SUPREME COURT OF QUEENSLAND

CITATION:	*R v Aplin* [2014] QCA 332
PARTIES:	**R** **v** **APLIN, Sunil Frederick** (applicant)
FILE NO/S:	CA No 101 of 2013 DC No 87 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	16 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	24 June 2014
JUDGES:	Margaret McMurdo P and Fraser and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal against sentence is 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 unlawfully doing grievous bodily harm – where the applicant was sentenced to nine years imprisonment with a declaration that his conviction was for a serious violent offence – where the applicant punched and twice kicked or stamped the complainant in the head – where the offence had terrible and permanent consequences for the complainant – whether the sentence, including the serious violent offence declaration, was manifestly excessive *R v Bonner* [1997] QCA 394, considered *R v Bryan; ex parte Attorney-General (Qld)* (2003) 137 A Crim R 489; [2003] QCA 18, considered *R v Chambers, Harrison and Fisher; ex parte Attorney-General (Qld)* (2002) 136 A Crim R 89; [2002] QCA 534, considered *R v Connelly*, unreported, Samios DCJ, DC No 164 of 2009, 10 June 2009, cited *R v Ford* [2011] QCA 208, distinguished *R v King & Morgan; ex parte Attorney-General (Qld)* (2002) 134 A Crim R 215; [2002] QCA 376, considered

R v Kirkby [2001] QCA 37, considered
R v Lewis; ex parte Attorney-General (Qld) [2003] QCA 133, considered
R v Parker [2011] QCA 198, distinguished
R v Tahir; ex parte Attorney-General (Qld) [2013] QCA 294, considered
R v Thomason; ex parte Attorney-General (Qld) [2011] QCA 9, considered

COUNSEL: M J Burns QC, with D P Carlton, for the applicant
B J Merrin for the respondent

SOLICITORS: Fiona Graham & Associates for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Fraser JA's reasons for refusing this application for leave to appeal against sentence.

[2] **FRASER JA:** Towards the end of the first day of the applicant's trial upon a charge of unlawfully doing grievous bodily harm, which it had been estimated would occupy approximately three days, the applicant was re-arraigned and he pleaded guilty. On the following day, 3 April 2013, he was sentenced to nine years imprisonment. The applicant's conviction was declared to be a conviction for a serious violent offence and it was declared that a period of 255 days between 22 July 2012 and 2 April 2013 during which the applicant was held in pre-sentence custody was imprisonment already served under the sentence.

[3] The applicant has applied for leave to appeal against sentence. The grounds of appeal stated in the application are that the sentence in all the circumstances is manifestly excessive and that the sentencing judge erred in failing to have due regard to the serious violent offence declaration in the determination of an appropriate head sentence. The applicant's outline of argument described the application as being made "on the single ground that the sentence of 9 years' imprisonment coupled with a Serious Violent Offence (SVO) declaration was, in its overall effect, manifestly excessive in all of the circumstances."

Circumstances of the offence

[4] At the sentence hearing the prosecutor outlined the circumstances of the offence. The applicant had recently commenced a relationship with the 21 year old complainant. At about 1.30 pm on 22 July 2012 the applicant and the complainant were walking behind the complainant's brother on a street in Townsville. The complainant's brother heard the applicant and the complainant arguing. A resident saw the applicant strike the complainant with a stick once to the complainant's left arm and once to the left side of her body. At about 2.00 pm the complainant was found on a different street lying motionless on the footpath and bleeding from her mouth. The applicant was seated next to the complainant. He denied any involvement in the reason why the complainant was on the ground. The applicant asked for an ambulance to be called and he poured water on to the complainant's body.

[5] At the scene the applicant denied any involvement to two different police officers. He was arrested and transported to a police station. He participated in a recorded

police interview and admitted to punching the complainant in the head and also kicking her twice in the head. At one point in the interview he retracted his admission that he had kicked the complainant. He said that after punching her he had used his left foot to stamp on the complainant's head twice. The applicant said that the complainant was knocked out and he thought he had killed her. He did this to her because she had punched him and he felt like a kid. The applicant said that the complainant had to learn not to punch people. He knew what he was doing at the time, which is why he only hit her once and kicked her twice.

