SUPREME COURT OF QUEENSLAND

CITATION:	*R v Broome* [2015] QCA 119
PARTIES:	**R** **v** **BROOME, Steven** (applicant)
FILE NO/S:	CA No 304 of 2014 DC No 90 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Rockhampton – Unreported, 15 October 2014
DELIVERED ON:	26 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	28 May 2015
JUDGES:	Margaret McMurdo P and North and Henry JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence granted and the appeal be allowed.** **2. Set aside the sentences of five years imprisonment imposed on each of counts one and two and instead impose sentences of imprisonment of four years on each of those counts.** **3. Confirm the sentences imposed in counts three and four.** **4. All sentences to be served concurrently.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted after trial of burglary in the night and assault offences and sentenced to a head sentence of five years imprisonment for two offences with lesser sentences all to be served concurrently – where the applicant has a bad criminal history – where the applicant claims his criminal history overwhelmed the sentence process and resulted in a sentence so high it was disproportionate to the seriousness of the offending for which he was sentenced *Penalties and Sentences Act* 1992 (Qld), s 9

R v Hess [2003] QCA 553, considered
R v Leu; *R v Togia* (2008) 186 A Crim R 240; [2008] QCA 201, distinguished
R v Rankin [2004] QCA 2, distinguished
Veen v The Queen [No 2] (1988) 164 CLR 465; [1988] HCA 14, applied

COUNSEL: V P Keegan for the applicant
J M Phillips for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Henry J's reasons and proposed orders.

[2] **NORTH J:** I have read the reasons for judgment of Henry J. I agree with his Honour's reasons and with the orders he proposes.

[3] **HENRY J:** The applicant was convicted after a trial in the Rockhampton District Court of the following offences:

Count 1 – Burglary in the night;
Count 2 – Assault occasioning bodily harm whilst armed;
Count 3 – Assault occasioning bodily harm whilst armed;
Count 4 – Common assault.

[4] He was sentenced to concurrent terms of imprisonment for five years in respect of each of counts one and two, three years in respect of count three and two years in respect of count four.

[5] He seeks leave to appeal his sentence on the ground it was manifestly excessive. He submits the head sentence of five years, imposed for each of counts one and two, should have been within the vicinity of three and a half to four years imprisonment.

[6] The applicant has a bad criminal history. He submits it overwhelmed the sentence process, resulting in a sentence so high as to be disproportionate to the seriousness of the offending for which he was sentenced.

Facts

[7] On 11 November 2011 in suburban Rockhampton a group of men were enjoying a social drink under the highset house of Melanie Kielly, a former girlfriend of the applicant.

[8] The area under the house was enclosed by slats and accessible via a door that was closed. The area was not a residential component of the dwelling. The residents of the house – Ms Kielly and her children – were not in the area during the offences that ensued.

[9] Some time after 9.00 pm one of the men, Isaac Kielly, noticed a shadowy figure moving outside and went to investigate, opening the door. The applicant then stepped uninvited into the area under the house. He looked angry and was holding a stick, about 80 to 90 centimetres in length. It was thicker at one end and described by the witnesses who saw it as a nulla nulla.

[10] The applicant stepped towards Isaac Kielly who backed away. One of the other men, Shaun Muller, was seated on a couch with his back to this activity. Mr Muller used crutches to walk because of a temporary back ailment. As Mr Muller moved to turn towards what was occurring the applicant struck Mr Muller's head with the nulla nulla. Mr Muller put a hand up to protect himself and was struck on the arm about three times.

[11] Mr Kielly yelled at the applicant who then advanced upon Mr Kielly swinging the nulla nulla at him as Mr Kielly backed away. Mr Kielly blocked the applicant's blows using one of Mr Muller's crutches. As he moved backwards he tripped over and the applicant swung the nulla nulla at him on the ground. He blocked those blows with his hand resulting in swelling and tenderness over the third knuckle of his left hand. It is this attack which gives rise to count three. Mr Kielly pushed himself under a bench press which the applicant struck at a few times.

