SUPREME COURT OF QUEENSLAND

CITATION:	*R v Noltenius* [2014] QCA 303
PARTIES:	**R** **v** **NOLTENIUS, Paul Leslie** (applicant)
FILE NO/S:	CA No 19 of 2014 DC No 198 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	28 November 2014
DELIVERED AT:	Brisbane
HEARING DATE:	15 July 2014
JUDGES:	Muir and Fraser JJA and Peter Lyons 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 was found guilty after trial of unlawful grievous bodily harm, and robbery with a circumstance of aggravation – where the applicant was sentenced to seven years imprisonment on each count, to be served concurrently, and the conviction for unlawful grievous bodily harm was declared to be a serious violent offence – where the applicant stabbed the complainant from behind in an unprovoked manner – whether the primary judge erred in declaring an offence to be a serious violent offence – whether the sentence was manifestly excessive *R v McDougall and Collas* [2007] 2 Qd R 87; [2006] QCA 365, cited *R v Parker* [2011] QCA 198, cited *R v Tahir; Ex parte Attorney-General (Qld)* [2013] QCA 294, cited *Siganto v The Queen* (1998) 194 CLR 656; [1998] HCA 74, cited
COUNSEL:	The applicant appeared on his own behalf G P Cash for the respondent

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

[1] **MUIR JA:** I agree that the application for leave to appeal against sentence should be refused for the reasons given by Fraser JA.

[2] **FRASER JA:** The applicant was found guilty by a jury after a trial in the District Court of unlawfully doing grievous bodily harm and of robbery with the circumstance of aggravation that he was armed with a dangerous instrument. On each offence the applicant was sentenced to seven years imprisonment, to be served concurrently. The sentencing judge (who was the trial judge) declared the conviction on the unlawful grievous bodily harm offence to be a conviction of a serious violent offence, with the statutory consequence that the applicant will not be eligible for parole until after he has served 80 per cent of the seven year term of imprisonment. A period of pre-sentence custody of 623 days was deemed to be imprisonment already served under the sentence.

[3] The applicant has applied for leave to appeal against his sentence on the grounds that the sentencing judge erred in exercising the discretion to make a serious violent offence declaration and that the sentence is manifestly excessive in all of the circumstances.

Circumstances of the offences

[4] The complainant gave evidence that shortly after midnight on 20 November 2011 he went to a unit complex in Nerang to visit a friend of his, Kavanagh. By this time the complainant had been drinking for about six hours. He attempted to wake up Kavanagh by knocking on the screen door. The complainant acknowledged that he was probably doing that a bit loudly because of the drink he had consumed. The complainant tried to rouse his friend by telling him to wake up and let him in and by knocking on the window. After two or three minutes he was approached by two men coming from behind him who asked him if he was trying to break in. The complainant did not know either of the men. The thinner of the two men (who other evidence identified as the applicant) asked the complainant what he was doing trying to break into the house. The complainant turned towards the general direction of the applicant and told him that he was not trying to break into the house and that he knew the man who lived there. The complainant then turned back to the unit and felt what he thought was a punch in his neck. When the complainant put his hand to his neck his hand and arm were covered in blood. He went down on one knee, realising that he was in some trouble. The complainant took out his phone to call an ambulance. The applicant told the complainant to give the applicant the phone and the complainant's wallet. The complainant complied. The applicant and his companion fled. Kavanagh opened the door of the unit and the complainant went inside. They were then joined by Belinda Latter, who had driven the complainant to the unit complex. (Latter gave evidence. She did not witness the offence.)

