SUPREME COURT OF QUEENSLAND

CITATION:	*R v Charles* [2013] QCA 362
PARTIES:	**R** **v** **CHARLES, Angela Toni** (appellant/applicant)
FILE NO/S:	CA No 299 of 2012 DC No 1120 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	6 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	19 November 2013
JUDGES:	Gotterson and Morrison JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Dismiss the appeal against conviction.** **2. Grant leave to appeal against sentence.** **3. Allow the appeal against sentence.** **4. Vacate the sentence imposed by the primary judge.** **5. In lieu thereof, it is ordered that:** **a. on the count of wilful damage, the appellant perform 20 hours community service (to be served concurrently);** **b. on the count of unlawful grievous bodily harm, the appellant perform 240 hours of community service (to be served concurrently); and** **c. the appellant comply with the requirements of s 103(1) of the *Penalties and Sentences Act* 1992.** **6. Declare that the time to be served under the community service orders imposed above has been satisfied by the time already served by way of community service under the sentence imposed on 12 October 2012, and that the requirements under s 103(1) of the *Penalties and Sentences Act* 1992 have been met.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where the appellant, in the course of driving, became involved in an altercation with another driver – where the complainant's

spectacles were damaged – where the complainant's left ring finger was bent backwards by the appellant causing ligament damage that had to be repaired by a surgical procedure – where the appellant was convicted after trial of one count of wilful damage and one count of doing grievous bodily harm – where the appellant challenges the conviction on the ground of miscarriage of justice – where the appellant contends the evidence against her is inconsistent and insufficient – whether there was a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF DEFENCE COUNSEL – where the appellant was convicted after trial of one count of wilful damage and one count of doing grievous bodily harm – where the appellant challenges the conviction on the ground of incompetence of trial counsel – where the appellant contends that trial counsel failed to cross-examine and adduce evidence as instructed – where the appellant contends that trial counsel was unprepared, nervous and inattentive – where the appellant contends that trial counsel failed to use evidence and follow lines of argument as instructed – whether the conduct of defence counsel deprived the appellant of a fair trial

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF TRIAL JUDGE – where the appellant was convicted after trial of one count of wilful damage and one count of doing grievous bodily harm – where the appellant challenges the conviction on the ground of bias on the part of the learned primary judge – where the appellant contends the primary judge shook her head and used body language that indicated her Honour did not believe the appellant was innocent – where the appellant contends the primary judge summing up "grossly overshadowed" anything defence counsel said – whether the conduct of the primary judge deprived the appellant of a fair trial

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was convicted after trial of one count of wilful damage and one count of doing grievous bodily harm – where the appellant was sentenced to nine months imprisonment on each count to be served concurrently and as an intensive correction order – where the appellant contends that the sentence imposed is manifestly excessive – where the appellant was 35 and a half years old at the time of the offences and had no criminal history – where the appellant has an eating disorder, depression and anxiety (a post traumatic stress disorder) – where the appellant is a commercial pilot required to hold an Aviation Security Identity card under the *Aviation Transport*

Security Regulations 2005 (Cth), which the appellant would not be entitled to if given a sentence of imprisonment for an offence of violence and/or an offence involving intentional damage to property – where the offending was at the "very low end" of the range of grievous bodily harm – where the complainant retaliated by assaulting the appellant – whether in all the circumstances the sentence was manifestly excessive

Aviation Transport Security Regulations 2005 (Cth), reg 6.01, reg 6.01(2), reg 6.28, reg 6.29
Penalties and Sentences Act 1992 (Qld), s 103(1)

R v Noble and Verheyden [1996] 1 Qd R 329; [1994] QCA 283, cited

COUNSEL: The appellant/applicant appeared on her own behalf
G Cummings for the respondent

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

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

[2] **MORRISON JA:** The appellant was convicted on 10 October 2012, after a trial, on two charges of wilful damage and unlawfully doing grievous bodily harm. On 12 October 2012, she was sentenced, on each count, to nine months imprisonment to be served as an intensive correction order (to be served concurrently).

[3] The appellant, who represented herself on the appeal, challenges the convictions on a variety of grounds. She also challenges, in the alternative, the sentence on each count on the ground that they were manifestly excessive.

Particulars of the wilful damage and grievous bodily harm

[4] In the course of driving on 4 May 2011, the appellant became involved with an altercation with another driver, Ms Krause. In the course of that altercation Ms Krause's spectacles were bent and damaged. That was the subject of the count of wilful and unlawful damage.