[12] Another of the group of men, John Murray, threw something at the applicant. The applicant then walked towards Mr Murray still holding the nulla nulla. Mr Murray backed away, turned and ran from the house. He ran down the street and jumped the fence into a nearby school yard. The applicant followed him but lost him. It is the applicant's threatening approach and pursuit of Mr Murray that gave rise to count four.

[13] The applicant did not return to the house. The police attended but no complaint was made that night.

[14] Mr Muller sought medical attention for a laceration to the top of his head caused by the assault. It required six staples to be inserted in it at a local hospital. Mr Muller also received bruises and abrasions to his left forearm. The assault upon him gave rise to count two.

[15] Complaints were eventually made to the police who conducted photo board identifications with the witnesses in August 2012 before finally charging the applicant. An indictment was not presented until May 2013 and the trial did not occur until October 2014.

[16] The applicant did not give evidence at his trial nor was any police interview tendered in evidence. The motivation for his attack remains unknown. He had been seen by some of the men earlier on the evening of the attack at a local bottle shop to which Ms Kielly had driven them. It is likely the applicant saw one or more of the men and his former girlfriend and his anger and violence had some connection with that sighting.

[17] A victim impact statement from Isaac Kielly, tendered on sentence, spoke of the impact of the offending on his friendships with members of the applicant's extended family.[1]

Antecedents and criminal history

[18] The applicant is an indigenous man. He was aged 41 at the time of his offending and 44 at the time of sentence. He spent much of his early adult life in jail. Since the end of his last prison term, in 2008, he has held various forms of employment involving welding and metal work. More recently he has been a support officer

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[1] Exhibit 3. The statement contains other assertions that, if correct, should have been but were not the subject of evidence at the trial. Those assertions were not given any weight: AR 22 L11.

assisting homeless persons into accommodation and employment. A reference from his manager in that work, tendered on sentence, spoke highly of the support he provided and the positive impact of that work upon the applicant's attitude.

[19] The applicant's lengthy criminal history includes 16 convictions for breaking and entering dwellings and other places and seven convictions for various forms of violence against the person. He has been sentenced to terms of imprisonment on multiple occasions. His most lengthy sentences were a period of seven years imprisonment imposed in 1989 when he was convicted of rape and break and enter offences and a sentence of 12 years imprisonment imposed in 1996 when he was again convicted of rape and break and enter offences. The latter sentence was followed by a cumulative four year term imposed later in 1996 for property offences including housebreaking. He was not released from prison until September 2008.

[20] The comparable seriousness of his offending since then has diminished. Within three months of his release he did commit a burglary offence. However his conviction for that offence in the Rockhampton Magistrates Court only resulted in him being placed on a $700.00 good behaviour bond. It may be that the sentencing Magistrate was unaware of his criminal history but in any event the sentence imposed suggests the conduct was not particularly serious. The following year he was convicted for breaching a domestic violence protection order and placed on 12 months probation. The present offences would have been committed about a month after the completion of that probation period.

[21] His only other convictions since have also been in the Magistrates Court. They involved two convictions for public nuisance, two convictions for failing to appear in accordance with a bail undertaking, one conviction for contravening a direction or requirement, three convictions for possession of dangerous drugs, one conviction for failing to take reasonable care in respect of a syringe and one offence of being drunk in a public place.

[22] Thus, while the applicant was not a law-abiding citizen after his release in 2008, he did not persist in offending at the same level of seriousness that saw him incarcerated for lengthy periods when he was a younger man. Unfortunately this feature of the matter was not highlighted in submissions below.

