SUPREME COURT OF QUEENSLAND

CITATION:	*R v Levy & Drobny; Ex parte Attorney-General (Qld)* [2014] QCA 205
PARTIES:	**In CA No 20 of 2014:** **R** **v** **LEVY, Nathan Edward Tulungi** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant) **In CA No 21 of 2014:** **R** **v** **DROBNY, Steve Robert** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 20 of 2014 CA No 21 of 2014 DC No 10 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeals by Attorney-General (Qld)
ORIGINATING COURT:	District Court at Hervey Bay
DELIVERED ON:	26 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	16 July 2014
JUDGES:	In CA No 20 of 2014: Holmes and Morrison JJA and Philip McMurdo J Separate reasons for judgment of each member of the Court, each concurring as to the orders made In CA No 21 of 2014: Holmes and Morrison JJA and Philip McMurdo J Separate reasons for judgment of each member of the Court, Holmes JA and Philip McMurdo J concurring as to the order made, Morrison JA dissenting

ORDERS: **In CA No 20 of 2014:**

1. **Allow the appeal.**
2. **Set aside the order made on 22 January 2014, that the date the offender be released on parole be fixed at 22 January 2014.**
3. **Order in lieu thereof, that the date the offender be released on parole be fixed at the conclusion of four months imprisonment.**
4. **Order that a warrant for the arrest of the respondent issue and lie in the registry for a period of one week.**
5. **Otherwise affirm the orders made on 22 January 2014.**

In CA No 21 of 2014:

Appeal dismissed.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY INADEQUATE – where Levy was convicted on his own plea of guilty of one count of causing grievous bodily harm and sentenced to imprisonment for 30 months but ordered to be released on parole immediately – where Drobny was convicted on his own plea of guilty of one count of assault occasioning bodily harm whilst in company and sentenced to perform unpaid community service of 150 hours to be performed within 12 months with no conviction recorded – where Drobny and Levy entered the complainant's taxi – where the complainant became aware that neither Drobny nor Levy had money to pay for the taxi fare – where the complainant indicated he would take them to a police station – where the taxi stopped with Drobny, Levy and the complainant getting out from the taxi – where Drobny tackled the complainant to the ground then took no further part in the assault – where Drobny's actions caused the complainant to suffer pain and bruising to his thighs – where Levy punched and kicked the complainant causing him to suffer multiple facial fractures – where the complainant underwent surgery during which plates and screws were inserted permanently – where Drobny was 19 years old, had no prior convictions, and good employment prosects – where Levy was 19 and a half, had no prior convictions and worked as an assistant manager at a fast food restaurant – where Levy cooperated with police, gave an early guilty plea and was remorseful – where the Attorney-General contends the offence was serious in that it involved an assault on a vulnerable member of the community performing an essential public function and the sentences did not reflect this – where the Attorney-General contends that a conviction should have been recorded for Drobny and actual imprisonment should have been ordered

for Levy – whether the sentences were manifestly inadequate

Penalties and Sentences Act 1992 (Qld), s 103(1), s 147(2)

AM v R (2012) 225 A Crim R 481; [2012] NSWCCA 203, cited
Ashdown v The Queen (2011) 37 VR 341; [2011] VSCA 408, cited
Barbaro v The Queen; *Zirilli v The Queen* (2014) 88 ALJR 372; [2014] HCA 2, cited
Dinsdale v The Queen (2000) 202 CLR 321; [2000] HCA 54, cited
Director of Public Prosecutions v Lawrence (2004) 10 VR 125; [2004] VSCA 154, applied
Director of Public Prosecutions v Zullo [2004] VSCA 153, cited
Everett v The Queen (1994) 181 CLR 295; [1994] HCA 49, cited
Griffiths v The Queen (1989) 167 CLR 372; [1989] HCA 39, cited
Malvaso v The Queen (1989) 168 CLR 227; [1989] HCA 58, cited
R v Allpass (1993) 72 A Crim R 561, cited
R v Blanch [2008] QCA 253, cited
R v Bryan; ex parte Attorney-General (Qld) (2003) 137 A Crim R 489; [2003] QCA 18, considered
R v Clarke [1996] 2 VR 520; (1996) 85 A Crim R 114; [1996] VicRp 83, cited
R v Gray [2005] QCA 280, cited
R v Hamilton [2009] QCA 391, considered
R v Hopper; Ex parte Attorney-General (Qld) [2014] QCA 108, considered
R v Kinersen-Smith & Connor; ex parte Attorney-General (Qld) [2009] QCA 153, considered
R v KU; Ex parte Attorney-General (Qld) (No 2) [2011] 1 Qd R 439; [2008] QCA 154, cited
R v Lude; R v Love [2007] QCA 319, considered
R v Melano; ex parte Attorney-General (Qld) [1995] 2 Qd R 186; [1994] QCA 523, cited
R v Mules [2007] QCA 47, cited
R v O'Grady; ex parte Attorney-General (Qld) (2003) 138 A Crim R 273; [2003] QCA 137, considered
R v Rochester; ex parte Attorney-General (Qld) [2003] QCA 326, cited
R v Tupou; ex parte Attorney-General (Qld) [2005] QCA 179, considered
R v Wilkins; ex parte Attorney-General (Qld) [2008] QCA 272, considered
R v Wyley [2009] VSCA 17, cited
Trowsdale v The Queen [2011] VSCA 81, cited
Winch v The Queen (2010) 27 VR 658; [2010] VSCA 141, cited

COUNSEL: A W Moynihan QC, with B J Power, for the appellant
D C Shepherd for the respondent, Levy
J J Allen for the respondent, Drobny

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Legal Aid Queensland for the respondents

[1] **HOLMES JA:** I have had the advantage of reading the reasons in draft of Morrison JA and agree with his Honour that the appeal against Levy's sentence should be allowed. The nature of the offence and the seriousness of its consequences for the victim required a punishment involving some actual imprisonment. I agree with the orders Morrison JA proposes in respect of that appeal.

[2] I agree also with Morrison JA's conclusion that there is no occasion to interfere with the sentencing judge's decision to sentence Drobny by way of a community service order. However, I respectfully disagree that error has been shown in the sentencing judge's exercise of his discretion under s 12(1) of the *Penalties and Sentences Act* 1992 against recording a conviction in Drobny's case.

[3] The appellant did not argue that the sentencing judge had failed to take into account any relevant circumstance in making his decision; the submission was simply that the seriousness of the offence necessitated the recording of a conviction. It is important to remember that the physical acts constituting Drobny's offending were confined to a tackle on the complainant which caused no more than short-term pain and bruising. It was not suggested he was in any way associated with the assault which followed. While there were features of the offence which increased its seriousness – the fact that it was committed in company, the vulnerability of the victim – I do not accept the proposition that its nature was so grave that it had inevitably to prevail over other factors identified in s 12(2) of the Act as relevant: his youth, lack of previous convictions and the accepted impact on his future of the recording of a conviction.