[6] The complainant was rushed to hospital. Emergency airway management and resuscitation were administered. She underwent an emergent left hemicraniectomy operation. A moderate sized left-sided hyperacute haematoma was evacuated. At the time of sentence the complainant remained in Townsville Hospital. She was bed-bound. She required 24 hour nursing care for all human needs. The prosecutor informed the sentencing judge that the complainant was awake and looked around, but she could not feed herself, walk, or go to the toilet. She was not expected to recover to a state which would allow for any rehabilitation from her current condition. Her quality of life and expected future prognosis were poor. Those submissions were supported by two medical reports.

[7] The prosecutor submitted to the sentencing judge that the complainant was effectively in a vegetative state. In this application it was pointed out for the respondent that the description "vegetative state" did not appear in the medical evidence before the Court. This does not raise any material issue; the sentencing judge did not use that term but summarised the effect of the complainant's injuries in a way which was consistent with the medical reports.

The applicant's personal circumstances

[8] The applicant was 26 years old at the time of the offence and when sentenced. He had a relevant criminal history. His first conviction was recorded in 2003 when he was 17 years of age and further convictions were recorded on more than one occasion in every subsequent year through to 2012. In total there were about 61 convictions recorded during about 40 court appearances. Most of the sentences were fines, but the applicant had also been sentenced to probation on three occasions, on one occasion he was given a combined prison/probation order, he was sentenced to wholly suspended periods of imprisonment on two occasions, and he was sentenced to imprisonment for offences of violence in 2007, 2010 and 2011. The applicant accepted the following summary in the respondent's outline of the circumstances of some of the applicant's prior convictions for offences of violence:

Conviction	Factual circumstances referred to
Breach of a Domestic Violence Order Conviction Date of 30 August 2004	The aggrieved was the Applicant's mother. The Applicant entered her house and threatened to punch her.
Breach of a Domestic Violence Order Conviction Date of 16 February 2005	The aggrieved was the Applicant's mother. The Applicant struck her in the face with his fists. He then pushed her onto a bed and punched her in the face.

Assault Occasioning Bodily Harm Conviction date of 17 May 2006	The Applicant repeatedly punched his girlfriend. He punched her in the head until she fell to the ground. He then kicked her several times to the head and body. He struck her repeatedly to the same areas with a wooden table, causing it to break. The complainant sustained a deep laceration to her forehead, as well as her foot, and bruising and swelling to the face.
Grievous Bodily Harm Conviction date of 2 February 2007	The Applicant threw a rock at the back of the head of a woman, in public. She sustained a head injury which required surgical treatment. At one time the victim had a Glasgow Coma score of 3, but she made a full recovery post-surgery.
Breach of a Domestic Violence Order Conviction date of 26 December 2009	The aggrieved was the Applicant's then female partner. The Applicant punched her in the head. She fell over. Whilst she was on the ground he kicked her to the body and head.
Breach of a Domestic Violence Order Conviction date of 17 March 2010	The aggrieved was the same female partner as for the previous conviction of the same offence. The Applicant repeatedly punched her to the face.
Breach of a Domestic Violence Order Conviction date of 23 May 2011	The aggrieved was the Applicant's girlfriend. The Applicant pulled her to the ground and punched and kicked her numerous times until a witness intervened. The Applicant then fled the scene.

[9] The applicant is an indigenous man who grew up in Doomadgee and Mount Isa. He told police that when he was 16 years old his father kicked him out of home. He had attended school to Year 11 but from that point alcohol was a feature of his life and his education ended. He was raised by a grandmother who was still alive. After leaving school the applicant lived on Palm Island with his grandmother. The applicant had never worked since he was a teenager.

[10] After the applicant's denials to members of the public and to police at the scene of the crime, he participated in a police interview later in the same day, when he made full admissions which formed the evidentiary basis for the prosecution and the sentence. (It was not submitted that the applicant could not have been charged and convicted were it not for his admissions.) There was a full hand up committal hearing. At a mention the day before the indictment was presented, the matter was listed for trial to commence eight days later with a direction for legal argument to occur at the commencement of the trial. That direction effectively precluded the applicant from bringing an application about the evidence before the trial pursuant to s 590AA of the *Criminal Code* 1899. At the trial the applicant pursued his

foreshadowed application to exclude the evidence of his admissions in the police interview. The application was refused, upon which defence counsel asked for the applicant to be re-arraigned and the applicant pleaded guilty. The sentencing judge accepted that the application was not spurious and that the applicant was entitled to advance it.