Sentence proceeding below

[23] The worst aspects of the applicant's criminal history were the focus of significant attention below; the applicant submits overwhelmingly so. The learned sentencing judge flagged in the course of argument that because of the bad criminal history he was inclined to impose a higher sentence than otherwise suggested by the comparable cases.[2]

[24] His counsel candidly submitted:

> "If not for the history, I would be submitting perhaps a sentence as high as three years, but because of the history, I'd have to concede that your Honour would be looking at a higher figure, possibly four years."[3]

[25] His counsel submitted the head sentence ought be moderated to allow for the improbability given his custodial history of him being released on parole after the statutory default minimum of 50 per cent of his sentence.[4]

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2 AR 24 L20.
3 AR 31 L45.
4 AR 32 L9.

[26] In sentencing the applicant the learned sentencing judge described his behaviour as cold blooded,[5] cowardly[6] and malevolent.[7] His Honour inferred the offending involved a degree of premeditation because the applicant went to the house armed with a nulla nulla or at least a piece of wood resembling a nulla nulla.[8]

[27] The learned sentencing judge commented at length on the applicant's criminal history and concluded it showed a lack of regard for other citizens, a lack of regard for court orders and showed the applicant is "a significant danger to the community".[9] His Honour also described the applicant as "a significant risk to the community".[10]

[28] In articulating those concerns his Honour did not allude to the comparably less serious nature of the applicant's offending since his release in 2008. Further, his Honour apparently misread part of the criminal history relating to that latter era for he observed the applicant had been imprisoned for 12 months for drug offences in July 2013 when the applicant had actually received a one month wholly suspended sentence on that occasion.[11]

[29] His Honour observed:

> "I agree with your counsel's submissions that, but for your criminal history or but for the extent of it, a sentence of three years imprisonment for an offence such as this might ordinarily be expected. Your criminal history, though, marks, I think a need for a significantly more serious sentence."[12]

[30] His Honour declined to fix a parole eligibility date, explaining:

> "I do that in circumstances where your lack of cooperation with the police is palpable, shown by the fact that you didn't assist police at all when they rang you immediately after this offence; didn't contact them or participate in any record of interview and your decision to proceed to trial in respect of this matter, despite the obvious strength of the case against you and your refusal to give any explanation for your conduct."[13]

Discussion

[31] No complaint is made about the decision not to fix an early parole eligibility date. That is an unremarkable decision given the applicant went to trial. It is the head sentence that is in issue.

[32] In this court, as below, the parties referred to the sentencing decisions in *R v Hess*[14], *R v Rankin*[15] and *R v Leu; R v Togia*.[16]

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5 AR 34 L8.
6 AR 34 L34.
7 AR 34 L20.
8 AR 34 L29.
9 AR 35 L40.
10 AR 36 L5.
11 AR 35 L28; AR 41,42. The period of suspension was later extended by 12 months, which may explain the misreading of the exhibit.
12 AR 36 L13.
13 AR 36 L20.
14 [2003] QCA 553.
15 [2004] QCA 2.
16 [2008] QCA 201.

[33] In *Hess*, offences of aggravated burglary, unlawful wounding and assault occasioning bodily harm in company attracted a head sentence of four years imprisonment suspended after 18 months for an operational period of five years. Hess and his co-offender Power entered the dwelling of Power's former wife and her new partner, Mr Gough, in the night time through a closed but probably unlocked door. They entered the darkened main bedroom where Power held a butchers knife to Mr Gough's throat saying he was going to kill him. Power sawed the knife back and forth, sufficiently to cause a laceration to the throat from which blood flowed. Power released Gough leaving him standing against a wall beside the bed. Hess then began head butting him telling him he was going to die. They then departed.

