SUPREME COURT OF QUEENSLAND

CITATION:	*R v RAP* [2014] QCA 228
PARTIES:	**R** **v** **RAP** (applicant)
FILE NO/S:	CA No 113 of 2014 DC No 576 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	11 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	29 August 2014
JUDGES:	Margaret McMurdo P and Fraser JA and Alan Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of unlawful assault causing bodily harm and one count of unlawful damage to property – where those counts arose out of an incident where the applicant assaulted his former wife – where the applicant was sentenced to two years' imprisonment for the first count, suspended after eight months with an operational period of 2.5 years, and for two months' imprisonment for the second count, to be served concurrently – where the applicant seeks leave to appeal against sentence on the ground that that sentence was manifestly excessive – where the applicant disputes aspects of the agreed schedule of facts that was before the sentencing judge – where the applicant also makes specific allegations of errors of fact, or concerning the weight given to facts, made by the sentencing judge – whether the sentencing judge's discretion miscarried and the applicant should be given leave to appeal *Criminal Code* 1899 (Qld), s 668D

R v Denham; ex parte A-G (Qld) [2003] QCA 74, cited
R v Eastwell [2007] QCA 272, cited
R v Fairbrother; ex parte A-G (Qld) [2005] QCA 105, cited
R v Frame [2009] QCA 9, cited
R v George [2006] QCA 1, cited
R v HBA [2010] QCA 306, cited
R v Johnson [2002] QCA 283, cited
R v King [2006] QCA 466, cited
R v Pierpoint (2001) 126 A Crim R 305; [2001] QCA 493, cited
R v Roach (2009) 213 A Crim R 485; [2009] QCA 360, cited
R v Ward [1998] QCA 329, cited

COUNSEL: The applicant appeared on his own behalf
J A Wooldridge for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Alan Wilson J's reasons for refusing this application for leave to appeal.

[2] **FRASER JA:** I agree with the reasons for judgment of Alan Wilson J and the order proposed by his Honour.

[3] **ALAN WILSON J:** The applicant RAP entered guilty pleas in the District Court at Brisbane, in May this year, to two charges arising out of events at his former matrimonial home on 18 January 2013: the unlawful assault of his wife, causing her bodily harm; and, unlawful damage to property.

[4] On the first count he was sentenced to two years' imprisonment, suspended after eight months with an operational period of 2.5 years. On the second he was sentenced to imprisonment for two months, to be served concurrently. He seeks leave to appeal on the ground the sentence was manifestly excessive.[1]

The factual basis for sentencing

[5] Mr RAP is now 48. He was a research fellow at a university. He and the complainant separated in 2012, after 22 years of marriage. They have three children, the youngest in his late teens. Mr RAP had been living away from the former matrimonial home for about six months before the events leading to these charges. His wife and their youngest son, 16, remained in the home.

[6] According to a schedule of facts agreed between the prosecutor and his legal representatives,[2] the separation had been "acrimonious". As the schedule records, Mr RAP returned to the former matrimonial home at about 6.45 pm on 18 January 2013. He walked through the house past his son and went to a pergola at the rear of the premises where his wife was working on a computer. He spoke to her. She asked that he leave her alone.

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1 Leave to appeal from the sentence is necessary: *Criminal Code* (Qld), s 668D.
2 Exhibit 4; Appeal Record Book p 47.

[7] Without warning he hit her on both sides of her head, from behind. He then punched her a further four times. He pulled her towards him by the hair and repeatedly hit her in the face and back. He then dragged her by the hair across gravel and timber surfaces towards a garden shed, repeating the words "*you're fucking dead*". According to the schedule the complainant suffered at least twelve blows to the head area, and "multiple" blows to the back, in this initial assault.

[8] The son heard the incident and saw his father punch his mother "many times". He attempted to intervene, and told his father to stop. Mr RAP dropped the complainant, but then kicked her in the head. She tried to protect herself with her arms. He punched her again. The son held Mr RAP's arms long enough for the complainant to run away. Mr RAP chased her, and again punched her to the face from behind, causing her to fall to the ground. The son again held his father's arms and the complainant ran into a bedroom, and locked the door.