[5] In cross-examination the complainant agreed that he was under the influence of alcohol at the time. He said that he knocked on Kavanagh's window rather than on the door to the unit because he did not want to wake the woman (MacLure) who the complainant knew was living with Kavanagh. He did not realise that Kavanagh and

MacLure had formed a relationship and were both in the bedroom. The complainant denied that he was trying to get into the unit. The complainant definitely remembered that his wallet and phone were taken from him. He only had one wallet and one phone on him that night. He agreed that he did not have them with him at the hospital to which he was taken for treatment. The complainant denied the suggestion by defence counsel that he had already been stabbed when the two men arrived at the unit. The complainant denied defence counsel's suggestion that the thin man with tattoos (the applicant) did not ask the complainant for his wallet or telephone. The complainant agreed that he knew that Kavanagh used drugs. He denied the following propositions: Kavanagh was running drugs for him, he supplied Kavanagh with drugs on credit, Kavanagh owed him money for drugs, and his reason for going to the unit was to collect money that Kavanagh owed him. The complainant denied the suggestion that when the unit door was open Kavanagh referred to someone (inferentially the complainant) breaking in and asking, "[h]ow smart are you now?".[1] The complainant denied that the thin man with the tattoos leant over him and enquired whether he was alright and that another man suggested that they should leave.

[6] A student, Rutherford, gave evidence that towards the end of 2011 he found a wallet and a knife on the grass near the front of the Nerang Returned Services League, which is adjacent to the unit complex. Rutherford called the police on the same day. He identified the wallet shown on the photograph tendered in the Crown case and he identified the knife.

[7] MacLure gave evidence that on 20 November 2011 she, Kavanagh, and the applicant lived in the unit in the complex, although the applicant was not at home on that day. MacLure recalled being woken up by the police at about three or four in the morning. At some time after 20 November, the applicant rang her wanting to speak to Kavanagh. The applicant was overwhelmed and irrational. He used the term "dog", implying that MacLure had given a statement against the applicant to police officers. The applicant said that she and her children would be hunted and he accused Kavanagh of being a dog.

[8] In cross-examination MacLure agreed that Kavanagh had told her that he had thought that someone was trying to break into the unit that night. Kavanagh had not woken her up. She was not sure whether Kavanagh had rung the applicant. She agreed that she and Kavanagh were addicted to amphetamines. She denied that the complainant was their supplier. She denied that Kavanagh had drug debts during their relationship. She said that there was nothing unusual about the applicant not being home. He was friends with other people in the same complex where he would sometimes sleep. MacLure said she did not know of any arrangement between Kavanagh and the applicant whereby the applicant would "take the fall for the stabbing incident that was done by Mr Kavanagh".[2] She did not know about a suggested incident when Kavanagh gave the applicant a wallet to dispose of.

[9] A police officer, Brindley, gave evidence that on the night of 19 November or the morning of 20 November he and another police officer went to the Gold Coast Hospital and spoke to the complainant. The complainant was in bed and his partner, Latter, was present. Brindley said that he saw an iPhone and wallet. He did not know

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1 Transcript, 14 January 2014, at 1-29.

2 Transcript, 14 January 2014, at 1-62.

whether the complainant had them in his hand or beside him, or anything like that, but said that they were in his possession. Brindley could not remember if the items were lying beside the complainant or sitting on a bench beside him. Hospital staff may have said that those items were the complainant's phone or wallet or something like that.

[10] In cross-examination Brindley agreed that the complainant and Latter were both heavily intoxicated. The items he observed with the complainant were an iPhone 4 in a green case and a wallet with $6.00 in it. (Those descriptions matched descriptions of the complainant's items.)

[11] Kavanagh gave evidence that around 20 November 2011 he was in bed asleep with MacLure in the unit they shared. He was awoken by a commotion happening outside with yelling voices. He heard the complainant's voice but could not make out what he was saying. When Kavanagh opened the door to the unit the complainant came in. He had a wound to his neck and was bleeding everywhere. MacLure asked the complainant to leave. The complainant's girlfriend arrived and drove the complainant to hospital. Kavanagh knew the applicant, who he called a cousin. The applicant was residing in the unit at the time, but not permanently.

[12] In cross-examination Kavanagh agreed that on the evening of 19 November the applicant was staying with someone else at another unit in the same complex. Kavanagh used amphetamine and had a drug problem. He denied that he owed money to people from whom he was buying drugs. He agreed that on an occasion around November or December 2011 when the applicant was with him the front door had been kicked in. He agreed that dealers who sold or bought drugs from Kavanagh would come around to the unit and collect money and that there were times when the door was kicked in.