[5] In the course of that altercation Ms Krause's left ring finger was bent backwards by the appellant, causing some ligament damage. Ultimately the ligament damage had to be repaired by a surgical procedure. The injury to the finger of Ms Krause was the subject of the second count of unlawfully causing grievous bodily harm.

Circumstances of the offences

[6] On 4 May 2011, at about 5.15 pm, the appellant was driving in a generally northward direction on Jubilee Terrace, Ashgrove in Brisbane. At the point at which Jubilee Terrace approaches Waterworks Road the northbound carriageway is divided into two lanes. The right hand lane is a turn right only lane into Waterworks Road. If one wished to progress across Waterworks Road into Elimatta Drive, one needed to be in the left hand lane.

[7] The appellant was in the right hand lane and wished to proceed across into Elimatta Drive, and therefore changed into the left lane. The circumstances in which she did so were in dispute. Ms Krause, and a Mr Clark[1], both of whom were travelling behind the appellant, said that the appellant made a sudden move without indicating. Mr Clark's description is that the appellant "swung aggressively into … oncoming traffic on my lane".[2] The appellant contended that she did indicate and the move was not sudden. In any event, Ms Krause let the appellant move into the left hand lane ahead of her.

[8] All three vehicles crossed over Waterworks Road and proceeded into Elimatta Drive, which continues until it reaches Stewart Road. Part the way along Elimatta Drive, as one drives towards Stewart Road, it changes from being a single lane into two marked lanes. The left hand lane is a turn left only lane. The right hand lane is marked so that one can either turn right or left into Stewart Road.

[9] Ms Krause said that she was in the right hand lane and the appellant was in the left, going down Elimatta Drive, when the appellant suddenly moved into the right hand lane, again without indicating. At that point, Ms Krause blew her horn and raised her hands in the air.

[10] Mr Clark said the appellant ended in the left lane and Ms Krause was in the right lane. At some point the appellant executed the same sort of manoeuvre as before, swinging aggressively without warning in front of Ms Krause's car.

[11] The appellant's version was that as they drove down Elimatta Drive, Ms Krause was tailgating her, and beeped her horn twice. She denied changing lanes in front of Ms Krause.

[12] Whatever version was correct, all three vehicles ended up one behind the other in the right hand lane of Elimatta Drive, waiting for the lights to change so that they could move into Stewart Road. When the lights did change there was some hesitation on the part of the appellant. Ms Krause and Mr Clark said that there was an appreciable delay before the appellant moved into Stewart Road to turn.

[13] According to Ms Krause, when the appellant did not move Ms Krause blew her horn and motioned to her to go. She also said she had a couple of cars behind her beeping their horns as well. Mr Clark also saw the appellant waiting some time before turning out of Elimatta Drive into Stewart Road. However, he said that no one was beeping their horn. He said he may have had his radio on and therefore the beeping of the horn may have happened, but he did not recall it.

[14] The appellant accepted there was some delay, saying that she was confused as to whether she should turn left or right, and paused momentarily to gain her bearings. As it happened, she intended to turn left so that she would end up heading north on Stewart Road. According to the appellant the cars in front of her moved off and she paused when she got to Stewart Road, then indicated and turned to the left.

[15] Once both the appellant and Ms Krause had turned left into Stewart Road, they were travelling in the right hand lane of the two north bound lanes. At that point there is a continuous white line separating northbound and southbound traffic.[3] Ms Krause

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1 He was in a car behind Ms Krause.

2 AB 50; T 1-45 ll 48-49.

3 The appellant's counsel (AB 35 and 58) and the primary judge (AB 170) referred to a double white line, but Exhibit 6 shows it to be a single continuous white line. The difference is immaterial.

waited until she got around the corner and then overtook the appellant's car on the right, crossing the continuous white line. At the same time she said the appellant blew the horn at her, and "I just flipped over my left [shoulder] just with my finger like "whatever"".[4] In cross-examination she described it thus: "They blew the horn at me and I flicked my finger up over my left shoulder".[5] The appellant only differed in this part of the account by saying that it was Ms Krause who had beeped the horn, not the appellant.

[16] A short way down the road the cars came to a stop at the traffic lights at the corner of Stewart Road and Frasers Road. There were cars in front of Ms Krause, the appellant behind Ms Krause and Mr Clark somewhere behind. At that point the appellant said that Ms Krause either reversed or let her car roll backwards until it touched or nearly touched her own. Ms Krause denied any such manoeuvre, but Mr Clark confirmed that Ms Krause's car had moved backwards, though not fast. He described it as "an unusual manoeuvre".[6] He did not see any contact between the two cars.

