SUPREME COURT OF QUEENSLAND

CITATION:	*R v Piper* [2015] QCA 129
PARTIES:	**R** **v** **PIPER, Douglas Paul** (applicant)
FILE NO/S:	CA No 13 of 2015 SC No 39 of 2014 SC No 49 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Sentence)
ORIGINATING COURT:	Supreme Court at Rockhampton – Unreported, 13 August 2014
DELIVERED ON:	17 July 2015
DELIVERED AT:	Brisbane
HEARING DATE:	11 June 2015
JUDGES:	Gotterson and Morrison JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The applicant's Notice of Abandonment filed 13 September 2014 be set aside.** **2. The applicant's application for leave to appeal against his sentence, filed 29 August 2014, be reinstated as of and from that date.** **3. The application for leave to appeal the sentence be granted.** **4. The appeal be allowed, to the limited extent that the applicant's parole eligibility date be fixed at 1 February 2016 instead of 1 October 2016.** **5. The notice of application for an extension of time within which to appeal, and the application for leave to appeal against sentence, both filed on 22 January 2015, be struck out.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where the applicant had filed an application for leave to appeal against sentence – where the applicant subsequently filed a Notice of Abandonment – where the

applicant was not legally represented as at the date of filing the Notice of Abandonment and was not aware of the legal consequences of filing a Notice of Abandonment – whether the applicant should be given leave to set aside the Notice of Abandonment and reinstate the application for leave to appeal

CRIMINAL LAW – SENTENCE – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant's attack on the complainant was premeditated, unanticipated, caused life-threatening wounds and was not provoked – where the applicant had, after attacking the victim, sought to attack his estranged wife – where the applicant did not have a prior criminal history – where the applicant's estranged wife had recently obtained a Domestic Violence Protection Order against the applicant – whether the sentence imposed was manifestly excessive

Criminal Practice Rules 1999 (Qld), r 64

Barbaro v The Queen (2014) 88 ALJR 372; (2014) 236 A Crim R 116; [2014] HCA 2, cited
R v Amery [2011] QCA 383, cited
R v Douglas [2004] QCA 1, cited
R v Flew [2008] QCA 290, applied
R v Folwell, Andrew Grant, unreported - 11 September 2013, (Mackay); Indictment No 22 of 2013, applied
R v Holland [2008] QCA 200, cited
R v Laing [2008] QCA 317, cited
R v Lyon [2006] QCA 146, cited
R v MBC [2008] QCA 263, cited
R v Mitchell [2006] QCA 240, cited
R v Oakes [2012] QCA 336, cited

COUNSEL:	S Holt QC for the applicant C N Marco for the respondent
SOLICITORS:	Fisher Dore for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Boddice J and with the reasons given by his Honour.

[2] **MORRISON JA:** I agree with the orders proposed by Boddice J and with the reasons given by his Honour, but wish to add some further matters.

[3] At the sentencing hearing both the Crown and Mr Piper's counsel referred to statements made by the learned sentencing judge in an earlier and similar case, *R v Folwell*.[1] That case involved a plea of guilty to the offence of causing grievous bodily harm with intent to do so. The offence involved an attack by a young man with a knife, by surprise and from behind, causing several wounds.

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[1] *R v Andrew Grant Folwell*, Unreported - 11 September 2013, (Mackay); Indictment No 22 of 2013. (***Folwell***)

[4] Both counsel supported the accuracy of the following statement from *Folwell*:

> "It's apparent that the range that is appropriate for an offence of this type is said to be, by the Court of Appeal, in the order of five to eight years of imprisonment…".[2]

[5] The comparable authorities examined in *Folwell* included *R v Lyon*,[3] *R v Amery*,[4] and *R v Laing*.[5] There is no present need to set out the full circumstances of each, but the following can be noted.

[6] In *Lyon* (a home invasion of an ex-wife, contrary to domestic violence orders, with a machete, causing injuries) a sentence of nine years with a serious violent offence declaration which was reduced on appeal to seven years with the declaration. The offence there was unlawful wounding with intent to do grievous bodily harm.

[7] In *Amery* (attack on a de facto wife, in breach of domestic violence orders, with a sledgehammer, causing serious head injuries) an eight year sentence with no parole eligibility fixed, which was reduced to seven years and seven months, with parole eligibility after three years. The offence was doing a malicious act with intent.

[8] In *Laing* (a home invasion and an attack on an elderly man, with a hammer, causing serious head injuries) this Court refused leave to appeal against a sentence of six and a half years, imposed after a trial for the same offence as that of Mr Piper. Importantly Keane JA,[6] in a passage specifically noted by the learned sentencing judge in *Folwell*, said that the range of sentences for offences of this kind was five to eight years.[7]

[9] The foregoing is sufficient to show that both parties approached Mr Piper's sentencing hearing on the basis that authority of this Court established a general range for this type of offence as being between five and eight years. *Lyon*, *Amery* and *Laing* demonstrate that to be correct.