[13] Kavanagh agreed that when he was in bed he heard someone at the window who he thought was trying to break into the unit. There was a loud rattling which went on for a little while. Especially because of the prior history of people breaking into the house he was concerned. He heard that the window was attempted to be slid open. Nobody was saying who it was and he did not know who was there. Kavanagh agreed that the screen on the window broke; it was bent and off the rails so that it would not slide anymore. Kavanagh said that MacLure had "freaked out".[3] Kavanagh thought somebody was about to come through the bedroom window. He agreed that he rang the applicant and told him that someone was trying to break in. Kavanagh then stayed in bed waiting for the applicant to come and sort out his problem. Kavanagh did not see the applicant arrive. When the complainant came into the unit Kavanagh realised that the complainant was very, very drunk. Kavanagh and MacLure subsequently cleaned up all of the blood as best they could inside the unit. He put some water on the path to wash blood away but did not do it very well. Kavanagh denied that he cleaned up the blood to get rid of evidence. He subsequently agreed that the purpose of getting rid of the blood was to do so before the police arrived. He and MacLure did not answer the door when the police first knocked on the door and they did not get up straight away when other police subsequently knocked on the door. Kavanagh denied a suggestion that he had stabbed the complainant and he denied that he had asked the applicant to take responsibility for the incident. He denied that he had possession of the complainant's wallet and that he had asked the applicant to get rid of it. Kavanagh agreed that he had convictions for drug offences and also for offences of dishonesty.

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[3] Transcript, 17 January 2014, at 4-14.

[14] The applicant formally admitted at the trial that the complainant had suffered grievous bodily harm. A specialist vascular surgeon at the Gold Coast University Hospital, Dr Butcher, gave evidence in the Crown case and supplied reports tendered in evidence at the sentence hearing. The stab wound was a large (three centimetre) and relatively deep injury. It was a very significant injury and carried with it a real and not remote risk of death. Some force would have been required to inflict the injury. Even if the artery had not been injured the injury would still have been significant.

[15] The applicant gave evidence in his defence at the trial. As at 19 November 2011 he had been living with his cousin Kavanagh at the unit occupied by Kavanagh and MacLure. The applicant stayed at a different unit in the same complex on the night of 19 November. He was asleep when he received a phone call from Kavanagh at about 1.00 or 1.30 am on 20 November. Kavanagh spoke quietly, saying that someone was trying to break into the unit and that he needed help. The applicant responded that he would be down in a minute. The applicant woke up a friend who was staying in the same unit, Elliot, and they went down to the unit together. Before leaving, the applicant took a bread knife out of the kitchen. He said that he did so because he did not know how many people would be at the unit or if they had weapons. The applicant said that when he and Elliot arrived at the unit occupied by Kavanagh and MacLure, there was a man standing outside that unit who was bleeding. The applicant asked the man whether he was alright. Kavanagh opened the front door to the unit. MacLure was standing there with a .22 gun barrel in her hand. The applicant exchanged words with Elliot and with Kavanagh and then the applicant and Elliot left. The applicant threw the knife down a drain at the front of the property. He did not know why he did not take it back to the unit he had come from. During the day of 20 November the applicant went back to the unit occupied by MacLure and Kavanagh. He noticed that the screen on the bedroom window had been ripped off. The applicant said that Kavanagh told him that the man (the complainant) had tried to break in and that Kavanagh owed him money for drugs. Kavanagh asked the applicant for assistance and the applicant said to tell police that the applicant did it and the applicant would "wear it" if Kavanagh got off drugs.[4] Kavanagh promised that he would do so.

[16] The applicant referred to a subsequent occasion when he spoke to Kavanagh at the unit. The applicant said that Kavanagh handed him a wallet and asked what to do with it. Kavanagh had told the applicant that the wallet was in the garden. The applicant took the wallet and threw it into the bushes at the front of the complex.