[17] At that point the appellant said she got out of her car and looked briefly at the front to see if there was damage. Having ascertained that there was no damage she then walked to the front driver's side of Ms Krause's car to remonstrate with her for having driven like an idiot and reversing into her car. She described Ms Krause as being abusive and swearing and yelling, and then Ms Krause grabbed the long pendant necklace that the appellant was wearing, and spat at the appellant. The appellant's version was that she tried to get away and was pushing Ms Krause away with her hands. She said that after a short struggle during which time the pendant necklace was broken, she managed to get free and went back to her car.

[18] Ms Krause's version was that once they were stopped at the traffic lights she could see the appellant undoing her seatbelt and getting out of her car. The appellant walked up to Ms Krause's car and Ms Krause wound the window partly down, then the appellant looked in and said, "What the fuck is your problem?".[7] She said the appellant then reached in and started slapping and scratching her. The appellant grabbed her spectacles, which ended up in her lap bent and broken. She said that in the altercation she tried to lock the door with her right hand, and as she tried to get the appellant's hands away, the appellant bent her finger back. Ms Krause said she "got a sharp, shooting pain down … the front of my hand into my wrist".[8] She said she also got a couple of deep scratches on her arm and described the appellant's conduct as "trying to get my face".[9]

[19] Mr Clark's version of events, seen from behind the vehicles, was that the appellant opened her door quickly, was shouting, and ran towards Ms Krause's car, and started punching her. He described the appellant as the aggressor, "pushing, shouting and striking the lady from the blue Mazda".[10] He described Ms Krause as mostly defending herself. He said that at the beginning the thing that started the physical contact was the punching of Ms Krause.

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4 AB 20; T 1-15 ll 46-48 (There is a transcription error in the transcript, which reads "should" instead of "shoulder"). Ms Krause accepted that the gesture was a commonly used obscene gesture using the middle finger.

5 AB 35; T 1-30 l 20-21.

6 AB 53; T 1-48 l 39.

7 AB 23; T 1-18 l 26.

8 AB 24; T 1-19 ll 12-13.

9 AB 24; T 1-19 ll 30-31.

10 AB 54; T 1-49 ll 55-56.

[20] Another witness, Ms Burton, was driving down Stewart Road in the opposite direction, approaching the corner of Frasers Road. She saw the appellant approach Ms Krause and start punching in the window of her car. She described it as punching "[w]ith her fist, just kind of grabbing in through the window … [g]rabbing and punching, sort of pushing her arms in".[11] In cross-examination she described it as being "violent arm movements coming into the car".[12]

[21] The next part of the altercation came when the appellant had returned to her car and was in the process of getting in the door. She said she was half way in the door of her car, the door was suddenly slammed closed by Ms Krause, hitting her on the head and jamming her leg, which was still partly outside.

[22] Ms Krause said that she followed the appellant to her car, saying that she should not walk away and Ms Krause wanted to know what that was all about. She said the appellant went to close her door, telling Ms Krause to "fuck off, you old slut", to which Ms Krause responded by kicking the car door shut "because I was upset and told her to fuck off then".[13] She said the act of kicking the door shut meant the door hit the appellant on her forehead: "I think she hit her forehead on the window … [s]he hit her head on the window, yeah".[14] At that point Ms Krause said she went to walk back to her car, at which point the appellant got out of her car again and attacked her, swinging punches at her face. At that point Ms Krause said she tried to defend herself, and was pushing her back. She then said, "I tried to tear her shirt to try and get her to let me go so she would fix herself up".[15] Her evidence was that she did tear the shirt. At about that point some men intervened and split the two women up.

[23] In cross-examination, Ms Krause confirmed that at the point when she kicked the door shut the appellant's leg was still out of the car. Ms Krause accepted that in her police statement she had described that part of the altercation slightly differently, as "I **pushed** her door shut and told her to fuck off then".[16]

[24] The appellant's version of this part of the altercation was that as she was getting in the car Ms Krause slammed the door, hitting her on the head and catching her leg. Then Ms Krause opened the door and pulled the appellant out and started hitting her. The appellant was pushing her away and hitting her with her arms. During that altercation someone intervened to split them up.

[25] Mr Clark's version did not include that part where the appellant went back to her car and Ms Krause followed and slammed the door. However, he did not deny it happened, simply that he did not see it.

[26] Ms Burton was in the process of driving and therefore concentrating on the traffic around her, but she saw Ms Krause exit her vehicle and "they came together and [the appellant] … continued to try and hit [Ms Krause]".[17]

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11 AB 44; T 1-39 ll 24-28.
12 AB 47; T 1-42 l 7.
13 AB 25; T 1-20 ll 7-11.
14 AB 24; T 1-19 ll 5-8.
15 AB 24; T 1-19 ll 29-30.
16 AB 40; T 1-35 ll 17-30 (emphasis added).
17 AB 44; T 1-39 ll 38-39.