[4] In my view, the sentencing judge's conclusion, after weighing all the relevant factors, as to how the discretion should be exercised was open to him. I would dismiss the appeal in CA No 21 of 2014.

[5] **MORRISON JA:** The Attorney-General of Queensland appeals against sentences imposed on 22 January 2014 on Steve Robert Drobny ("***Drobny***") and Nathan Edward Tulungi Levy ("***Levy***"). On that date:

(a) Drobny was convicted, on a plea of guilty, of one count of assault occasioning bodily harm whilst in company; he was sentenced to perform unpaid community service of 150 hours, to be performed within 12 months;[1] and

(b) Levy was convicted, on a plea of guilty, of one count of causing grievous bodily harm; he was sentenced to imprisonment for 30 months, but ordered to be released on parole immediately.

[6] In each case the Attorney-General contends that the sentence was manifestly inadequate.

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[1] Other formal parts of the sentence included the requirement to comply with s 103(1) of the *Penalties and Sentences Act* 1992 (Qld), and to report to a specified corrective services officer.

Circumstances of the offences

[7] On 6 July 2013, at about 5.00 am, the complainant was carrying out his work as a taxi driver; he was 64 years old at the time. At that time Drobny and Levy had been celebrating Drobny's nineteenth birthday. Drobny was very inebriated and in all likelihood so was Levy.

[8] Drobny and Levy entered the complainant's taxi. It was intended that others take the same taxi, one being a female (unidentified) who was meant to pay for the fare. As events occurred, she did not enter the taxi, with the consequence that Drobny and Levy had no way of paying for the use of the taxi.

[9] The complainant had only driven about a kilometre when he became aware of a discussion in the back of the taxi, to the effect that neither Drobny nor Levy had money to pay for the taxi fare. At that point the meter indicated a debt of $7.90.

[10] Drobny and Levy spoke to the complainant about them giving him money later. The complainant asked for identification, which both Drobny and Levy refused to show. At that point the complainant indicated that he would take them to a police station. The consequence was that both Drobny and Levy started swearing and cursing. The taxi stopped and Drobny and Levy got out. They left the taxi doors open. The complainant got out of the taxi and was talking to them, and closing the taxi doors. Drobny's counsel added, without dispute, that when the complainant got out of the taxi to close the doors, he continued to say that the proper place for Drobny and Levy was up at the police station.

[11] Drobny then initiated an attack on the complainant. He tackled him, grabbing his legs and causing him to topple over onto the ground. The tackle caused pain and bruising to the complainant's thighs.

[12] At that point Drobny stepped away and had no further dealings in any assault upon the complainant. However, whilst the complainant was on the ground, Levy started to punch and kick him a number of times. The complainant had a jacket on, and it was pulled over his face. While he was in that position he was punched or kicked all over his body. He rolled into a foetal position and tried to move away from the punching and kicking. One kick, in particular, was to his face and caused fractures of his cheek.

[13] The attack on the complainant eventually stopped, and both Levy and Drobny ran away. The complainant closed both doors to the taxi, and sought assistance. He noticed an indentation in the side of his head and immediately drove to hospital. He was in terrible pain, which was prolonged because he was not able to take pain killers until after a scan had been done. He was released from hospital the next day.

The injuries caused

[14] Medical evidence was tendered on the sentence in relation to the injuries sustained in the attack. The complainant reported "seizure-like activity",[2] and CT scans were conducted. These revealed facial fractures. Two days later the complainant was reviewed in the maxillofacial clinic where he was found to have:

(a) a left coronoid fracture;[3]

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2 AB 32.

3 Back of the lower jaw.

(b) left zygomatic complex[4] fracture with displacement;

(c) base of skull fracture; and

(d) right temporomandibular[5] joint dislocation.[6]

[15] He was referred to an eye clinic because of eye trauma, but cleared of any ocular injury except bruising to the left eye.

[16] The complainant was admitted and underwent surgery "for an open reduction and internal fixation of the left zygomatico-maxillary complex".[7] Plates and screws were inserted. The complainant was discharged the next day. A week later he was noted to be suffering numbness to the left side of his face, but that was improving.

[17] The complainant will always need the plates and screws in his face, to support his cheek bones to allow for proper vision. It was accepted at the sentencing that the bodily harm relevant to Drobny consisted of the force to the complainant's legs, causing pain and bruising. The grievous bodily harm was constituted by the facial injuries, including fractures requiring surgery.

Drobny's antecedents

[18] Drobny was just over 19 years old at the date of the offences, and therefore about 19 and a half at the date of sentence. He had no prior convictions. He had played rugby league and rugby union, as well as AFL. He had completed year 12 at TAFE and, as well, had completed a Certificate II in Sports Fitness and a Certificate III in Fitness. He had qualified (at least by the time of sentence) to teach at a gym or become a personal trainer.

Levy's antecedents

[19] Levy was born on 30 January 1994 and was 19 and a half at the time of the offences. He was therefore about 20 at the time of sentence. He had no previous convictions.

[20] He had completed year 12 at Hervey Bay. He worked for Red Rooster from about grade 10, and after completing year 12 worked as an assistant, eventually becoming an assistant manager. It was submitted to the learned sentencing judge that Levy had in mind attending TAFE, but that had not yet happened.

[21] On the night of the offences he and Drobny (and perhaps others) were discussing Levy's previous girlfriend, who had committed suicide some months before.

Approach of the sentencing judge – Drobny

[22] The sentencing remarks indicate that the learned sentencing judge took into account Drobny's age and "the various matters that both counsel urged upon me".[8] Though not specifically identified, those matters included the fact that the Crown accepted that a community-based order was within range for Drobny, but urged that a conviction should be recorded.[9] From the defence point of view it was urged that

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4 The cheekbone.
5 The joint of the jaw.
6 AB 32.
7 AB 32.
8 AB 22.
9 AB 13.

Drobny's involvement was limited and not in a category which would require the recording of a conviction.[10]

[23] On the question of whether a conviction should be recorded, his Honour said:

> "So far as the question of whether or not a conviction should be recorded, I certainly accept Mr Spinaze's submission that this is a serious offence, being, sadly, yet another example of violence which I'm entirely convinced was fuelled by alcohol. On the other hand, you are a young man about to make his way into the working world, and bearing in mind that I've decided to impose a community-based order, it seems to me that I should give you the benefit of directing that a conviction not be recorded."[11]

Approach of the sentencing judge – Levy

[24] It is plain from the sentencing remarks that his Honour took into account Levy's youth, early co-operation with the police and admissions, the early plea of guilty, and that he was genuinely remorseful for what he did. In addition his Honour referred to the support for Levy, evidenced before him by his family being in court, his absence of any prior convictions, and letters by referees. From those letters his Honour accepted that Levy was not someone who would ordinarily resort to violence, as he did on that particular day.