Sentencing remarks

[11] The sentencing judge referred to the applicant's plea of guilty and noted that at 26 years of age he was a relatively young man. The sentencing judge took into account the applicant's lengthy criminal history, noting that the applicant's history for violence was unenviable and that much of it had been directed at women. The subject offence, like previous offences of violence, involved the applicant assaulting a woman who was his partner. The sentencing judge accepted a submission by defence counsel that it might not be clear whether the applicant's kicking of the complainant caused her injury, or whether the injury might have been caused by her head coming into contact with the hard bitumen surface as she fell to the ground, but the sentencing judge found that it was nevertheless a violent assault which the applicant committed for no reason other than anger. The sentencing judge found the circumstance that the complainant might have punched the applicant did not provide any justification or excuse in any measure for the way in which the applicant retaliated. Although the applicant expressed some concern when told that the complainant was in hospital, it was difficult to detect any great remorse in some statements which the applicant made to police. The sentencing judge observed that he had taken the applicant's plea of guilty into account and the sentencing judge referred also to the adverse impact which alcohol had upon the applicant's life. The sentencing judge took into account that the consequences for the complainant had been catastrophic and were likely to be with her for the remainder of her life; for all intents and purposes the complainant's life had been taken from her.

[12] After referring to guidance provided by sentencing decisions (*R v Connelly*, unreported, Samios DCJ, DC No 164 of 2009, 10 June 2009; *R v Savo*, unreported, Pack DCJ, DC No 516 of 2007, 21 April 2008; *R v Parker* [2011] QCA 198; and the decisions referred to in *R v Parker* of *R v Kirkby* [2001] QCA 37 and *R v Bonner* [1997] QCA 394), the sentencing judge mentioned the need to have regard particularly to the applicant's history of violence, the extent of the injuries inflicted upon the complainant, and the need not only to punish the applicant but to send a clear message to others who might be minded to behave in a similar way.

Arguments for the applicant

[13] The applicant emphasised that the factual basis for the sentence was that he punched the complainant only once in the head followed by two kicks or stamps to her head as she lay on the ground; no weapon was involved; the applicant did not act in company; the assault was not premeditated; the applicant did not flee from the scene but remained with the complainant and was observed to sit near her and pour water on her body; he asked for an ambulance to be called; and he expressed concern when police told him that the complainant was in hospital. In addition the applicant submitted that there was a degree of provocation by the complainant, in the form of a punch to the applicant, which sparked a reaction by the applicant.

[14] The applicant analysed the comparable sentencing decisions to which the sentencing judge referred and other decisions to which the sentencing judge's attention was

drawn, and referred to a remark by the sentencing judge that, "[i]t seems that head sentences as low as six years' imprisonment have been imposed for offences of unlawfully doing grievous bodily harm, usually it seems for younger men with no prior convictions and frequently for offences involving a single blow." The applicant submitted that this remark did not sit comfortably with *R v King & Morgan; ex parte Attorney-General (Qld)* (2002) 134 A Crim R 215, *R v Bryan; ex parte Attorney-General (Qld)* (2003) 137 A Crim R 489, *R v Lewis; ex parte Attorney-General (Qld)* [2003] QCA 133, *R v Thomason; ex parte Attorney-General (Qld)* [2011] QCA 9, *R v Dietz* [2009] QCA 392, *R v Ford* [2011] QCA 208, *R v Parker*, and *R v Tahir; ex parte Attorney-General (Qld)* [2013] QCA 294. The applicant submitted that six years imprisonment might have been a useful starting point for consideration, with the serious consequences of the assault to then be taken into account.

[15] It was submitted that the sentencing judge erred by commencing with the sentence of 10 years imprisonment imposed in *Connelly*, supported by observations in *Savo*, and working down from that sentence. *Connelly* and *Savo* were submitted to be significantly worse examples of this offence. The applicant submitted that it was difficult to justify the disparity between the minimum custodial period under the applicant's sentence of 7.2 years and the minimum custodial period of four years under the sentence imposed in *Parker*. It was submitted that the consequence to the complainant in this case was wrongly allowed to overwhelm the other sentencing factors and insufficient regard was had to factors personal to the applicant. The applicant submitted that a sentence of between seven and seven and a half years imprisonment with a serious violent offence declaration should be substituted.