[9] Mr RAP moved away towards the street as if to leave the premises but then returned to the house, and smashed in the top half of the bedroom door. The complainant retreated to an ensuite bathroom but he also attacked that door, repeatedly yelling, "*You're fucking dead bitch*". He did not penetrate that door and, after a short time, left the premises. Police found a knife at the scene which was alleged to have caused damage consistent with that in one of the doors, and relates to the unlawful damage charge.

[10] The complainant suffered significant injuries, including three facial fractures to the cheek, cheekbone, and eye socket. Photographs showed gross damage to the bedroom door. The complainant said she thought she was going to die during the initial assault. When her husband broke into the bedroom and she retreated to the bathroom she says she was terrified, and feared for her life. The nature of her injuries, and the evidence of damage, suggests these statements are not exaggerated. Neither, with respect, was the learned sentencing judge's description of the incident as "*a persistent, brutal attack*"[3] and a "*vicious sustained attack*".[4]

Other matters considered by the sentencing Judge

[11] In his sentencing remarks the learned District Court judge accepted that Mr RAP had entered a timely plea and had no criminal history; had voluntarily sought professional help before the offences and continued to undergo professional treatment afterwards; and, was a "likely" candidate for rehabilitation.

[12] (Mr RAP did, by the time of sentence, have a criminal history involving a breach of a Domestic Violence Order. The DVO, made on 9 May 2013, was breached by Mr RAP on 11 May 2013 when he sent an offensive email. The breach was effectively ignored by the learned sentencing judge.[5])

[13] His Honour also accepted that the applicant had suffered a degree of public shaming arising from the need to tell work colleagues of the charges, and as a result of publicity about the event appearing on a website which showed a photograph of Mr RAP's wife after the assault, and contained text which spoke of Mr RAP as "… *a seriously unhinged human being*" who "… *beat his wife so badly he fractured her scull* [sic]".[6]

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3 R 32.27.
4 R 39.08.
5 Sentencing remarks, 1 May 2014, R 39.5.
6 Exhibit 13, R 84.

[14] The learned sentencing judge expressed some "hesitation" whether Mr RAP was genuinely remorseful, and said he may have "… *minimised to others the conduct that comprises this offending*".[7] That observation was criticised by the applicant, and is considered in some detail later.

[15] Dr Beech, a psychiatrist whose report was tendered on Mr RAP's behalf, advanced the opinion that at the time of the incident in January 2013 he was most likely suffering from a major depressive episode and, probably, a form of alcohol dependence. In the psychiatrist's opinion he was still, at the time of examination in April 2014, mildly depressed, but the risk of further violence was quite low. The learned sentencing judge accepted Dr Beech's opinion that Mr RAP had good prospects of rehabilitation.

[16] A report was also tendered from a psychologist, Mr Brimstone. He had been consulted by Mr RAP toward the end of 2012, before the commission of these offences. He diagnosed an acute, moderate to severe adjustment disorder with mixed anxiety depressed moods at that time. He reviewed Mr RAP again in April 2013 and concluded that he suffered a chronic and mild adjustment disorder with anxiety. In April 2014 he diagnosed a mild borderline adjustment disorder.

[17] Mr Brimstone's report makes no reference to these offences other than to note that Mr RAP "*... impresses as credible in the remorse he expresses in relation to an instance of assaultative* [sic] *behaviour towards his spouse*".[8] There is, also, no reference to the subsequent breach of the DVO.

[18] In his remarks the learned sentencing judge also observed that Mr RAP had suffered other ill effects – his relationship with his children had deteriorated, and he would lose his employment.

Mr RAP disputes some of the agreed facts

[19] The sentencing hearing was diverted by conflicts in the evidence about the events at the home immediately preceding the assault. According to Dr Beech's report, Mr RAP told him that the incident only occurred after an argument developed about a coffee table which he wished to take from the home, and his wife spat at him.