Appellant's contentions

[27] The appellant raised three general grounds of appeal against conviction, namely miscarriage of justice, incompetence of the trial counsel, and bias on the part of the learned primary judge. Except for the ground based on bias, the other grounds consisted of an intermingled set of contentions about the quality of the evidence at the trial, and the conduct of the appellant's counsel.

[28] It is convenient to deal with the ground based on bias first. The contention was that the learned primary judge from time to time shook her head or suggested with her body language that she did not think the appellant was innocent. It was also suggested that the primary judge spoke at length in the summing up about the appellant's offences, "which grossly overshadowed anything my defence said prior".[18]

[29] Because of the way in which the appellant drew her outline of argument, legal professional privilege was waived. The consequence was that the appellant's trial counsel and solicitor both swore affidavits as to the conduct of the proceedings. Neither of them offered any support for the suggestion that the primary judge did anything to suggest bias. Nothing in the appellant's contentions give me cause to think that the primary judge was biased in the least respect. I do not consider there is anything in this ground.

[30] The contention that trial counsel had been incompetent concerned three categories: first, matters to do with how counsel did not follow the appellant's urgings to cross-examine in a particular way or to adduce evidence which the appellant thought might assist her; secondly, concerns the appellant had that counsel was unprepared, nervous and inattentive to various incidents in the courtroom which attracted the appellant's attention; and thirdly, failure to adhere to instructions she gave about the use of pieces of evidence, or lines of argument.

[31] The affidavits sworn by the trial counsel and solicitor were made after they had had the benefit of reading the appellant's outline, which raised all the matters to do with incompetence. What emerged from those affidavits is that the trial was conducted in accordance with the appellant's instructions (given in writing) and that the appellant's counsel made the best he could of the evidence at hand.

[32] The difficulty with which defence counsel was confronted was that there were two independent witnesses who supported a central part of the prosecution case, namely that it was the appellant who left her vehicle first and attacked Ms Krause through the window of her car. It was in that attack, according to the prosecution case, that the two offences occurred. The appellant's counsel was also confronted with the fact that there was strong evidence, supported by one of the independent witnesses, that Ms Krause's finger had been injured at some point during the altercation. Ms Burton gave evidence that she assisted Ms Krause to the Enoggera Army Barracks where first aid was administered. In addition to that, medical evidence was called to reveal that there had been ligament damage in the finger, which required a surgical procedure to correct it.

[33] Having carefully examined the transcript of the trial, and particularly focussing on the way in which the appellant's counsel exposed the inconsistencies in Ms Krause's

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[18] Appellant's Outline of Argument, filed 26 September 2013, p 3.

version of evidence, and the limits on the evidence of the independent witnesses, in my opinion nothing is revealed which would support the contention that the conduct of the trial counsel resulted in a miscarriage of justice.

[34] In her oral argument, the appellant reviewed many aspects of the way the case was conducted, and matters of evidence where she contended the inconsistency or improbability was such as to result in a jury being unable to convict. I do not agree. The matters the appellant raised were all at the periphery of the central issues in the case. The two offences were based on the physical altercation which resulted damage to Ms Krause's spectacles, and her finger being injured. As to those two offences there was strong support from two independent witnesses, and the medical evidence.

[35] A couple of examples will serve to highlight the nature of the matters raised, and the fact that they would not have impacted upon the ability of the jury to convict.

[36] The appellant complained that her counsel did not cross-examine Ms Krause on the fact that she had changed her story between giving a police statement and giving evidence. In the police statement Ms Krause said that when she went back to the appellant's car "I pushed her door shut …". In her evidence Ms Krause said she kicked the door shut. The appellant says that her counsel did not cross-examine Ms Krause on this point. The transcript reveals that he did.[19] The appellant also complains that not enough was made of the fact that it was improbable, if Ms Krause's finger had been hurt in the way she said, that she would have **pushed** the door shut. Part of that is the assertion by the appellant that Ms Krause changed her story to kicking the door, because she knew that she had injured her own finger by slamming the door. She complains that her counsel did not follow her pleas to raise this. The transcript reveals that he did, putting to Ms Krause the change in her version of events, and that she had injured her finger by slamming the door shut.[20] Ms Krause admitted that her police statement had contained a contrary version, but denied that she had injured her finger at the appellant's car.