[17] After the applicant was reunited with his own family, he decided that his arrangement to accept responsibility for Kavanagh's offence no longer applied. The applicant agreed that he telephoned MacLure and said to her that if she provided a statement she was a "dog".[5] The applicant referred to evidence given by a police officer in the Crown case, Knowles, that when Knowles attempted to apprehend him the applicant had run from him. The applicant explained his conduct as attributable to the fact that he was in breach of a pre-existing probation order. The applicant denied that he had stabbed the complainant and he denied that he had used violence to the complainant to steal his phone and wallet. In cross-examination, the applicant agreed that he had got rid of the wallet in the same area where he had got rid of the knife, with the knife in a drain and the wallet in the bushes. The applicant agreed that he had told police that he had not been armed when the complainant was

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4 Transcript, 17 January 2014, at 4-60.

5 Transcript, 17 January 2014, at 4-62.

stabbed. When it was put to the applicant that he had robbed the complainant, the applicant denied it. He suggested that there had been no robbery because the complainant had his phone and wallet on him at the hospital. In a subsequent answer the applicant admitted that he had disposed of the wallet with the complainant's ID in it, but added that he would "like to know how the wallet got from the hospital back to me cousin's garden".[6] The applicant acknowledged that he threw the knife into the drain and told the prosecutor that Kavanagh had found the wallet in the garden on the day following the offence and had given it to the applicant.

[18] The complainant gave a victim impact statement. He had regular flashbacks of the incident and suffered intense anxiety. He was nervous and aggressive to people who grabbed him from behind. He was afraid of being in public places at night and found it difficult to maintain relationships with people including his girlfriend. He suffered other adverse emotional consequences.

The applicant's personal circumstances

[19] The applicant was 42 years old at the time of the offences and 45 years old when he was sentenced. He had a criminal history in Queensland, New South Wales, and the Australian Capital Territory. Much of his criminal history concerned drug offences. He had also committed offences of dishonesty, perhaps associated with drug offending. He had also committed offences of violence. In 2005 he was sentenced to 18 months imprisonment with a non-parole period of nine months for an intentional wounding offence committed in 2004. In 2007 he was given a short term of imprisonment for common assault, cumulative upon other terms of imprisonment for offences of dishonesty. His Queensland criminal history, which spanned between 1992 and 2012, mostly comprised drug related offences. In 2002 he was convicted in the Magistrates Court in the Australian Capital Territory of possessing an offensive weapon with intent, for which he was given a recognizance to be of good behaviour. He had earlier convictions in New South Wales of assault for which he was fined or given recognizance orders.

Sentencing remarks

[20] The sentencing judge referred to the circumstances of the offences and the applicant's personal circumstances. The sentencing judge found that the applicant was not remorseful; in addition to denying that he had committed the offences he endeavoured to blame the complainant and suggested that the complainant and Kavanagh were drug dealers. The applicant ran from police because he thought that they were looking for him for the present offences. He lied under oath at the trial. He threatened witnesses. The sentencing judge took into account steps which the applicant had taken towards self-rehabilitation whilst in prison which were referred to in certificates of courses which the applicant had completed.

[21] The sentencing judge considered that a serious violent offence declaration was appropriate because the complainant suffered a very serious injury with potentially fatal consequences, the applicant's attack was vicious and unprovoked, the complainant was a stranger to the applicant and had done him no harm or wrong, it was a deliberate and intentional stabbing and no explanation for the stabbing was forthcoming from the applicant. The sentencing judge considered that such a declaration was supported by *R v Bryan; Ex parte Attorney-General (Qld)* (2003) 137 A Crim R 489 and *R v Tahir; Ex parte Attorney-General (Qld)* [2013] QCA 294.

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6 Transcript, 20 January 2014, at 5-4.

Consideration

[22] At the hearing of the application, the applicant maintained his account that when he arrived at the scene of the offences the complainant had already been stabbed. That account must be disregarded as being inconsistent with the jury's verdict. Similarly, despite the curious inconsistency between the evidence of the police officer (see [9]) and the complainant's evidence of his phone and wallet being taken (see [4] and [5]), the guilty verdict on the robbery charge– which the applicant does not challenge – requires the Court to accept that the applicant took one or both of the complainant's phone and wallet. Whether the applicant took one or the other, or both, is not material to the sentence.