Consideration

[16] Contrary to a submission advanced for the applicant, the applicant was not entitled to mitigation in the sentence on account of the suggested provocation by the complainant in punching the applicant's jaw; if there was such a punch, it apparently followed the applicant's assaults upon the complainant with a stick. There is no reason to think that the sentencing judge overlooked the applicant's disadvantageous background, his attempt to administer aid to the complainant, his request for an ambulance to be called, and his expressions of concern for the complainant. However it was open to the sentencing judge to attribute relatively slight weight to those matters in the context of the seriousness of the offence, the catastrophic consequences for the complainant, and the applicant's bad history of violent offending in broadly similar circumstances. The sentencing judge expressly took into account the applicant's plea of guilty, which was the most significant mitigating factor. I am not persuaded that the sentencing judge failed to take into account any of the applicant's personal circumstances.

[17] There is no basis for a finding that the sentencing judge used the 10 year sentence in *Connelly* as a starting point. That was merely one of the sentencing decisions which the sentencing judge described as providing "some guidance". There was no error in that approach. The particular seriousness of this offending and its shocking consequences in the context of the applicant's criminal record merited the serious violent offence declaration. The contrary was not submitted. There is no basis for thinking that in determining the length of the term of imprisonment the experienced sentencing judge did not take into account the effect of the serious violent offence declaration in deferring parole eligibility until after the applicant will have served 80 per cent of that term: see *R v Bojovic* [2000] 2 Qd R 183 at 191 [31], 191 – 192 [34];

R v Eveleigh [2003] 1 Qd R 398 at 431 [111], and *R v McDougall and Collas* [2007] 2 Qd R 87 at 95 – 96 [18]. The only real question in this application is whether the sentence, including the serious violent offence declaration, is manifestly excessive.

[18] *King & Morgan*, *Bryan*, *Lewis*, and *Thomason* are discussed in my reasons, with which Holmes JA and Douglas J agreed, in *Tahir*. In *King & Morgan*, in which the Court added serious violent offence declarations to a sentence of six years imprisonment, the complainant suffered adverse psychological consequences but no permanent physical disability, the resulting sentence took into account the then moderate approach adopted in Attorney-General's appeal, and the sentence was described by the Chief Justice as being moderate. In *Thomason*, the complainant was left with scars and psychological or emotional consequences and the possibility of some problems because of scar tissue on the heart resulting from a knife attack, but otherwise no serious physical consequences. That offender, who was re-sentenced on appeal to six years imprisonment with a serious violent offence declaration, was only 18 years old at the time of the offence. The sentence of six years imprisonment imposed on appeal in *Bryan* must be seen in the context that no serious violent offence declaration was sought before the sentencing judge or an appeal, the offender was only 21 years old at the time of the offence, he had no previous convictions for offences of violence, the complainant was left with no permanent injury other than some areas of numbness particularly in one arm and his back, and the sentence was described by Williams JA as reflecting the moderation which was then associated with an appeal by the Attorney-General. In *Lewis* a young man was re-sentenced on appeal to seven years imprisonment with a serious violent offence declaration. He struck the complainant with a Samurai sword at least four times, producing severe injuries including the severing of an artery, nerves and muscle tissue. Although that offender had an extensive criminal history including a conviction for assault occasioning bodily harm, the applicant's history of violent offending was worse. Furthermore, although the complainant in *Lewis* was left with restricted movement in a hand, loss of feeling below the knee in one leg, a withered leg, and the possibility that a leg would have to be amputated, the consequences for the complainant in this case are far more serious.

[19] In each of those cases the conduct of the offender was objectively more serious, particularly because of the use of a weapon and the more prolonged nature of the assaults. On the other hand, in most of those cases the offender's criminal record was not as bad as the applicant's. More significantly, in each of those cases the consequences for the victim of the offender's assault were far less serious than in this case. Those decisions cannot be regarded as supplying much guidance for the sentence in this case, in which the consequence of the applicant's assault was a catastrophic injury for the complainant.

[20] In *Tahir*, the offender was re-sentenced on appeal to seven years imprisonment with a serious violent offence declaration. That offence was again worse than here in so far as it comprised a series of assaults with weapons over a lengthy period, but that offender had no prior conviction for any offence of violence, and although the victim of his offence suffered devastating physical and psychological injuries, the consequences sustained by the complainant in this case are yet much worse. The sentence imposed in *Tahir* also does not indicate that the applicant's sentence is excessive.

[21] In *Parker*, a sentence of eight and a half years imprisonment with parole eligibility after four years imposed after a trial was described as being very severe but not so severe as to justify appellate interference. Again, the conduct in that offence was

worse than here; that 41 year old offender twice struck the complainant on his head with a hammer without warning whilst the complainant lay in bed. However that offender had a minor criminal history, he had not previously been imprisoned, and although the complainant in that case was very severely injured – he could not be left alone to prepare a meal and had severe intellectual and physical deficits – the consequence of his injuries were nevertheless far less devastating than those suffered by the complainant in this case.