[37] Then the appellant also contends that her counsel did not make anything of the fact that the two independent witnesses did not give evidence as to that part of the altercation where Ms Krause left her car and followed the appellant back to hers, slamming or kicking the door shut. The transcript reveals that both of those witnesses were cross-examined about that aspect of the altercation, and each of them said that they did not see it. In Ms Burton's case she gave an explanation, which was that she was driving and paying attention to the other traffic, and therefore did not necessarily see everything.[21] In Mr Clark's case, he expressly said that he was not saying that it did not happen, just that he did not see it.[22]

[38] None of the matters raised by the appellant satisfy me that it was not open to the jury to be satisfied beyond reasonable doubt that the appellant had caused the damage to the spectacles and the damage to the finger.

[39] One further matter of complaint by the appellant concerned the question whether the injury to the finger was correctly to be considered grievous bodily harm. There is

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19 AB 40.
20 AB 40.
21 AB 48.
22 AB 61.

nothing in this point. The injury caused ligament damage which had to be repaired by surgical procedure. The medical evidence was that had the surgery not been performed the residual impairment would have been ongoing. Clearly the injury came within the definition of grievous bodily harm though, as the learned primary judge made very clear, it was at the lowest possible scale of grievous bodily harm.

[40] Clearly the learned primary judge was perplexed as to why an injury as minor as this one was, was the subject of a charge of grievous bodily harm rather than a lesser charge. The learned primary judge observed that whilst the injury technically came within the definition of grievous bodily harm, "it is the very lowest end of grievous bodily harm that I have seen prosecuted".[23] She contrasted the present case with recent cases where the victim had teeth knocked out or suffered a subdural haematoma, and grievous bodily harm was not the charge. The learned primary judge questioned "where the consistency lies in the approach that the Crown is taking".[24] With respect, I share those concerns.

[41] I am not persuaded that there is merit in the appellant's contentions insofar as her convictions are concerned. The difficulty that the appellant faced at trial was that there were two independent witnesses who supported the substantive part of the case against her, namely that it was she who attacked Ms Krause through the window of her car, in a way quite consistent with the version that Ms Krause had given. In addition, the fact that the finger had been injured at about that time was supported by both an independent witness and the medical evidence. In my view, it was open to the jury to find the appellant guilty on both counts.

Was the sentence excessive?

[42] The appellant was born on 23 September 1975 and was thus 35 and a half years old at the time of the offence. She was 37 at the time sentence was imposed. She had no criminal history.

[43] The learned primary judge was informed, as the evidence revealed, that the appellant was a "flight instructing commercial pilot".[25] She gained her pilot's licence on leaving school, and qualified as an instructor in New Zealand, working there as a senior pilot. She left New Zealand and moved to Australia when aged about 20. Because her pilot's qualifications did not transfer to Australia, she worked in other occupations. Eventually she qualified as a pilot in Australia and has flown sky diving flights, charter flights and aerial photography.

[44] Some years prior to the sentence, the appellant developed an eating disorder described as "Eating Disorder Not Otherwise Specified", a condition which in the past would have met the criteria for anorexia nervosa. Medical evidence was tendered from Dr McMahon, the appellant's treating psychiatric registrar, and from Dr Thompson, the appellant's treating doctor. In addition to the eating disorder, Dr Thompson referred to the appellant's long history of depression and anxiety (a post traumatic stress disorder) associated with the eating disorder. Dr Thompson also referred to the fact that the appellant had made consistent efforts to overcome her difficulties, with ongoing psychological treatment and regular contact with health professionals. She lived a healthy life, not drinking alcohol or taking drugs.

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23 AB 156; T 3-6 ll 32-35.

24 AB 156; T 3-6 ll 44-45.

25 AB 81 and 94.

[45] During the process of sentencing, the learned primary judge indicated that she needed further medical evidence to be satisfied that the appellant was suffering from her depression and anxiety at the time of the offence.[26] As a consequence the sentencing hearing was adjourned from 10 October to 12 October to permit that evidence to be obtained. On that occasion a further letter was tendered from Dr Thompson detailing the long history of depression and anxiety, and the eating disorder. He described the depression and anxiety as chronic conditions, rather than new and acute, and that her previous "GP" corroborated the history of depression and anxiety going back to at least 2008. He saw the appellant in May 2011 when the question of starting a new anti-depressant was discussed.[27] Dr Thompson expressed the view that with regular counselling and treatment, the appellant could remain stable and well.