[20] The learned sentencing judge pointed out the discrepancy between that version and what appeared in the agreed schedule of facts. After further discussion Mr RAP's counsel told the court that his instructions were that the schedule of facts was accepted as the basis for the sentence, and that it was not contended that the complainant had deliberately spat upon her husband, but that the applicant had instructed he thought some spittle had landed on him. Mr RAP's counsel informed the court that his client instructed he had "… *very little recollection of the incident*".[9]

[21] The learned sentencing judge said he would proceed to sentence on the basis set out in the agreed statement. Mr RAP's counsel did not object to that course.

[22] This different version of events has, however, reappeared. Mr RAP, who represented himself in his application for leave to appeal, has filed an outline of submissions in which he repeats what he told Dr Beech, with some variations. He

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7 R 28.15; Sentencing remarks, R 39.33-34.
8 R 76.
9 R 22.37.

now says he has a clear memory of these "lead up" events. He says his wife called him a "cunt". The assault that followed occurred, he now says, after he was sent into an uncontrollable rage because of spit landing on his arm.

[23] He does not, however, dispute that he accepted the version in the schedule of facts at the sentencing hearing, and the transcript shows he confirmed those instructions, in writing, to counsel who represented him on sentence.[10] In that circumstance there can be no criticism of a sentence based upon the facts set out in the agreed schedule; and, Mr RAP's new revised version must, for the purposes of this application, be disregarded.[11]

[24] He also complains about a sentence submission made by the Crown prosecutor concerning text messages he had sent the complainant in the period immediately preceding the assault. The prosecutor told the learned sentencing judge that the messages followed a letter to Mr RAP from his wife's solicitors regarding Family Court property proceedings and that, in them, he referred to the complainant as a "*lying slut, a wrinkled hag, a hairy fuck beast, an old bag, manipulative, nasty, self-serving pig*" and accused her of trying to take his money and of not appreciating him, and of acts of infidelity.[12]

[25] Mr RAP contends that this submission was "*factually inaccurate and misleading*" but does not say how, or why. No issue was taken with these facts when they were placed on record by the prosecutor at the sentence hearing. The existence of SMS messages and texts from Mr RAP to the complainant is also documented in the report of Dr Beech.[13]

[26] Mr RAP also asserts in his submissions that photographs tendered at the crime scene were not reliable and, in particular, disputes that there was any evidence that a knife was used by him in connection with damage to a door. He asserts that the photographs contradict the agreed schedule of facts. A perusal of both does not reveal any conflict and, again, these matters were not raised before the learned sentencing Judge and have no relevance now.

Mr RAP's other specific complaints: allegations of error by the sentencing judge

[27] Mr RAP's written and oral submissions were lengthy, and raise a number of contentions in the nature of submissions alleging errors of fact, or concerning the weight given to particular factual matters, by the learned sentencing judge.

[28] He says, first, that the judge erred in presuming he was in a rage when he entered the house. The sentencing remarks do not, however, contain any statement to that effect, and there is nothing in them suggesting a finding that he entered the home already in a state of rage or anger, or with any specific intent.

[29] Secondly it is alleged that the learned sentencing judge failed to acknowledge the effects of the major depression he was suffering at the time of the assault and, hence, failed to give proper weight to the "… *neurobiological underpinnings of the appellant's mental state at the time of the offence* …". The sentencing remarks

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10 R 26.17.
11 *R v Frame* [2009] QCA 9.
12 R 13.9-10.
13 R 61, and 63.

make it clear, however, that his Honour had regard to the content of the reports before him (including a report from a parole officer of 10 April 2014) and, in particular, to the stressors and mental health difficulties Mr RAP was experiencing. Beyond that, there was nothing in the reports to suggest those things diminished his moral culpability in a way which should have been reflected, to his advantage, in the exercise of the sentencing discretion.[14]

[30] The third complaint is that insufficient weight was placed on the voluntary steps Mr RAP had undertaken towards rehabilitation, and his progress during therapy. The sentencing remarks specifically refer to Mr RAP having voluntarily sought professional care, and it is implicit in the observation that rehabilitation seemed "likely" that the learned judge had regard to the progress Mr RAP had made.