[34] Jerrard JA engaged in a review of comparable cases. He observed:

> "An examination of the sentences to which Mr Hess and the Crown have referred the court shows a considerable range of sentences upheld or imposed by this court, in "home invasion" cases and that Mr Hess received a head sentence at the higher end of that range. The range of sentences may be explained by the presence or absence of aggravating or mitigating circumstances, and the actual offences for which sentence is imposed is obviously important."[17]

[35] Hess had pleaded guilty mid-trial after about one day of evidence and after the prosecution discontinued a charge of attempted murder against both men. His previous criminal history, which was described as not particularly serious, involved previous convictions for breaking and entering, burglary, two counts of assault occasioning bodily harm on a female, receiving and two counts of production of dangerous drugs. His application for leave to appeal was dismissed. Jerrard JA observed that the argument for a larger discount of the minimum term required to be served would have been stronger had Hess pleaded guilty earlier.

[36] The offending in *Hess* was more serious than here, particularly in that co-offenders were involved and their intrusion extended into the victims' bedroom where they used violence and threats in a terrifying way. On the other hand *Hess* had a less serious criminal history and he did at least plead guilty, albeit during the trial. Balancing those factors the four year head sentence in *Hess* provides more guidance here than the other cases referred to by the parties.

[37] *Rankin* received a head sentence of five years imprisonment on his pleas of guilty to aggravated burglary, attempted armed robbery with violence and assault occasioning bodily harm whilst armed. He was hired to commit the offences for $100.00 by the former female partner of the complainant who was living with another woman and her two year old child in a flat. At about 8.30 pm Rankin banged upon the flat door. The female occupant went to answer it while holding her child in her arms. Rankin smashed the glass of the door, forcing his way in and knocking over a nearby television set. He was dressed in black wearing a beanie and carrying a wooden axe handle. He demanded the complainant's wallet and drugs. The complainant who had been sitting on a couch was struck in the face with the axe handle, resulting in lacerations that required stitching. He jumped up and physically subdued Rankin, who later managed to escape. The offences had a lasting impact on the lives of the complainant and his partner. Rankin's criminal record was said to have strongly influenced the sentence he received. He had previous convictions for breaking and entering, stealing, unlawful use of a motor vehicle, wilful damage, drug offences, obtaining

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17 [2003] QCA 553 [47].

property dishonestly and more than one conviction for assault occasioning bodily harm. He had served terms of imprisonment on at least three occasions and had previously failed to make use of probation orders in his favour. The former partner of the complainant and another lady were convicted and sentenced for their secondary roles in the matter and received significantly lesser sentences than Rankin. Moved by the apparent disparity in the sentences the Court of Appeal varied the five year head sentence by ordering that it be suspended after the service of two years for an operational period of five years.

[38] The offending here was markedly less serious than that of Rankin, particularly in that Rankin was a hired thug, his entry was forced, it was into the residential component of a home and he also committed an attempted armed robbery with violence.

[39] In *Leu and Togia* the applicants pleaded guilty to aggravated burglary, assault occasioning bodily harm whilst armed in company, common assault and armed robbery in company with personal violence. They received head sentences of five years imprisonment with parole eligibility after serving three years. Leu and Togia, who were brothers, knew the complainant as their drug supplier. The complainant had alleged that Leu stole money or drugs from his house. Leu denied this and made repeated threats to the complainant. Leu and Togia drove to the complainant's house and burst through the door chasing the complainant into a bedroom. Leu was armed with a vacuum cleaner pipe and Togia was armed with a wooden stake. Togia asked where the complainant's money was. When the complainant fell onto a mattress Leu and Togia punched and kicked him and the complainant's girlfriend tried to intervene. She was pushed away resulting in the charge of common assault. Togia thrust the stake towards the complainant striking him on the right side of the face. Togia hit the door of a cupboard causing it to fall and smash a fish tank. Togia stole some marijuana and either he or Leu stole some money. The complainant's "relatively minor injuries" consisted of contusions to the scalp and shoulder and abrasions to the face and a facial scar that would fade away. The major distinction between Leu and Togia was that Leu had a previous conviction for armed robbery in company with personal violence and was on probation and community service when he committed the subject offences.

[40] The application for leave to appeal was granted. Togia's head sentence was reduced to three and a half years imprisonment with parole eligibility after 12 months. Leu's head sentence was reduced to four and a half years imprisonment with parole eligibility after 16 months.