[46] On the first day of the sentencing hearing the following exchange occurred between the appellant's counsel and the learned primary judge, her Honour referring initially to her view of the grievous bodily harm:[28]

> "HER HONOUR: I said I think it's at the lowest end that I've ever seen. People with arthritis, they can suffer the same sort of pain and discomfort and restriction, but it fits the technical description. The problem is the DPP is not prosecuting them consistently since I am not getting consistent sentences. All right. Anything else?
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> MR FENTON: No. The only – I am sure your Honour - - - - -
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> HER HONOUR: Your submission is that she should be sentenced to imprisonment of six months, wholly suspended.
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> MR FENTON: Yes.
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> HER HONOUR: Is she working at the moment?
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> MR FENTON: No, she isn't."

[47] On 12 October when the sentencing hearing resumed, the appellant's counsel raised the matter of the appellant's eligibility for an aviation security identity card ("ASI Card") under the *Aviation Transport Security Regulations* 2005 (Cth). The exchange with the learned primary judge was as follows:[29]

> "MR FENTON: Yes. Other than that the only further matter that I haven't dealt with on Wednesday is, on my reading of the Aviation Transport Security Regulation from 2005, Ms Charles will no longer be eligible for an aviation security identity card, that is the card which allows you to go into the secure area of airports. If she was to resume her career as a pilot, it seems to me that on a fair reading of that regulation, and I'm happy to take your Honour through it, that the sentence of – a sentence of imprisonment for an offence of violence necessarily precludes her from gaining that security identification card.

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26 AB 162.

27 The appellant gave evidence (unchallenged) that on the day of the offence she was driving home from having seen her "doctors at Bardon": AB 81. That was obviously a reference to having consulted Dr Thompson.

28 AB 165-166.

29 AB 168-169.

HER HONOUR: So do you maintain your present submission?

MR FENTON: I do. Unless there's anything further."

The primary judge's sentencing remarks

[48] The learned primary judge noted that in cases of road rage type violence, a very important factor is the question of general deterrence.[30] Her Honour then referred to the circumstances leading up to the offence, observing that though in a technical sense the violence towards Ms Krause was unprovoked:[31]

> "… in the wider sense of provocation, I do not think that is a fair submission because there was a lead-up to what happened, including the complainant sounding the car horn at you, overtaking you on a double line and making an indelicate gesture and, according to one of the eyewitnesses, her car did roll backwards towards your car."

[49] Her Honour contrasted that situation with those where the relevant violence happened out of the blue and in a more serious way.

[50] The primary judge then referred to the difficulty with which she had been confronted by the fact that the DPP had decided to bring the charge as grievous bodily harm. She said:[32]

> "I made the comment, and I maintain it, that this is the lowest level of injury that I have seen where the Crown has prosecuted grievous bodily harm. It technically fits the description and I believe that the jury has had significant trouble with the same proposition and I believe that from the notes that they sent me. The first note related to whether intention was needed for grievous bodily harm and whether it was said to be just a more serious injury than the assault occasioning bodily harm and I think it was also indicated by the last note they sent me where they were asking for the doctors' evidence to be read."

[51] Having said that the appellant was "at the very low end, in my view, of the range of grievous bodily harm",[33] her Honour referred again to the fact that incidents of violent conduct as a consequence of road rage have to be actively discouraged, giving rise to the very important factor of general deterrence.[34]

[52] Her Honour accepted that the appellant was suffering from major depression and anxiety, both long term and at the time of the incident.[35] Her Honour also took into account, in terms of whether she would impose actual imprisonment, the fact that the appellant still showed signs of suffering from anxiety and anorexia.

[53] In the end, her Honour came to the view that she should order a term of imprisonment, but order it to be served by way of an intensive correction order.[36] Her Honour described it in this way:[37]

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30 AB 170.
31 AB 170.
32 AB 171-172.
33 AB 172.
34 AB 173.
35 AB 173.
36 AB 174.
37 AB 174-175.

> "That means you will serve it in the community. It is a real punishment because you will be required to report twice a week or receive visits, and there is some community service involved in the order, but it will provide you with a great infrastructure and I will direct that the reports that I have been given go to the Department of Corrective Services and it may be that you will be required to attend programs such as anger management. I would expect that would be the case. As long as you do not offend in that term, you will serve the matter in the community; if you do, you will have to serve the remainder in prison. I think it would create another buffer to the treatment you have already sought for yourself. It is by no means an easy way out but I think it is the appropriate sentence."

[54] On each count the primary judge ordered that the appellant be imprisoned for a period of nine months, to be served as an intensive correction order.

[55] At no point during the sentencing remarks did her Honour advert to the impact of a sentence of imprisonment on the appellant's ability to obtain an ASI Card.