[25] His Honour then identified the most important factor in this way:

> "Perhaps the most significant matter that's been urged upon me is your youthfulness. You were 19 at the time of committing the offence and you're still 19, though you will shortly turn 20. The law, I think it's fair to say, is, some would say, notoriously lenient as far as young first offenders are concerned. The view is usually taken that it is more in society's interest, so far as young first offenders are concerned, to impose orders that will enable them to rehabilitate, to get their life in order so that they don't commit offences in the future, rather than to focus on the punitive side of the sentencing process."[12]

[26] His Honour then noted that there was no real dispute as between the prosecutor and the defence counsel as to the head sentence which should be imposed. The prosecutor submitted between two or three years imprisonment, and defence counsel had suggested two and a half years imprisonment. His Honour then noted that some comparable cases had been referred to him, but referred only to one specifically, namely *R v Kinersen-Smith & Connor; ex parte A-G (Qld)*.[13] From that decision his Honour recited a passage in the reasons of Holmes JA at [26], dealing with the tension between the need for deterrence for offences of serious violence in public places, and the need for leniency in respect of youthful offenders. His Honour then continued:[14]

> "With some misgivings, I have come to the conclusion that I should order your immediate release on parole. I was initially attracted to

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10 AB 15.
11 AB 23.
12 AB 27.
13 *R v Kinersen-Smith & Connor; ex parte A-G (Qld)* [2009] QCA 153 ("***Kinersen-Smith & Connor***").
14 AB 28.

> the prospect of ordering that you be imprisoned for a comparatively short period. I'm mindful, however, of a number of authorities and statements which suggest that short periods of incarceration essentially achieve very little. Indeed, one remembers Hoare J in the '60s, when he was chairman of the Parole Board, saying that on a number of occasions.
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> In imposing a sentence on you, of course, I have to take into account, as the quotation from Holmes JA refers, the importance of the deterrent aspect. Sentences must be imposed which hopefully will deter you from committing this type of offence and, hopefully, others who might be minded to commit such offences. I must also impose a sentence which I hope will make clear society's condemnation of your conduct on that particular day. But at the end of the day, as I've already indicated, it seems to me, taking into account your cooperation with the authorities, what I perceive to be your genuine remorse, the fact of your youthfulness and that you've not previously had any convictions and that a number of people who seem to know you well attest to your actions as being out of character, that's persuaded me that I should make the order I've indicated."

Appellant's submissions – Drobny

[27] The appellant submitted that a community-based order with no conviction failed to reflect the seriousness of the offence and to give sufficient weight to general deterrence and denunciation. Further, even though the prosecutor before the sentencing judge submitted that a community-based order was within range, that was an irrelevant opinion[15] which did not relieve the judge of the responsibility for imposing a proper sentence. It was submitted that the appropriate sentence would require a term of imprisonment, albeit suspended; referring to *R v Wilkins; ex parte A-G (Qld),*[16] *R v Bryan; ex parte A-G (Qld),*[17] *R v Tupou; ex parte A-G (Qld),*[18] *R v Hamilton,*[19] and *R v Lude; R v Love*.[20]

Appellant's contentions – Levy

[28] Relying on the same authorities as mentioned in respect of Drobny, the appellant submitted that the sentence of two and a half years imprisonment with immediate release on parole failed to give sufficient weight to the seriousness of the offence and the particular need for general deterrence and denunciation. It was contended that the sentence gave too much weight to factors personal to Levy, including his guilty plea and youth. Emphasis was placed on the need for salutary deterrent penalties where violent offences were committed on innocent members of the community in public places. It was contended that the learned sentencing judge's reliance on *Kinersen-Smith & Connor* was misplaced, because that did not involve an assault on a taxi driver, and was, in any event, considered in *Hamilton* where a much heavier sentence than the one imposed was indicated as being appropriate.

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15 In that respect the High Court decision in *Barbaro v The Queen*; *Zirilli v The Queen* [2014] HCA 2 was referred to.

16 *R v Wilkins; ex parte A-G (Qld)* [2008] QCA 272 ("***Wilkins***").

17 *R v Bryan; ex parte A-G (Qld)* [2003] QCA 18 ("***Bryan***").

18 *R v Tupou; ex parte A-G (Qld)* [2005] QCA 179 ("***Tupou***").

19 *R v Hamilton* [2009] QCA 391 ("***Hamilton***").

20 *R v Lude; R v Love* [2007] QCA 319 ("***Lude & Love***").

Respondent contentions – Drobny

[29] For Drobny it was contended that no error had been demonstrated in the approach of the learned sentencing judge. As the prosecutor had submitted that a community-based order was within range, it was unfair if there were inconsistent approaches by the Crown at sentence and on appeal. The comparable cases referred to did not establish that the penalty imposed was outside the parameters of proper sentencing discretion.

Respondent contentions – Levy

[30] For Levy it was submitted that the head sentence of two and a half years was, by itself, not one that warranted interference. The issues relevant to the task of fixing a date for release on parole were somewhat different than those under consideration when the head sentence was fixed. Relevant to that was the need for deterrence, but with the competing considerations of youth, remorse and protection of the community. There was no realistic prospect of reoffending, and the chance of rehabilitation being adversely affected, combined with Levy's youth, remorse and co-operation, meant that the sentence was within proper discretion. It was conceded that the sentence might be considered lenient, but it was not unreasonable or unjust.

[31] Further, in the event that the court concluded the sentence was manifestly inadequate, Levy contended that the Court should exercise the residual discretion not to interfere. This was on the basis that Levy had already been under the supervision of the parole authorities for six to seven months, and remained to be supervised for a further two years. Interruption of that process, along with the potentially adverse consequences brought about by a short period in custody, suggested that the public interest was not best served by imprisoning Levy for any term. In this respect reliance was placed on *R v Hopper; Ex parte Attorney-General (Qld)*.[21]

Discussion – Drobny

[32] The appellant referred to *Wilkins*, both in respect of general statements as well as being a comparable authority. That case involved a 21 year old man who pleaded guilty to several charges, namely assault occasioning bodily harm, unlawful entry of a vehicle to commit an indictable offence, and wilful damage. Those offences were committed whilst he was on an operational period of a suspended two year term of imprisonment for dangerous operation of a vehicle causing grievous bodily harm. He was sentenced to 12 months imprisonment with an immediate parole release date. The Attorney-General appealed, contending that the sentence was manifestly inadequate.