[31] It is then alleged that the learned sentencing judge erred when he expressed "hesitation" about the level of Mr RAP's remorse, and spoke in terms suggesting that Mr RAP had minimised or downplayed the seriousness of his conduct in his reports of it to Dr Beech and the psychologist Mr Brimstone, and to one of his character witnesses, Professor Barry Watson.[15]

[32] Mr RAP's account to Dr Beech, as it appears in the psychiatrist's report, contains allegations that before the assault his wife called him names, and spat upon him and he "lost control"[16] – i.e., the version mentioned earlier, but disavowed at the sentence hearing. The psychologist, Mr Brimstone, thought Mr RAP a "reliable historian",[17] but his report barely mentions this very serious event and refers only to "*an instance of assaultative behaviour towards his spouse*".[18] Mr RAP's supervisor, Professor Watson, says Mr RAP "*made me aware of an incident where he hit his wife*".[19]

[33] The learned sentencing judge said: "*On the material that's been placed before me, I get the distinct impression that you have minimised your conduct to others*".[20] The remark is, with respect, unexceptionable when what the learned sentencing judge referred to as a "*vicious [and] sustained*" and "*persistent [and] brutal*" attack is contrasted with these relatively anodyne reports of it, to others, by Mr RAP.[21]

[34] He also contended that the learned sentencing judge wrongly assumed a lack of remorse on his part in circumstances where he had sent a letter of apology to both his wife, and the court. Mr RAP was critical of the way the letter was dealt with, in sentencing submissions, by the prosecutor and he was permitted to tender the letter and an email at the appeal hearing. The letter, addressed to his wife, does not advance his case: he begins by saying, "*Firstly, I want to apologise for hitting you*" but then goes on to discuss Family Court matters at considerable length, and to say, "*I ask that you cease pursuing the criminal charges against me [and] your application for a DVO…*" – a request tending to detract from the quality of the earlier apology and to cement, rather than allay, the learned sentencing judge's doubts about the degree and extent of his remorse.

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14 *R v HBA* [2010] QCA 306.
15 R 79.
16 R 69
17 R 73
18 R 76.
19 R 79.
20 R 39.33-34.
21 R 39.9, 40.16-17.

[35] Finally Mr RAP criticised the learned sentencing judge for failing to give sufficient weight, in mitigation, to the professional work he had undertaken in road safety research and policy. Mr RAP's counsel made oral submissions and, through the tendered reports and references, placed detailed information before the court on his antecedents, and his work. In his sentencing remarks the learned judge made specific reference to Mr RAP's lack of a prior criminal history and, also, the negative impact the offending would have on his employment, family relationships, and in terms of community respect. In so doing, the court gave these matters due, and sufficient, weight.

[36] In the same vein, Mr RAP asserts that insufficient weight was given to his outstanding character prior to this offending. Again, his Honour's sentencing remarks contained specific references to all of these matters.[22]

Was the sentence outside the range?

[37] In Mr RAP's submission the proper sentence lay in the range between nine months' imprisonment, wholly suspended, and 12 months' imprisonment suspended after 2.5 months. At the sentencing hearing his counsel accepted that he faced imprisonment "… *in the range of 18 months*" but argued that the court should consider an immediate parole order.

[38] His Honour was referred to a number of comparative decisions, and seven have been referred to by the DPP in its submissions. Others were raised by Mr RAP in his lengthy written and oral submissions here.

[39] In *R v Ward* [1998] QCA 329 the male applicant was 49, with no prior convictions. He assaulted his de facto partner, slapping her and aggravating a back condition from which she suffered. The applicant's guilty plea came on the second day of his trial. The trial judge sentenced him to nine months' imprisonment, suspended after three months with an operational period of three years. On appeal, the sentence was wholly suspended.

[40] In *R v Pierpoint* [2001] QCA 493 the parties had been living in a de facto relationship for about 10 years, but had recently separated after some domestic disharmony. The female partner had taken out a restraining order about two weeks before an occasion when the male arrived at the parties' former family home and, after an argument with her during which she rang the police, he cut off the telephone. She struck him, and he retaliated by throwing her to the floor and punching her, and attempting to cover her face with a pillow. The assault only ended when police officers arrived. He pleaded guilty and was sentenced to 18 months' imprisonment with a recommendation for eligibility for parole after six months. On appeal the sentence was reduced to 12 months, with immediate suspension (the appellant had already served about three months).