[41] Once again their offending was materially more serious than the applicant's in that it involved a forced entry, in company, into the residential component of a home and additionally involved an armed robbery.

[42] Fraser JA engaged in a review of comparable cases in *Leu and Togia*. His Honour noted of *R v Blenkinsop; R v Blenkinsop*[18] that it supported the view that a head sentence in excess of three years was appropriate for Leu and Togia and that *R v Bower-Miles & Smith*[19] supported a view that a minimum term of imprisonment of three years might be expected for the more serious offending of Leu and Togia. His Honour observed of the cases he had reviewed:

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18 [2007] QCA 101.
19 [1995] QCA 453.

> "This examination of broadly comparable decisions leads me to conclude that for these applicants, whose premeditated home invasion at night in company with each other included a robbery and the use of weapons by both in an assault that caused relatively minor bodily harm to an occupant who was in dispute with one of the applicants related to the complainant's supply of drugs, the sentencing range falls between about three and five and a half years imprisonment."[20]

[43] In the present matter the offences committed by the applicant were of course serious. The applicant entered a dwelling in the night having gone there armed with the apparent intention of assaulting one or more of the males there present. The event would have been very frightening and it occasioned some injuries.

[44] However, the above observations by Fraser JA are of limited utility in this case because it is not typical of that category of offences sometimes described as "home invasions". It was apparently motivated by an emotional reaction rather than associated criminal conduct such as drug dealing or robbery. It was not committed in company. It was unaccompanied by theft or property damage. Moreover, it involved unforced entry into the enclosed area under the house rather than the residential component of the home upstairs. As explained by Muir JA in *R v Bartram*,[21] such a downstairs area would come within the definition of "dwelling" in s 1 of the *Criminal Code* (Qld) because it is part of the residential building or structure. While entry into such an area is still serious, it is comparably less serious than violating the sanctity of the residential component of a dwelling. The latter form of violation was a common feature of the home invasion cases reviewed by Fraser JA in *Leu and Togia*.

[45] Were it not for the applicant's bad criminal history a sentence of three years imprisonment would be close to the upper end of the appropriate range for the offending here. His criminal history, even allowing for its declining gravity in recent years, is undoubtedly a relevant consideration. It is relevant both in its own right[22] and in informing the relevant consideration of community protection.[23] It does support the imposition of a more severe penalty than three years.

[46] However, the principle in *Veen v The Queen [No 2]*[24] requires that the criminal history not give rise to a sentence that is so high as to be disproportionate to the seriousness of the instant offending, for that would impermissibly amount to a fresh penalty for past offending. While the applicant's criminal history justifies a more severe penalty than three years imprisonment a head sentence of five years is too great an uplift. It is so high as to be disproportionate to the gravity of the instant offending and bespeaks error in the sentencing discretion.

[47] The applicant has made good his ground that the sentence was manifestly excessive. I would grant leave to appeal the sentence in respect of counts one and two.

[48] Sentencing afresh on those counts I would impose sentences of four years imprisonment in each instance. Such sentences would be heavy having regard to the objective seriousness of the offending but not disproportionate to it. They would also give due weight to the importance of community protection in this case.

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20 [2008] QCA 201 [44].
21 [2013] QCA 361 [19].
22 Section 9(3)(g) *Penalties and Sentences Act* 1992 (Qld).
23 Section 9(3)(a)-(b) *Penalties and Sentences Act* 1992 (Qld).
24 (1988) 164 CLR 465.

Orders

[49] My orders would be:

1. Application for leave to appeal against sentence granted and the appeal be allowed.
2. Set aside the sentences of five years imprisonment imposed on each of counts one and two and instead impose sentences of imprisonment of four years on each of those counts.
3. Confirm the sentences imposed in counts three and four.
4. All sentences to be served concurrently.