[33] The offence involved an assault on a 35 year old part-time taxi driver. Wilkins lent in through the driver's window and fiddled with a computer mounted on the taxi's dashboard. Without provocation he then became aggressive, yelling at the driver and calling him something to the effect of a "fucking black Indian". He then reached through the driver's side window and punched the taxi driver in the jaw, three or four times. Another person restrained him, but he broke free and tried to open the taxi door, threatening to "fucking kill this Indian black". Having opened the door he then kicked the taxi driver three or four times in the area of his legs or waist.[22] He was pulled away by another person, but followed the taxi when it reversed out of the driveway, punching and kicking it on the driver's side.

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21 *R v Hopper; Ex parte Attorney-General (Qld)* [2014] QCA 108 at [37]-[42] ("***Hopper***").

22 This was the subject of the second count, not the first.

[34] The taxi driver had a contusion to his right jaw which required simple analgesia.

[35] The prosecutor contended that the suspended period of imprisonment should be fully activated and a cumulative penalty imposed for the offence with the taxi driver. Defence counsel emphasised Wilkins' grossly dysfunctional upbringing, his solid work history, his intoxication at the time, the fact that the offence was out of character, and restitution was offered. Taking all those matters into account, he was sentenced to 12 months imprisonment with an immediate parole release date.

[36] On appeal the court considered *Lude & Love*, and expressed this conclusion:[23]

> "*Lude and Love* recognises that actual imprisonment in that case was within the range of a proper exercise of the sentencing discretion. It is not authority for the proposition that young offenders with promising prospects of rehabilitation, who have pleaded guilty and co-operated with the administration of justice and who are being sentenced for the first time for an offence of violence which is not in the most serious category of violence, must serve a period of actual custody."

[37] Having said that, the court went on to consider the case before it. In that context it said:[24]

> "There are very serious aspects to Mr Wilkins' offending on August 2007. He behaved violently and irrationally and made offensive racist slurs while under the influence of alcohol. The offences and the injuries suffered by the complainant may have been even more serious if Mr Wilkins' friends had not restrained him. The complainant's work as a taxi driver in the early hours was providing a valuable service to the community. In providing this service, he was vulnerable to those like Mr Wilkins. Offences of this kind must result in salutary deterrent penalties. Mr Wilkins committed these worrying offences in breach of a suspended sentence imposed but six months earlier and a mere three months after his release from custody. Under s 147(2) *Penalties and Sentences Act* 1992 (Qld) the judge was required to order Mr Wilkins to serve the whole of the suspended imprisonment unless of the opinion it would be unjust to do so. In making that decision, the court is required to consider the matters listed in s 147(3). It does not seem from the judge's sentencing remarks that his Honour undertook that exercise. Further, an effective sentence of 12 months imprisonment with immediate parole was a manifestly inadequate punishment to reflect Mr Wilkins' culpability for committing counts 1, 2 and 3 during the operational period of the suspended sentence. The appeal should be allowed and this Court must re-sentence Mr Wilkins."

[38] It was noted that s 147(2) of the *Penalties and Sentences Act* 1992 (Qld) required the sentencing judge to order that Wilkins serve the whole of the suspended imprisonment unless it was unjust to do so. Because the sentencing judge had not done so, and because 12 months imprisonment with immediate parole "was a manifestly inadequate punishment to reflect Mr Wilkins culpability for committing counts 1, 2 and 3 during the operational period of the suspended sentence", the appeal was allowed.[25] The court concluded that it was appropriate that the sentences for the August 2007

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23 *Wilkins* at [15].

24 *Wilkins* at [16].

25 *Wilkins* at [16].

offences should be concurrent with one another, but served cumulatively on the previous suspended imprisonment. Then, because it was necessary to moderate the total effect of the cumulative sentences, a sentence of six months imprisonment was imposed, cumulative on the previous sentence. The court then considered whether it should have fixed a parole release date at the original sentence date, or required the service of a period of actual custody. As to that the court said:[26]

> "*Lude and Love* demonstrates that a period of actual imprisonment could well have been imposed in this case. I agree, however, with the primary judge that the better course is to now order immediate release on parole in this case. This is an Attorney-General's appeal. Mr Wilkins has been successfully serving his sentence on parole for two and a half months. Concern about double jeopardy requires this Court to sentence at the moderate end of the applicable range.[27] The offence of assault occasioning bodily harm was Mr Wilkins' first offence of personal violence. Fortunately, the physical injuries suffered by the complainant were relatively minor. Mr Wilkins is still a young man and pleaded guilty at an early stage. He has had a troubled background and seems to be making some progress towards his rehabilitation despite some significant lapses. The fact that he is employed and has arranged for restitution to be taken from his wages in regular payments is a significant matter in his favour. Were he now sentenced to actual custody, he would probably lose his job and be unable to make that restitution. The sentence I propose meets the requirements of particular and general deterrence, whilst allowing this young man with a troubled background one final opportunity to continue his rehabilitation whilst working and paying restitution."

[39] *Wilkins* involved a more serious level of assault, combined with abuse, contrary to that involving Drobny. Further, Wilkins had a criminal history and committed the offences whilst on a suspended term of imprisonment for a previous conviction. Neither is the case for Drobny. Thus, whilst one can accept that offences of violence on vulnerable taxi drivers must result in salutary deterrent penalties, *Wilkins* does not support the view that any period of actual custody is required in the case of Drobny.

[40] *Lude & Love* involved two assailants who attacked a taxi driver when he remonstrated with them for punching and kicking a taxi. Love punched him in the head and face, and then Lude joined in the assault, punching and kicking the taxi driver, who was then assisted by others. The taxi driver sustained a laceration to the bridge of his nose, his nasal septum was deviated to one side, he had black eyes, his neck, lumbar spine and ribs were tender, and his chest was bruised. In addition his upper denture plate was broken and he had cuts to the inside of his mouth. Both Lude and Love took part in police interviews and made admissions. Love had a minor criminal history and a troubled upbringing, but favourable references from employers. Lude was employed and had a 14 month old child from a relationship which ended shortly before sentence.

[41] The sentencing judge considered deterrent custodial sentences were appropriate for offenders involved in crimes of unprovoked gratuitous violence. Each was

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26 *Wilkins* at [20].

27 *Dinsdale v The Queen* (2000) 202 CLR 321; [2000] HCA 54 at 341 [62]; *R v KU & Ors; ex parte A-G (Qld) (No 2)* [2008] QCA 154 at [156].

sentenced to 18 months imprisonment, with a parole release date fixed after six months. The offence in each case was assault occasioning bodily harm in company, the same as Drobny.