[23] The respondent submitted that there was no scope for the applicant to be sentenced on the basis that he had acted excessively in response to concern that the complainant was committing a criminal act. The respondent argued that the applicant's claim that he was at the unit because Kavanagh had called him to report a break in was not supported by the evidence at the trial and was necessarily rejected by the jury. In fact there was evidence which supported the applicant's evidence that Kavanagh had telephoned him and asked for his assistance. The evidence by the complainant of his own conduct in attempting to wake Kavanagh in the middle of the night by knocking on the bedroom window and calling out is consistent with the evidence of Kavanagh that because of his concern that someone was attempting to break in, he rang the applicant and told him that someone was trying to break into the house. MacLure's evidence was consistent with Kavanagh's evidence on that point. Although there were substantial grounds for challenging the reliability of this evidence, there is no basis for a conclusion that the jury must have rejected the applicant's evidence on this point.

[24] Assuming, however, that this evidence should be accepted, it does not falsify the sentencing judge's finding that the applicant's attack was unprovoked and done upon a man who had done no harm or wrong to the applicant. Consistently with the jury's verdict, the sentencing judge could sentence the applicant on the basis of the complainant's evidence that he told the applicant that he knew the occupant of the unit and was not trying to break in. From the applicant's perspective, the drunken complainant should have presented no threat to the applicant or any occupant of the unit. The request by Kavanagh is capable of explaining why the applicant went to the unit, but it is wholly incapable of explaining, much less justifying, the applicant's unprovoked and vicious attack upon the complainant. Nor is this evidence inconsistent with the sentencing judge's finding that the applicant gave no explanation for the stabbing: the applicant altogether denied stabbing the complainant.

[25] The applicant argued that the serious violent offence declaration should not have been made because he was "only doing what anyone would actually do", the complainant was drunk, and the complainant was knocking on windows at 1.30 in the morning. Those submissions demonstrated the applicant's lack of insight into his offending. It was open to the sentencing judge to make a serious violent offence declaration on the basis that using of the knife with some force to stab the unsuspecting complainant in the neck from behind in a surprise attack made this an unusually serious example of the offence: see *R v McDougall and Collas* [2007] 2 Qd R 87 at 97.

[26] The applicant's list of cases included *Siganto v The Queen* (1998) 194 CLR 656 at 663 [21]. In the cited passage, Gleeson CJ, Gummow, Hayne and Callinan JJ referred to

an argument that the manner in which a sentencing judge had referred to a plea of not guilty indicated that it was treated as an aggravating circumstance and the sentencing judge increased the punishment which otherwise would have been imposed by reason of the fact that the appellant had defended himself against the charge. It was held that to do so would have constituted a serious error. As was subsequently pointed out in the same case, a reference by a sentencing judge to the plea of not guilty for the purpose of pointing out that an offender is not entitled to the leniency which ordinarily flows from a plea of guilty is proper. The sentencing judge here did not infringe the principle approved in the High Court. The sentencing judge's references to the applicant having denied committing the offences, having sought to blame Kavanagh, having suggested by his defence that the complainant and Kavanagh were drug dealers, having run from police, having lied under oath in the trial, and having threatened witnesses were all relevant to the sentencing judge's finding that the applicant had not demonstrated remorse. The absence of remorse was relevant in the formulation of the sentence. The other remark to which the applicant may have intended to refer by the reference to *Siganto v The Queen* was the sentencing judge's remark that "[b]ecause of the way your defence was conducted, no explanation for the stabbing is forthcoming…". That too was unexceptional and relevant in the formulation of the sentence.

[27] The applicant could not rely upon the mitigation commonly afforded to one who was remorseful and pleads guilty, and his criminal record included violent offences. That the appropriate sentence for the applicant in such circumstances extended to seven years imprisonment with a serious violent offence declaration is demonstrated by *R v Tahir; Ex parte Attorney-General (Qld)* and the comparable sentencing decisions analysed in that case ([2013] QCA 294 at [21] – [29]) and by Dalton J's analysis in *R v Parker* [2011] QCA 198 at [29] – [32]. The applicant's sentence is not manifestly excessive.

Proposed order

[28] I would refuse the application for leave to appeal against sentence.

[29] **PETER LYONS J:** I have had the advantage of reading in draft the reasons for judgment of Fraser JA. I agree with them and the order proposed by his Honour.