[41] In *R v Johnson* [2002] QCA 283 the applicant had been sentenced to two years' imprisonment, suspended after eight months with an operational period of three years, in respect of two assaults occasioning bodily harm upon a female with whom he had a "casual" relationship, and one offence of wilful damage. In the first assault he grabbed the complainant around the throat and then threw her to the ground. In the second he again grabbed her, shook her and then pushed her. His plea was

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22 R 39.40-50; R 40.1.

timely. He had an extensive criminal history including convictions for breaches of a DVO, and another conviction for assault occasioning bodily harm.

[42] Holmes J (with whom Davies and Williams JJA agreed) observed that while a head sentence of two years was heavy, the applicant's previous criminal history and the repeated nature of the offending meant it was not outside the range. The applicant's plea of guilty had been appropriately recognised by suspension after eight months.

[43] *R v Denham; ex parte A-G (Qld)* [2003] QCA 74 was an Attorney-General's appeal against, relevantly, a 12 month Intensive Correction Order imposed upon a man who assaulted his ex-partner's elderly father in a domestic fracas. While the appeal was rejected McMurdo P noted that a custodial sentence of up to two years was within the sentencing range,[23] and Jerrard JA said the respondent should "just" escape a sentence which included up to six months' actual imprisonment.[24]

[44] *R v Fairbrother; ex parte A-G (Qld)* [2005] QCA 105 was an Attorney-General's appeal. The parties had been living together for five years, with occasional periods of separation. On an occasion when the male respondent was drunk they argued, and he pushed her to the floor and hit her on the head with cans of beer. He was taken into custody and released later that evening under conditions which required that he have no contact with the complainant, and that he not go to her residence. He did just that early the following morning. The parties scuffled, and hot water from a kettle scalded the complainant.

[45] The respondent entered a guilty plea on the second day of his trial and was sentenced to 2.5 years' imprisonment, wholly suspended with an operational period of four years. The Attorney-General argued the sentence was manifestly inadequate. McMurdo P observed that, "*Domestic violence is an insidious, prevalent and serious problem in our society*",[25] but held that in light, in particular, of the sentencing judge's finding that the applicant had not deliberately poured hot water onto the complainant, the appeal should be dismissed (Jerrard JA and Cullinane J concurring).

[46] In *R v George* [2006] QCA 1 the parties had been married for some 20 years. They separated in 2004 and the applicant moved out but, on an evening in June 2004, returned to the home when the complainant was in the bathroom, and hit her in the face and body and held her on the floor, covering her mouth with his hand. He was found to have taken a knife and rope to the home. The complainant suffered fractures of the cheek-bone, and a rib, and was hospitalised for a week.

[47] The assault occurred shortly after one of the applicant's grand-daughters had complained that he had sexually abused her. He was sentenced, on his own plea of guilty, on the assault charge immediately after his acquittal following his trial on those abuse charges. The sentencing judge accepted that the applicant's conduct and judgment, at the time of the assault, were affected by incidents of harassment and public vilification arising out of those sexual charges.

[48] He was sentenced to 2.5 years' imprisonment. He had no prior criminal history. McMurdo P observed that:

> "… *the applicant took the law into his own hands and in an act of retaliation severely bashed a middle-aged woman with her arm in a*

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23 At paragraph [17].
24 At paragraph [21].
25 At paragraph [23].

> *cast and with a history of back problems in her own home at night time. On any view, the applicant's conduct was extremely serious and warranted a salutary penalty by way of specific and general deterrence*".[26]

The application for leave to appeal was refused, McPherson JA and Muir J concurring.

[49] In *R v King* [2006] QCA 466 the applicant and the complainant had lived together for about three years. The relationship had featured incidents of domestic violence and, after two years, the complainant obtained a DVO against the applicant. In December 2003 they argued and he chased her out of the house, grabbed her by the hair, and threw her against a fence. In March 2004 he grabbed her by the hair, dragged her across a street and threw her onto the ground, and then punched her repeatedly in the face and on the back and head.