[42] On appeal this Court considered that actual imprisonment was not outside the range of a proper exercise of sentencing discretion, but 18 months imprisonment was excessive having regard to the fact that no weapon was used, there was no premeditation, the assault was not committed in connection with any criminal purpose, and it did not result in any serious injury. Further, the court noted that the imposition of a six month period of actual custody did not properly recognise the importance of rehabilitation for young offenders who had no significant previous convictions. It also did not reflect the important mitigating factors. As a consequence Love was resentenced to nine months imprisonment with a parole release date fixed after serving three months. Lude was sentenced to nine months imprisonment with a parole release date fixed after serving two months.

[43] As was recognised in *Wilkins*, *Lude & Love* recognises that actual imprisonment was within the range of a proper exercise of the sentencing discretion. However, when considering the position of Drobny alone, the assault in *Lude & Love* was of much greater severity, and with a more severe outcome. Drobny merely tackled the taxi driver to the ground, causing some bruising to his legs. True it is that in one sense he was the instigator of the attack on the taxi driver, and it must be recognised that his actions then placed the taxi driver in a very vulnerable position for the subsequent attack by Levy. However, once he had tackled the taxi driver to the ground, he then desisted. For those reasons I do not consider that *Lude & Love* provides any good guidance as to the appropriate penalty for Drobny.

[44] The other comparable authorities relied upon by the appellant, *Bryan*, *Tupou* and *Hamilton*, are all cases involving offences of grievous bodily harm and, from the point of view of the conduct of Drobny, the conduct and injuries of a much more severe nature. They are of no assistance in relation to Drobny.

[45] However, it seems to me there is force in the appellant's submission that the failure to record a conviction as well as the imposition of a community-based order, does not meet what this Court said in *Wilkins*, namely that where offences of violence are carried out on vulnerable taxi drivers, they must or should result in "salutary deterrent penalties".[28] There is no question that Drobny is a young man who is yet to make his way in the working world, having qualified to teach at a gym or become a personal trainer, but not having yet embarked upon that, or indeed any, formal career. Furthermore, one can accept the general proposition that a conviction will affect him into the future.

[46] However, that must be balanced with the fact that it was Drobny's assault which came first, and placed the taxi driver in a vulnerable position on the ground where he was then subject to an even more serious assault by Levy. The attack was unprovoked and no doubt the consequence of inebriation. This Court has observed recently that the seriousness of an offence can, according to the circumstances outweigh the considerations of youth and rehabilitation, particularly where there is a strong need for deterrence.[29] In my view the absence of a conviction in the case of Drobny has

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[28] *Wilkins* at [16].

[29] See *R v Blanch* [2008] QCA 253 at [22] per Keane JA, in the context of dangerous driving causing death; also *R v Gray* [2005] QCA 280 at [12].

the effect that his sentence does not have any salutary deterrent effect. For that reason, and to that extent, the appeal should succeed.

Discussion – Levy

[47] The appellant referred to *Bryan* as one of the cases that "stand as a yardstick against which to measure the sentences in this case".[30] *Bryan* involved a 21 year old man (22 at sentence) who provoked a fight in the city. Mutual kicks and punches were exchanged, but in the course of it Bryan inflicted three stab wounds on the complainant. The first was an extensive wound into the left chest cavity, such that the complainant's heart and lung were visible through it. There was a 10 centimetre laceration on the upper left arm, extending into the muscle, and another 3 centimetre laceration also on the upper left arm. The medical evidence was that the injuries were life threatening. Following the attack Bryan absconded, and later lied about his involvement. Later again he threatened a witness.

[48] The level of violence used was described in this way by Williams JA:[31]

> "This was a vicious attack with a weapon upon a stranger. It was gratuitous street violence. It took place in the centre of Brisbane where, particularly on New Years Eve and the early hours of the following morning, it would be customary for people to congregate. However one looks at the circumstances of this case it is one of the worst examples of the offence of doing grievous bodily harm that one could find."[32]

[49] Recitation of those matters is enough to demonstrate that it is of no assistance on the question of the actual sentence imposed on Levy. However, it was relied upon for the contention that it signalled the strengthening of approach to the sentencing of young men who commit violent acts on innocent members of the community in public places and cause grievous bodily harm.[33] In that respect the appellant relied upon the following passage:[34]

> "Given the nature and circumstances of the crime, deterrence must be the major factor influencing sentencing. Ordinary citizens must be able to make use of areas such as the Mall, even at night, sure in the knowledge that they will not be savagely attacked. The only way courts can preserve the rights of citizens to use public areas in going about their own affairs is by imposing severe punishment on those who perpetrate crimes such as this."

[50] The basis for suggesting that *Bryan* shows a strengthening of approach lay in the fact that this Court increased the original sentence from four years imprisonment suspended after 12 months, to six years. That *Bryan* signalled the strengthening of approach to sentencing young men who commit violent acts on innocent members of the community was recognised in *Tupou*:

> "Considerable importance should nevertheless attach to *Bryan* in our disposition of this appeal. As observed by Justice McPherson in *R v Johnston* [2004] QCA 12:

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30 Appellants Outline of Submissions, dated 9 May 2014, para 16.
31 With whom de Jersey CJ and Cullinane J agreed.
32 *Bryan* at [29].
33 Appellant's Outline of Submissions, para 17.
34 *Bryan* at [30].

> "The Queen against Bryan is one of two or more recent decisions of this Court that establish a benchmark in cases of this kind that may be higher or more severe than has been common in the past."
>
> He was not, I believe, confining that to cases involving weapons. As a member of the Court in *Bryan*, I may say that it was certainly not my intention that *Bryan* be interpreted in any other way."[35]

[51] Other than the recognition of the principle reflected in the passage set out in paragraph [47] above, which reflects what was said in *Wilkins* at [16], and the strengthening of approach to sentences for gratuitous violence against members of the public and people serving the public, *Bryan* is of no assistance for the reasons outlined above.

[52] *Tupou* involved an 18 year old man who pleaded guilty to causing grievous bodily harm to a 25 year old man at a taxi rank. He had a minor criminal history involving street offences, for which he had been fined and placed on a good behaviour bond, and the relevant offence occurred whilst he was on that bond. It was an unprovoked attack involving a punch which knocked the complainant to the ground and then a second punch while he was on the ground. Video evidence suggested that the offender was going to kick the complainant, but it was not clear whether contact had been made. The offender ran off and tried to avoid detection, but later admitted his offence at an interview. He told the police he was intoxicated at the time. He was also a diabetic and had failed to take his insulin that night, compounding the adverse affect of the alcohol.

[53] The injuries sustained were a depressed fracture of the right cheek, a fracture of the left cheek, a broken nose, a fractured jaw and loosening of several teeth. The complainant was overnight in hospital, and for some months was unable to eat solid foods, experienced severe headaches, and experienced difficulty sleeping. He was also off work for several months. Ongoing effects included numbness in one cheek, the need for dental treatment, possibly maxillofacial treatment, and the redevelopment of a stutter.