[22] In *R v Bonner* [1997] QCA 394 the offender pleaded guilty but he had not co-operated with the police and had originally given a false alibi. That was also a very bad offence; the offender, acting as a professional hitman, savagely hit a defenceless man whom he did not know with a pick handle, fracturing both the skull and the membrane around the brain. That complainant had a major operation and was off work for a total of eight weeks, which apparently contributed to his going bankrupt. Otherwise, the most serious consequence of the assault mentioned in the judgment is that he was left with a large indentation in his forehead. Furthermore, that offender's relevant criminal record was not as bad as the applicant's. Before the offence he had been fined for two assaults and for an assault occasioning bodily harm and after the offence he had been imprisoned for an aggravated assault causing bodily harm and threatening with an offensive weapon. For those reasons, Pincus JA's conclusion, with which Lee and Cullinane JJ agreed, that eight years imprisonment was not manifestly excessive is readily reconcilable with the sentence imposed upon the applicant. I note also that Pincus JA observed that the sentence was not excessive at all.

[23] In *R v Kirkby* [2001] QCA 37 the offender was convicted of grievous bodily harm on the basis that he had paid Bonner to commit his offence. In finding that a sentence of nine and a half years imprisonment was not manifestly excessive, Williams JA took into account that Bonner had been entitled to some discounting because he pleaded guilty, although it was a late plea, and that there was force in the trial judge's observation that Kirkby's conduct in paying a "hitman" to remove competition was more reprehensible than Bonner's conduct. This sentence is also reconcilable with the sentence imposed upon the applicant for the reasons already given.

[24] In *R v Ford* [2011] QCA 208 a sentence of six years imprisonment with a parole recommendation after two years was not disturbed. The complainant suffered permanent, grossly disabling injuries, but that offender was only 18 years old when he committed the offence, he had no criminal history, he co-operated with the authorities, and he had promising prospects of rehabilitation, and the decision was only that the sentence was not manifestly excessive. Accordingly, that sentence does not justify a conclusion that the sentence in this case was outside the sentencing discretion.

[25] The sentence imposed upon the applicant may be compared with the sentences of 15 years imprisonment with a serious violent offence declaration imposed upon the offenders in *R v Chambers, Harrison and Fisher; ex parte Attorney-General (Qld)* (2002) 136 A Crim R 89. The complainant in that case was reduced by the offenders' various assaults to a vegetative state. The offending was also objectively worse because the offenders brutally attacked the complainant in company and persisted in kicking him whilst he was on the ground and unable to move. Furthermore, those offenders pleaded guilty to doing grievous bodily harm with intent to cause grievous bodily harm, the maximum penalty for which is life imprisonment. However, bearing in mind that those offenders were very young (aged 17, 19 and 20 at the time they offended), their markedly more severe sentences are reconcilable with the applicant's sentence.

[26] Fortunately the Court rarely sees cases in which the victim of a grievous bodily harm offence suffers such serious, permanent consequences as afflict the complainant. A sentence of nine years imprisonment with a serious violent offence declaration is certainly severe when seen in the context of the maximum penalty for this offence of 14 years imprisonment with a serious violent offence declaration, particularly where the life threatening injury was imposed without the use of a weapon, the assault may have occupied only seconds, the applicant pleaded guilty, he was only 26 years old when he offended, and he was not entirely bereft of other mitigating circumstances. However it must steadily be borne in mind that the Court is empowered to intervene only if the sentencing discretion miscarried. The applicant's argument that the sentence was manifestly excessive can succeed only if the sentence was "unreasonable or plainly unjust" such as to demonstrate that the sentencing discretion must have miscarried even though no specific error can be identified: *House v The King* (1936) 55 CLR 499 at 505. The sentencing judge did not err by attributing substantial weight to the terrible consequences for the complainant of the applicant's offence, and general deterrence and the protection of the community were also real considerations in the sentence for this extreme example of domestic violence by a repeat offender. It is also necessary to bear in mind that sentencing judges are to be afforded "as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies" (*Markarian v The Queen* (2005) 228 CLR 357 at 371). In the result, notwithstanding the severity of the sentence, I am not persuaded that it is manifestly excessive.

Proposed order

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

[28] **MORRISON JA:** I have read the reasons of Fraser JA and agree with those reasons and the order his Honour proposes.