[50] He was also charged with one count of wilful damage and three counts of unlawful use of a motor vehicle. In February 2006 he entered a guilty plea to all counts and in August of that year was sentenced to two years' imprisonment in respect of the assaults, suspended after nine months with an operational period of three years.

[51] Keane JA (with whom McMurdo P and Fryberg J agreed) said:

> "*In each of the assaults …, the applicant's attack on the complainant was unrelenting, and ceased only after the intervention of a third party. …. In my respectful opinion, the decision of this Court in* R v Johnson,[27] *which concerned two offences of assault occasioning bodily harm and one offence of wilful damage in a domestic context, confirms that a sentence of two years was comfortably within the appropriate range for multiple assaults of the kind in question here where they have been carried out by an offender with a record of violent offending*".[28]

The application for leave to appeal was refused.

[52] In *R v Eastwell* [2007] QCA 272 the applicant assaulted his estranged wife after they had been separated for over a year. In September 2006 they argued and he punched her in the face at least three times – on the nose, left eye and cheek. There had been an earlier assault in August 2005 when he had been sentenced to 12 months' imprisonment, wholly suspended for three years. He was sentenced on his own plea in May 2007 to a further 12 months, cumulative upon the 12 months activated by the previous suspended sentence, with the parole release date one year later.

[53] Wilson J (with whom Holmes JA and Philippides J agreed) held that the sentence was "… *clearly within range*".[29] The reasons of Wilson J make it clear that the fact the offending occurred in the face of an earlier DVO and, also, during the term of the earlier suspended sentence, were significant factors.

[54] In *R v Roach* [2009] QCA 360 the applicant and the complainant had a "… *sexual relationship of an intermittent nature*" between early 2004 and mid April 2006.[30]

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26 At page 8.
27 [2002] QCA 283.
28 At paragraph [22].
29 At page 6.
30 At paragraph [3].

For some part of that time the applicant received a carer's pension for looking after the complainant who was, however, living alone when the applicant came to her home unit early on the morning of 13 April 2006 and, after a short argument, punched her in the face and arms with a closed fist. He said, "*I know you're gonna ring the fuckin' coppers, so I may as well make a fuckin' good job of it*" before punching her another eight times.[31]

[55] The matter went to trial, the presiding judge making an early ruling that evidence of prior assaults by the applicant on the complainant was admissible. Those assaults had been frequent over the previous two years, and included regular incidents of punching.

[56] The applicant was 54 at the time of the assault, with two previous similar convictions dating back to 1994. The sentence – 18 months, with parole after eight months – was said by Holmes JA to be at the high end of the proper sentencing range, but not outside it having regard to the applicant's previous conviction for assault on the same complainant and her particular frailty, and vulnerability. Keane JA and A Lyons J agreed.

[57] Unsurprisingly these cases show that sentences for incidents of serious domestic violence will reflect the nature and severity of the assault, the injuries caused, the surrounding circumstances and, in some cases, the defendant's criminal history.

[58] What *Johnson*, *George* and *King* indicate is that, in the case of a serious assault in a domestic setting, a sentence of imprisonment for two years or more is plainly within the proper sentencing range. Mr RAP's attack upon his estranged wife was vicious and sustained, and only interrupted by the intervention of their 16 year old son; involved repeated threats to kill, and had been terrifying for both the complainant, and the son; and, had caused the complainant significant injuries with both physical and emotional consequences. Two years was, in those circumstances, far from excessive.

[59] Suspension of the term of imprisonment after eight months also reflected a proper balancing of mitigating factors (including a timely plea, the applicant's otherwise unblemished criminal history, the effects the conviction had already had (and would have) upon his personal, family and professional life, and prospects of rehabilitation) against the vicious and sustained nature of the attack and the threats to kill which accompanied it, and the injuries and consequences for the complainant.

[60] While suspension at an earlier time might have been contemplated, the serious and prolonged nature of the assault meant that actual imprisonment was strongly called for, for reasons of both general and specific deterrence. It cannot be said that, in fixing the suspension at one-third, the learned sentencing judge's discretion miscarried. The application for leave to appeal should be refused.

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31 At paragraph [4].