[54] The sentence imposed upon him for grievous bodily harm was three years imprisonment, suspended after nine months, for an operational period of three years. On appeal the sentence was increased, but only to the extent of providing for suspension after 15 months rather than nine months. The court described the circumstances as involving "an unprovoked cowardly and vicious attack"[36] together with a calculated attempt to avoid detection and a demonstrated disregard for the complainant. The consequences were serious and the offender was on a good behaviour bond at the time. On the other hand, no weapon was used, Tupou appeared to have acted spontaneously, there was an early plea and cooperation with the authorities.

[55] The court had the following to say:

> "In a number of recent decisions, the Court of Appeal has emphasised the strength of the importance of deterrence in sentencing for violent offending of this general character. The public rightly expects the Courts by their sentences to achieve so much as can be achieved to

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35 *Tupou* at p 11 per de Jersey CJ.

36 *Tupou* at p 9.

> help ensure the cities of this State are safe places for those who venture out during the night."[37]

[56] In my view *Tupou* bears some similarity to the case of Levy. The level of violence was somewhat less, involving two punches and no kicking. The injuries were similar, but did not involve surgery and the insertion of plates and screws. However, the ongoing effects in *Tupou* seem to have been of greater duration. The age of the offender is comparable, as was the fact that intoxication was involved. Likewise the offender in each case ran away, but later cooperated with police. *Tupou*, however, unlike Levy, involved an offender with a more extensive criminal history, and who was on a bond at the time of the offences.

[57] Bearing in mind that in *Tupou* the period of actual custody of nine months was increased to 15 months, *Tupou* supports the contention that the sentence imposed on Levy, particularly insofar as it released him to immediate parole, was inadequate.

[58] *Hamilton* involved a young offender, 17 at the time of the grievous bodily harm offence, and 19 at the date of sentence. He pleaded guilty to a charge of doing grievous bodily harm and another count of attempted armed robbery. The offence of robbery occurred whilst he was on probation for other offences committed subsequently to the grievous bodily harm charge. The circumstances of the grievous bodily harm offence were that Hamilton insulted a taxi driver who stopped the taxi and told him to leave. He got out, went around to the driver's side, and threw a bottle which he had been carrying in the direction of the complainant. The bottle smashed and fragments of the broken glass hit the taxi driver's face. Hamilton then threw punches at the taxi driver's head and a struggle ensued. Another passenger joined in and they all ended upon the ground. The taxi driver staggered back to his cab and slumped on the ground near the back wheel. At that point Hamilton then kicked him, to the back and front of his body, between three and six times. Then Hamilton and his companions left, after a passer-by came to the assistance of the taxi driver.

[59] The taxi driver suffered contusions and abrasions to his left eyelid, and a contusion to his right eyebrow, as well as soft tissue injuries to both cheeks, the left angle of the jaw, some fingers on both hands, lower chest walls and upper abdomen. On medical examination he had sustained a fracture to his lumbar vertebrae with a disc protrusion impinging on the nerve. He had suffered a permanent injury to his lower back which required constant pain medication. His ability to perform normal daily functions was affected, he had given up work, and his sleep was disturbed. His mental (stress and anxiety) and physical injuries had put his marriage under strain.

[60] On the charge of grievous bodily harm Hamilton was sentenced by the primary judge to four years imprisonment suspended after 16 months, for an operational period of five years. On the charge of armed robbery he was sentenced to three years imprisonment, suspended after 12 months with an operational period of five years, to be served cumulatively on the other term.

[61] On appeal the President referred to the serious aspects of both offences. As to that the she said:

> "Taxi drivers provide a valuable community service, particularly late at night and often in situations which leave them vulnerable to

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37 *Tupou* at p 10.

> attacks like this. Courts must ordinarily impose heavy deterrent penalties on those who gratuitously assault taxi drivers. There were other serious aspects to the offence of grievous bodily harm. The applicant was in the company of three others. Although there was no suggestion that they were involved in the attack on the complainant or acting in concert with the applicant, their presence must have made the complainant feel at considerable risk. The applicant was a young man whilst the complainant was 58 years old. … As a result of the offence, the complainant has suffered serious life-changing physical injuries which have impacted detrimentally upon his emotional and financial well-being."[38]

[62] The President also recognised the mitigating factors and "modest cause for optimism as to the applicant's prospects of rehabilitation".[39] That referred to his troubled background and prior criminal history, and the fact that since in custody "he has undertaken an alcohol and drug course, is remorseful and insightful and keen to participate in alcohol counselling when released from prison".[40]

[63] At [23] of *Hamilton*, the President said:

> "Were I sentencing the applicant only for the offence of grievous bodily harm, because he was then a 17 year old first offender, I would have imposed a sentence of about three years imprisonment with a parole release date fixed at about one-third of that term."

[64] Fryberg J said that the sentencing range, were the applicant to be sentenced only for the offence of grievous bodily harm, "would be 4 – 6 years imprisonment".[41]

[65] The ultimate sentence imposed as a result of the appeal gives no good guide in respect of Levy, because of the impact of the sentence for the armed robbery. The totality principle was relevant and brought into play in ensuring that the combined effect of the sentences was not crushing. However, some assistance can be gained from *Hamilton*, at least in a limited sense, from the comments of the President and Fryberg J. The attack in *Hamilton* included some broken glass hitting the taxi driver's face but otherwise was of comparable severity. However, it resulted in a greater degree of injury, with a much more prolonged aftermath. Moreover, whilst the offender was of a very young age, he had a greater criminal history. Notwithstanding those factors, the suggested minimum sentence[42] would have involved a period of actual imprisonment of one year.

[66] The learned sentencing judge was also referred to *Kinersen-Smith & Connor*. That involved two young men, aged 18 and 17, who attacked another young man (aged 19) while he was sitting on the kerb on the side of a street. Kinersen-Smith hit him in the head with a open hand, after which Connor punched him in the head. Those blows were followed by kicks from each of them to the complainant's torso and another open-handed blow by Connor to the complainant's head. It was that blow which probably caused the grievous bodily harm with which each was charged. Each was sentenced to two and a half years imprisonment, suspended after six months, with an operational period of three years.

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38 *Hamilton* at [20].

39 *Hamilton* at [22].

40 *Hamilton* at [22].

41 *Hamilton* at [28].

42 That is to say, the lower of the sentences between the President and Fryberg J.

[67] The injuries sustained were choroidal ruptures,[43] haemorrhaging and retinal detachment in the right eye. The retinal detachment was corrected by surgery, but the ruptures left the complainant with some loss of eyesight to the extent that he was described as "legally blind".[44] There was no prospect of improvement. The complainant suffered excruciating pain, and if he attempted to read or focus his vision, he suffered migraine headaches. The eye remained useless for reading, driving and focussing vision. The injuries also impacted upon his university career, and his future professional and personal life.

