had instigated the dispute by throwing a punch at the offender and there was no suggestion that the offender had attended the scene with the intention of attacking anyone.

[33] The appellant referred also to two case notes in which published judgments are not readily available. A sentence of three years imprisonment was imposed in *R v Daniels*.[2] In that case the appellant pointed a thin piece of pipe at the complainant and injured his eye, which had to be removed later. The complainant was a friend of the offender. Similarly, the facts of *R v Miletic*[3] differ greatly from the present case. That offender, who was sentenced to three years imprisonment, fired a rifle at the complainant, wrongly thinking that the complainant was an intruder. The shot blew off the complainant's right thumb. The offence was regarded as reflecting a gross degree of recklessness and the sentencing judge took into account that the 64 year old offender had suffered an assault during World War II which made him overly concerned for his own safety. Those sentences may be explicable by their unusual facts. *Daniels* and *Miletic* are much less reliable indicators of the sentencing range than the recent decisions about factually similar case discussed earlier.

[34] The appellant referred to the sentencing principles relevant to indigenous offenders articulated in *R v Fernando* (1992) 76 A Crim R 58, in which Wood J observed of the relevance of aboriginality of an offender that it "is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender." The trial judge expressly took into account the appellant's relevant personal circumstances, referring in particular to his very disadvantaged background and upbringing. Unfortunately the appellant did suffer from serious disadvantages, but it was necessary for the trial judge also to take into account other matters, including the appellant's concerning criminal record. The appellant's criminal record, and the ineffectiveness of previous rehabilitative and deterrent sentences to deter him from committing this offence, required the trial judge to take into account, in addition to personal and general deterrence, the protection of the community (see *Penalties and Sentences Act* 1992, s 9(1)(e) and s 9(4)(b),(g)).

[35] When all of the circumstances are taken into account, it is clear that the sentence was not excessive. No error has been demonstrated in the exercise of the sentencing discretion.

Proposed orders

[36] The appeal should be dismissed and the application for leave to appeal against sentence should be refused.

[37] **GOTTERSON JA:** I agree with the orders proposed by Fraser JA and with the reasons given by his Honour.

[38] **DALTON J:** I agree with the reasons of Fraser JA and the orders proposed.

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2 *R v Daniels*, unreported, District Court of Queensland, Pack DCJ, 10 February 1998.

3 *R v Miletic*, unreported, Supreme Court of Queensland, Dowsett J, 22 July 1988.