[10] **BODDICE J:** On 12 August 2014, the applicant was arraigned in the Supreme Court at Rockhampton on one count of attempted murder and, alternatively, one count of unlawfully doing grievous bodily harm with intent to do grievous bodily harm. He pleaded not guilty to each count. A jury was empanelled for his trial.

[11] On the morning of 13 August 2014, before any evidence had been called in the trial, the applicant was re-arraigned on the alternate count of unlawfully doing grievous bodily harm with intent to do grievous bodily harm. The applicant pleaded guilty to that count. The Crown accepted that plea in discharge of the indictment. The applicant subsequently pleaded guilty to a count of contravening a Domestic Violence Protection Order (**DVPO**) made on 19 August 2013.

[12] After hearing submissions, the sentencing judge sentenced the applicant to seven years imprisonment for the offence of unlawfully doing grievous bodily harm with intent to do grievous bodily harm. His parole eligibility date was set at three years. Allowing for a period of 317 days served in custody, from 1 October 2013 to 13 August 2014, declared as time served, the applicant's parole eligibility date was fixed at 1 October 2016. The sentencing judge also ordered the DVPO be extended until 19 August 2018.

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2 *Folwell*, Unreported - 11 September 2013, (Mackay); Indictment No 22 of 2013, Sentence, Pg 3.
3 *R v Lyon* [2006] QCA 146. (***Lyon***)
4 *R v Amery* [2011] QCA 383. (***Amery***)
5 *R v Laing* [2008] QCA 317. (***Laing***)
6 With whom Fraser JA and Jones J agreed.
7 *Laing* at [48].

[13] The applicant seeks leave to appeal his sentence of imprisonment. He had initially filed an application for leave to appeal against his sentence in August 2014. A Notice of Abandonment was filed on 13 September 2014. Whilst a fresh application for leave to appeal the sentence was filed on 22 January 2015, the applicant now applies, pursuant to rule 69(4) of the *Criminal Practice Rules* 1999 (Qld), for orders setting aside the Notice of Abandonment and reinstating his application for leave to appeal against sentence.

Background

[14] The applicant was born on 25 March 1957. He was aged 56 years at the time of the offence, and 57 years at the sentence. He had no prior criminal history. He had led a productive life with a good work history. He had been married, although he and his wife separated some time prior to the offence.

[15] The protection order had been imposed less than a month before its contravention. That contravention occurred at the time of the offence of unlawfully doing grievous bodily harm with an intent to do grievous bodily harm. Relevantly, the DVPO prevented the applicant from coming within five metres of his wife.

Offences

[16] On the afternoon of 29 September 2013, the applicant's wife and a friend attended the Prince of Wales Hotel at Blackall. The applicant's wife and her friend were not in a romantic relationship, although the applicant seemed to think they were in such a relationship. Whilst they were talking at the bar of that hotel, the applicant entered the hotel and attacked his wife's friend. The applicant was armed with a knife. It was 18 centimetres long, with an eight centimetre blade.

[17] CCTV footage captured the attack. It revealed the victim was struck with the knife, without warning, forcefully and on multiple occasions. He sustained six stab wounds, the most serious to the side of his neck, involving a five centimetre laceration affecting the facial artery. The victim had other cuts to his neck and face. He also sustained a cut to his torso and an elbow.

[18] The applicant ceased his attack when a bystander sought to intervene. The applicant moved towards his wife but desisted when she moved behind a bystander. The applicant then left the hotel. As he left, he told bystanders police would know where to find him. During the attack, the applicant told his wife "you've pushed me too far. I've had a gutful of you bitch. I bet you are scared of me now." The applicant returned home and later telephoned police to advise there would be no violence towards them when they came to apprehend him.

[19] The victim lost a significant quantity of blood as a consequence of his injuries. He required treatment in an intensive care unit of a hospital. He was discharged after some three or four days. Without treatment he probably would have lost his life due to blood loss and the compromise of his airway. Whilst he recovered from his physical injuries, his victim impact statement spoke of continuing psychological difficulties and significant changes to his lifestyle as a consequence of having become withdrawn and anxious following the attack.

[20] The incident in the hotel also formed the basis for the contravention of the DVPO. The applicant's wife was next to the victim at the time of the attack. As a consequence, the applicant was in breach of the limit on being in the vicinity of his wife.

Sentencing remarks

[21] The sentencing judge noted the attack was cowardly and unprovoked, and occurred when the applicant attended the hotel armed with a knife expecting to find his wife and the victim. The attack was premeditated, and without reason. Whilst a romantic relationship with the applicant's wife would not justify an attack, no such relationship existed. A further aggravating feature was that the attack occurred in circumstances where a DVPO had been specifically put in place to ensure distance between the applicant and his wife.

[22] The sentencing judge noted, to the applicant's credit, that he had desisted in the attack and had thrown the knife away. The applicant also had otherwise led a blameless life, with a good work history and no prior criminal history. Whilst in custody, he had performed well. The sentencing judge accepted the applicant was suffering from depression, for which he was receiving medication.