[68] Each of the offenders declined to be interviewed, but Kinersen-Smith apologised 10 days after the incident, and Connor tendered an apology at sentence. Neither had any previous criminal convictions. The offence was the product of intoxication, from binge drinking. Both had since been attending rehabilitation programs, and neither was thought to be at risk of further offending.

[69] In considering the Attorney-General's appeal, the Court looked at a number of decisions including *Tupou* and *Bryan*. Holmes JA[45] considered that there was not much to readily distinguish *Tupou* from the case under consideration. The tension between, on the one hand, the undoubted need for deterrence as an important factor in sentencing offenders who commit serious violence in public places, and on the other hand, the community interest in rehabilitation of young offenders, was noted.[46]

[70] Holmes JA also referred to *O'Grady* which involved a 28 year old, with no previous convictions, having been in a group which set upon two middle aged couples in the city around midnight. O'Grady crash-tackled and punched one of the two men, causing a relatively minor facial injury, and punched the other, splitting his lip and making his nose bleed. When the police arrived, one of the victims made a gesture suggesting O'Grady should be shot, and O'Grady responded with punches causing grievous bodily harm. He knocked the man unconscious and in the process fractured his orbital bone. That required surgery and there was some residual distortion of vision. At first instance O'Grady was sentenced to 12 months imprisonment, to be served by way of an intensive correction order.

[71] This Court[47] described the offence as "a case of unprovoked, gratuitous street violence … the culmination of a reasonably prolonged attack on two passers-by who were unknown to the respondent".[48] Williams JA[49] considered that an intensive correction order was manifestly inadequate, and that a head sentence of two years imprisonment was the appropriate punishment, and because of the factors of youth, and early plea and remorse, that should be suspended after a short period in actual custody. However, O'Grady had already completed two months of the intensive correction order, and therefore, bearing in mind that it was an appeal by an Attorney-General, it was not appropriate to require any actual time in custody. Instead, O'Grady was sentenced to two years, wholly suspended with an operational period of three years.

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43 Ruptures in the eye.

44 *Kinersen-Smith & Connor* at [5].

45 With whom McMurdo P and A Lyons J concurred.

46 *Kinersen-Smith & Connor* at [26]-[27], referring to *R v Mules* [2007] QCA 47 at [21] and *R v O'Grady; ex parte A-G (Qld)* [2003] QCA 137 ("***O'Grady***").

47 Williams JA, with whose judgment Atkinson J agreed.

48 *O'Grady* at [25].

49 Atkinson J concurring.

[72] In *O'Grady* all members of the court were of the view that the 12 month sentence, to be served as an intensive correction order, was manifestly inadequate.[50] They also held that offences of unprovoked gratuitous street violence had to be met with strong deterrence.[51] Williams JA said:[52]

> "In my view as a head sentence two years imprisonment is the appropriate punishment for the offences in question. The early plea of guilty, the clear remorse, the previous good character, and the fact he is a relatively young man would ordinarily have resulted in such a head sentence being suspended after serving a short period in actual custody."

[73] Thus, in my view, *O'Grady* lends support to the appellant's contention that a sentence involving a period of time in actual custody is the appropriate sentence for an offence such as this.

[74] In *Kinersen-Smith & Connor*, the Court said:[53]

> "The head sentence, while lenient, was not outside a proper range; and the allowance for mitigating factors, particularly the youth and strong prospects of rehabilitation of the respondents, was appropriately made. The need for real punishment of the brutish and mindless assault on the complainant was properly recognised by the penalty of six months actual imprisonment; a severe penalty for offenders of the respondents' youth, who had not previously fallen foul of the criminal justice system. Added to that is the prospect they face, for another two and a half years after they emerge from custody, of spending another two years in jail should they re-offend. The deterrent effect, both personal and general, of such a punishment for first-time offenders is likely to be considerable."

[75] In my view both *Kinersen-Smith & Connor* and *O'Grady* suggest that the sentence imposed on Levy was manifestly inadequate. Levy's attack was unprovoked, vicious and cowardly, in that Drobny had already tackled the complainant to the ground before Levy made any move to attack him. Not only was the complainant vulnerable in the normal sense in which any taxi driver is, in this case he was on the ground as the result of someone else's attack. The consequences of Levy's actions are that the taxi-driver faced surgery and will live with plates and screws in his face. True it is that he has not sustained the ongoing physical impairment that the complainant in *Kinersen-Smith & Connor* did, but there was only some residual ongoing difficulty in *O'Grady*. Each was seen to call for a custodial sentence to recognise "unprovoked gratuitous street violence"[54] or "brutish and mindless assault".[55]

[76] In my view the review of the authorities above support the contention that the sentence imposed on Levy was inadequate. Indeed, the learned sentencing judge had misgivings about ordering Levy's immediate release on parole. The aspect which seemed to sway the learned sentencing judge was the number of authorities

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50 *O'Grady* per de Jersey CJ at [9]; Williams JA at [26].
51 *O'Grady* per de Jersey CJ at [7]; Williams JA at [25]-[26].
52 *O'Grady* at [30].
53 *Kinersen-Smith & Connor* at [28].
54 In *O'Grady*'s case.
55 In *Kinersen-Smith & Connor*'s case.

and statements which suggest that short periods of incarceration essentially achieve very little.[56] However, the learned sentencing judge did recognise that sentences must be imposed "which hopefully will deter you from committing this type offence and, hopefully others who might be minded to commit such offences".

[77] In my view his Honour gave too little weight to the aspect of public deterrence. Cases of this sort often involve young men who are intoxicated and seemingly indifferent, at least at the time of their assault, to the consequences of what they are doing. In many of the cases the assailants express remorse once they are sober and the consequences are known. Many seem to have little in the way of criminal history and inevitably, because of their youth, have some prospects of rehabilitation and employment. But all of those matters cannot deny, in an appropriate case, the need for public deterrence to be recognised by a term of actual imprisonment.

[78] Where serious violent offences are concerned, it is sometimes the case that youth and rehabilitation should not be the predominant factors. At Batt JA explained in *Director of Public Prosecutions v Lawrence*,[57] referring to the offence of intentionally causing serious injury, with serious violent offences:

> "with an offence as serious as intentionally causing serious injury and particularly with an instance of it as grave as this one, the offender's youthfulness and rehabilitation, achieved and prospective, whilst not irrelevant in the instinctive synthesis which the sentencing judge must make, were of much less significance than they would have been with a less serious offence. As has been said, youth and rehabilitation must be subjugated to other considerations. They must, as the President said in *Wright*, take a "back seat" to specific and general deterrence where crimes of wanton and unprovoked viciousness (of which the present is an example) are involved, particularly where (again as here) the perpetrator has been given previous chances to control his aggressive habits. This is because the offending is of such a nature and so prevalent that general deterrence, specific deterrence and denunciation of the conduct must be emphasised. There is a particular reason why, with this offence, youthfulness of an offender cannot be of much significance. This is that, as this very case exemplifies, the persons who commit the offence and wreak appalling injuries, very often by kicking and stomping upon their prone or supine victims, are predominantly youths and young men acting under the influence of alcohol or drugs or both."[58]

[79] Whilst *Lawrence* involved a much more serious attack, with more serious ongoing consequences, than the present case, the principle set out above has been adopted in less serious cases, such as glassing,[59] and unprovoked attacks on members of the public.[60]

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56 AB 28.