Discussion on the question of sentence

[56] Notwithstanding the learned primary judge's careful attention to various matters concerning the question of sentence, it is clear that she did not have regard to the impact of that sentence on the appellant's eligibility to obtain an ASI Card. The appellant's occupation as a commercial pilot had been given in evidence, and during the sentencing hearing her Honour had been given some details of the appellant's history in terms of qualifying and then being occupied as a commercial pilot.[38]

[57] When the question of the impact of a sentence of imprisonment on the question of an ASI Card was raised,[39] the appellant's counsel did not take the primary judge through the provisions of the relevant regulation, nor did he elucidate the detail of how the impact could be avoided whilst still sentencing the appellant for the offences of which she had been found guilty. In the passage referred to above at paragraph [47][40] her Honour asked the appellant's counsel, immediately upon his having referred to the *Aviation Transport Security Regulations*: "So do you maintain your present submission?". Counsel said that he did. It seems tolerably clear to me that the "present submission" referred to by her Honour was the one referred to on two days earlier, namely that the appellant "should be sentenced to imprisonment of 6 months, wholly suspended".[41]

[58] For reasons which will appear, in my view there were three errors involved in that exchange and then in the sentencing remarks.

[59] First, the appellant's counsel failed to adequately inform the learned primary judge of the detail of the *Aviation Transport Security Regulations* so that she was properly equipped to weigh them on the question of sentencing. Secondly, when the primary judge asked whether he was maintaining his "present submission", counsel said he was. If the primary judge was referring to the submission that the appellant should be sentenced to imprisonment of six months, wholly suspended, counsel's response

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38 AB 160.
39 AB 168-169.
40 AB 168-169.
41 AB 165.

was contradictory of the submission he had just made, namely that a sentence of imprisonment would preclude her from gaining the identification card. If he meant to say that a sentence of imprisonment should not be imposed, that was certainly not made clear. Thirdly, whatever was said, the learned primary judge did not take the effect of the *Aviation Transport Security Regulations* into account in considering the appropriate sentence.

[60] Under Reg 6.28 of the *Aviation Transport Security Regulations*, a person is not entitled to have an ASI Card issued to them if that person has "an adverse criminal record".[42] Regulation 6.01(2) defines what an adverse criminal record means, as follows:

> "(2) A person has an ***adverse criminal record*** if the person:
>
> (a) has been convicted of an aviation-security-relevant offence and sentenced to imprisonment; or
>
> (b) in the case of a person who has been convicted twice or more of aviation-security-relevant offences, but no sentence of imprisonment was imposed – received 1 of those convictions within the 12 months ending on the date when the relevant background check was conducted."

[61] An "***aviation-security-relevant offence***" is defined to include an offence against a law of a State involving violence or a threat of violence,[43] an offence involving intentional damage to property or a threat of damage to property.[44]

[62] The term "***imprisonment***" is defined as "includes periodic detention, home-based detention and detention until the rising of a court, but does not include an obligation to perform community service."[45]

[63] Thus it is clear that the two offences of which the appellant was convicted come within the definitions of an "***aviation-security-relevant offence***". Further, the sentence imposed on each of these offences would clearly have the result that the appellant would have an "adverse criminal record" for the purposes of Reg 6.01 and Reg 6.28, and therefore not be entitled to the issue of an ASI Card.

[64] The importance to the appellant is that without such a card the appellant would not be permitted into the secure areas of any airport, with the consequence that she would not be able to continue in her occupation as a commercial pilot.

[65] There is an avenue under Reg 6.29 for someone who has an adverse criminal record to apply to the Secretary, for approval to issue an ASI Card. Regulation 6.29 sets out a procedure to be followed by the Secretary, but not does not provide any certainty that an ASI Card will be issued. The Secretary has discretionary power to grant a card under Reg 6.29(5) and before doing so much consider:

> "(a) the nature of the offence the person was convicted of; and
>
> (b) the length of the term of imprisonment imposed on him or her; and

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42 Regulation 6.28(1)(d)(ii).
43 Regulation 6.01(1), item 2 of the definition.
44 Regulation 6.01(1), item 3 of the definition.
45 Regulation 6.01.

(c) if he or she has served the term, or part of the term – how long it is, and his or her conduct and employment history, since he or she did so; and

(d) if the whole of the sentence was suspended – how long the sentence is, and his or her conduct and employment history, since the sentence was imposed; and

(e) anything else relevant that the Secretary knows about."

[66] The respondent also pointed out that if the Secretary refuses to issue an ASI Card on such an application, there are avenues to have that decision reviewed by the Administrative Appeals Tribunal of Australia. That is no doubt so, but again there is no certainty of outcome.

[67] The impact of the particular sentence imposed by the primary judge on the appellant, in terms of the *Aviation Transport Security Regulations* is substantial. Her means of livelihood is as a commercial pilot. Failure to hold an ASI Card would effectively mean that she cannot pursue her sole occupation. This is an impact that would potentially have some considerable duration, as convictions for indictable offences are not spent for a period of 10 years.

[68] None of these matters were explored properly at the sentencing hearing, nor taken into account by the primary judge in sentencing.

[69] Further, it was the fact that the appellant sustained injuries herself, as a consequence of Ms Krause's attacking her, by kicking or slamming the car door closed. Those injuries were a hit to the head causing bruising, scratches to two fingers, and bruising to her right leg.[46] There is no doubt that those injuries were caused by Ms Krause; indeed, in her evidence-in-chief, Ms Krause said that she had followed the appellant back to her car and kicked the door closed, causing the appellant to hit her forehead on the window.[47] That caused the final episode of fighting during which Ms Krause said she tried to tear the appellant's shirt, and (she believed) she succeeded.[48]

[70] The fact that the appellant sustained injuries, at the hands of Ms Krause, as a result of her offending actions, was a relevant sentencing consideration, as recognised in *R v Noble and Verheyden*.[49] However, it received no consideration in the sentencing remarks.

[71] Because of the errors identified above this Court must exercise the sentencing discretion anew.

[72] In that exercise, it has to be borne in mind that Ms Krause was very much involved in creating the situation. First, by beeping her horn, overtaking across the continuous white line while signalling an obscene gesture, and then reversing or letting her car roll back close to or into the appellant's vehicle. Secondly, after the

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46 Shown in Exhibits 14 and 15 (bruising to head), 16 (scratch on finger) and 17, 18 and 19 (bruising on right leg). Dr Thompson's report reveals that he examined the appellant on the day after the incident. He noted the injuries as bruising and mild swelling to the forehead, mild bruising to the upper and lower right leg, and scratches on two fingers: AB 206.

47 AB 24-25 (examination-in-chief) and 39-40 (cross-examination).

48 AB 25.

49 *R v Noble and Verheyden* [1996] 1 Qd R 329.

initial altercation at Ms Krause's car, by following the appellant to her car, and assaulting her, causing injuries. The latter occasion can hardly be considered as a defensive move; it was to inflict her own form of punishment. The irony, apparently lost on Ms Krause, was that her evidence was that she said to the appellant "you can't assault people and just walk away"[50], when that is what she did herself. As discreditable as the appellant's behaviour was, so too was that of Ms Krause.

[73] Given that the offence in relation to the spectacles was minor, and the fact that the injury to the finger was correctly described by the primary judge being at the lowest end of the scale, and given that any sentence of imprisonment has a drastic effect on the ability of the appellant to follow her sole occupation, in my respectful opinion an appropriate sentence would be one which imposed a suitable period of community service. Such a sentence would meet the need to punish, but also to deter incidents such as this, involving road rage.

[74] I make it clear that I regard this as an exceptional case, and but for the attack on the appellant and the resulting injuries, but more importantly the severe and prolonged impact on the appellant's ability to follow her occupation as a pilot, I would not have thought the original sentence warranted correction.

[75] I would set aside the sentences that were imposed on each count, and substitute for them:

1. on the count of wilful damage, a sentence of 20 hours community service (to be served concurrently); and

2. on the count of unlawful grievous bodily harm, a sentence of 240 hours of community service (to be served concurrently).

Thus the total sentence I propose is 240 hours of community service.

[76] I note that under the orders imposed by the learned primary judge, the appellant was required to perform community service as part of the intensive correction order. She has performed eight hours community service per week since the sentence was imposed, thus totalling some 312 hours of community service actually performed. She has therefore already served in excess of the sentence I would impose.

Orders

[77] The orders I propose are:

1. Dismiss the appeal against conviction.

2. Grant leave to appeal against sentence.

3. Allow the appeal against sentence.

4. Vacate the sentence imposed by the primary judge.

5. In lieu thereof, it is ordered that:

   (a) on the count of wilful damage, the appellant perform 20 hours community service (to be served concurrently);

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50 AB 24.

(b) on the count of unlawful grievous bodily harm, the appellant perform 240 hours of community service (to be served concurrently); and

(c) the appellant comply with the requirements of s 103(1) of the *Penalties and Sentences Act* 1992.

6. Declare that the time to be served under the community service orders imposed above has been satisfied by the time already served by way of community service under the sentence imposed on 12 October 2012, and that the requirements under s 103(1) of the *Penalties and Sentences Act* 1992 have been met.

[78] **APPLEGARTH J**: I have had the advantage of reading the reasons of Morrison JA, with which I agree. I also agree with the orders proposed by his Honour.