57 *Director of Public Prosecutions v Lawrence* [2004] 10 VR 125; [2004] VSCA 154 ("***Lawrence***"). The offence there was recklessly causing serious injury, an offence which can include instances of unprovoked street violence against innocent victims: see, for example, the cases referred to in *Ashdown v The Queen* [2011] VSCA 408 at [24].

58 *Lawrence* at [22] per Batt JA (Winneke P and Nettle JA agreeing) (internal references omitted).

59 *Winch v The Queen* [2010] VSCA 141; *Trowsdale v The Queen* [2011] VSCA 81.

60 *The Queen v Wyley* [2009] VSCA 17 at [11] per Kellam JA and at [18]-[21] per Maxwell P; *Ashdown v The Queen* [2011] VSCA 408 at [151]; *AM v R* [2012] NSWCCA 203 at [82]-[84] per Johnson J (McClellan CJ at CL and Garling J agreeing). See also *Director of Public Prosecutions (Vic) v Zullo* [2004] VSCA 153.

[80] In a case such as this, which involved an alcohol fuelled, vicious and unprovoked attack on a person who, as a member of the public was performing a public service, and which has left the victim with permanent injuries (the plates and screws in his jaw), there is no reason why the principle in *Lawrence* is not applicable.

[81] For the reasons above I consider that Levy's sentence, to the extent that it ordered his immediate release, should be set aside. I would order that Levy be released on parole after serving a period of actual imprisonment of six months.

[82] Counsel for Levy urged that any period of imprisonment would now be too great, considering that Levy has been subject to supervision on parole from 22 January 2014. Thus, it was contended, relying on *Hopper*[61] the court should exercise the residual discretion not to uphold the appeal, notwithstanding a conclusion that the sentence was manifestly inadequate. It was said that the desirability of correcting the sentence is outweighed by the effect of imposing a short period of custody on Levy, where he has been subject to parole authorities for six months, and will be for a further two years.[62]

[83] *Hopper* was a different case. One of the predominant features in the court's decision to exercise the residual discretion in that case was the psychological vulnerability of the young offender. No such factor is present here. Further, whilst Levy is in employment, as was the offender in *Hopper*, that factor, whilst relevant, cannot in my opinion be determinative of the outcome. Were it otherwise violent offenders could escape appropriate punishment simply by being employed.

[84] *O'Grady* does not, in my view, compel the conclusion that the residual discretion should be exercised in this case. By the time the appeal was heard O'Grady had completed two months of the intensive correction order, reported twice weekly, and commenced a number of programs as part of that order. He also had a dependent child. None of those are factors here.

[85] Counsel for Levy also referred the court to a report by the Queensland Corrective Services into the supervision of Levy whilst on parole. That report indicates general compliance with requirements of him though there were, for reasons attributed to work commitments, two occasions when he failed to report. In each case contact was resumed within the relevant timeframe, and only a verbal warning was issued. The report indicates that Levy's "overall compliance is deemed satisfactory", and he "continues to engage in an appropriate manner and has not presented with any increased risks".[63]

[86] The tension presented by Levy's situation is one which confronts the court every time a young offender is immediately released[64] and the subsequent view of the court is that the sentence was inadequate. In such circumstances the fact that the offender has been released into the community, albeit under supervision, has to be tempered with the acceptance that the release has been wrongful in the sense that the sentence has been determined to be inadequate. Therefore, the fact that the person has been released into the community, whilst relevant, cannot, of itself, be determinative.

[87] In my view the need for general deterrence in respect of this sort of assault outweighs the considerations that would otherwise attach to youth and

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61 *Hopper* at [37]-[42].

62 Respondent's Outline of Submissions, dated 7 July 2014, paras 18-19.

63 Exhibit "A" to the Affidavit of Mr Zwoerner, sworn 7 July 2014.

64 Whether that be on a suspended order, or a release to parole.

rehabilitation, and the fact that Levy has been released to the community. This is not a case which calls for the exercise of the residual discretion.

[88] However, I accept that there is some force in the submission that the six month period that has been spent under parole supervision should be taken into account. Further, as this is an Attorney General's appeal it must be borne in mind that there are elements of double jeopardy involved, and therefore the sentence imposed should not be as severe as it might otherwise be.[65] For those reasons I would moderate the period of imprisonment otherwise imposed, to four months.

Conclusion and disposition

[89] The orders I would make are as follows:

In respect CA No 20 of 2014:

1. Allow the appeal.

2. Set aside the order made on 22 January 2014, that the date the offender be released on parole be fixed at 22 January 2014.

3. Order in lieu thereof, that the date the offender be released on parole be fixed at the conclusion of four months imprisonment.

4. Order that a warrant for the arrest of the respondent issue and lie in the registry for a period of one week.

5. Otherwise affirm the orders made on 22 January 2014.

In respect of CA No 21 of 2014:

1. Allow the appeal.

2. Order that a conviction be recorded.

3. Otherwise affirm the orders made on 22 January 2014.

[90] **PHILIP McMURDO J:** In the appeal against Levy's sentence, I agree with the orders proposed by Morrison JA and with his reasons.

[91] In the appeal against Drobny's sentence, I agree that the community service order should stand. But like Holmes JA, I respectfully disagree with his Honour's conclusion that a conviction should be recorded. On that question, I can add nothing to the reasons of Holmes JA. Therefore, I would dismiss the appeal in CA No 21 of 2014.

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65 *R v Melano; ex parte Attorney-General(Qld)* [1995] 2 Qd R 186 at 195; *The Queen v Everett and Phillips* (1994) 181 CLR 295 at 305; *Malvaso v The Queen* (1989) 168 CLR 227 per Deane J and McHugh J at p 324; *R v Clarke* (1996) 85 A Crim R 114 at 116; *Dinsdale v The Queen* (2000) 202 CLR 321 at [62] per Kirby J; *R v Allpass* (1993) 72 A Crim R 561 at 562; *Griffiths v The Queen* (1989) 167 CLR 372 at 386 per Deane J; *R v Rochester; ex parte A-G (Qld)* [2003] QCA 326 at [32].