[23] In determining the appropriate sentence, the sentencing judge observed that whilst the applicant had pleaded guilty, it was a late plea in circumstances where there was a strong case against him. The sentencing judge made no criticism of the applicant pleading not guilty to attempted murder, noting the prosecution were likely to have great difficulty in establishing an intention to kill, but observed the plea to the alternate charge had occurred after the witnesses had been gathered, a jury empanelled, and the matter was ready to proceed to trial.

[24] The sentencing judge also took into account the applicant was remorseful for his conduct, had co-operated by informing the police where he had thrown the knife away, and had telephoned Police Link from his home to inform them he had no intention of harming police when they came to his home.

[25] After reviewing a number of comparable decisions, the sentencing judge observed the significant features in determining the appropriate sentence were that the victim had suffered life-threatening injuries, the attack had occurred in circumstances where there was a DVPO in place and the intervention of onlookers had prevented the applicant from attacking further. The attack was savage, cowardly, unprovoked and persisted for some time. The victim had suffered lasting consequences psychologically. In those circumstance, a head sentence of seven years imprisonment was appropriate.

Applicant's submissions

[26] The applicant submitted it was in the interests of justice for the Court to set aside his Notice of Abandonment, and reinstate his original application. The abandonment had occurred when the applicant was unrepresented, and believed that was the appropriate way to adjourn his application. The Notice of Abandonment was not a manifestation of a deliberate decision to end his desire to appeal his sentence. Further, there was merit in the proposed ground of appeal as the sentence was long, and on a first offender. The respondent would suffer no prejudice as a result of a reinstatement of that application.

[27] In respect of the sentence, the applicant submitted a head sentence of seven years imprisonment was outside a reasonable exercise of the sentencing discretion. The comparable decisions supported a conclusion a sentence of seven years imprisonment may be within the appropriate sentencing discretion where there had been a trial, but a lesser head sentence was appropriate after a plea of guilty. This was particularly so where the plea followed the Crown deciding not to proceed on a more serious charge,

and a change of legal representation. Further, the applicant expressed genuine remorse, had no prior convictions, had a good work history, had voluntarily desisted in the attack, and had telephoned police after the attack.

The respondent's submissions

[28] The respondent submitted the applicant's Notice of Abandonment should not be set aside. There has been no satisfactory explanation for the applicant's change of mind, and there are no reasonable prospects of an appeal against sentence being successful.

[29] The respondent submitted the sentence imposed was not manifestly excessive. The offence was premeditated, sudden and unexpected, involved the use of a concealable knife, was persistent, with a number of forceful blows being inflicted, and resulted in life-threatening wounds to the victim. The applicant had also moved in the direction of his wife, with an intention to harm her, after injuring the complainant. Whilst the applicant desisted in the attack, that occurred after bystanders sought to intervene.

[30] The respondent submitted the comparable cases[8] supported a conclusion the sentence of seven years imprisonment, for an offence of unlawfully doing grievous bodily harm with intent to cause grievous bodily harm, was not manifestly excessive. The fact the applicant had no prior criminal history did not alter that conclusion. The presence of a lengthy criminal history often is met with the imposition of a serious violent offence declaration, which was not sought in the applicant's offence. Further, the offending occurred against a background of a DVPO having been recently imposed, and the plea of guilty occurred after a jury had been empanelled at his trial.

Discussion

Notice of Abandonment

[31] To succeed in his application to set aside the Notice of Abandonment, and reinstate his application for leave to appeal the sentence, the applicant must establish it is necessary in the interests of justice for that order to be made. The relevant test was enunciated in *R v MBC*:[9]

> "Under r 69(4) and r 70(3) of the *Criminal Practice Rules* 1999 (Qld) respectively, the court may set aside the abandonment of an application or an appeal and reinstate the application or appeal 'if the court considers it necessary in the interests of justice'.
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> This Court's decisions in *R v Marriner* and *R v BBI* suggest that where an appeal has been abandoned, whether its reinstatement is necessary in the interests of justice requires a satisfactory explanation for the applicant's change of mind. The rules which regulate the bringing of appeals within prescribed time limits serve the important purpose of bringing finality to litigation; they should not be set at nought save for good reason. The abandonment of an application or an appeal brings the process of litigation to an end: that process should not be re-enlivened without good reason.
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> It must be borne in mind that an abandonment of an appeal not only brings the process of litigation to an end; it is also apt to be regarded as acknowledgement that the party who had appealed has no real

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8 *R v Beer* [2000] QCA 193; *R v Dempsey* [2001] QCA 141; *R v Lyon* [2006] QCA 146 and *R v Melissant* [2003] QCA 122.

9 [2008] QCA 263 at [4]-[6].

> ground to impugn the justice of his or her conviction or sentence. The decisions in *R v Marriner* and *R v BBI* confirm that the interests of justice include what might be thought to be the paramount interest in ensuring that citizens are not wrongly convicted or excessively punished by the processes of the criminal law. Whether the interests of justice make it necessary to allow the reinstatement of an application or an appeal requires a consideration of the ultimate prospects of success of the application or the appeal."

[32] In the present case, the applicant had promptly filed an application for leave to appeal against sentence. A few weeks later he filed a Notice of Abandonment. At the time, he was not legally represented, and believed filing the notice would mean his application would be effectively adjourned until he could find legal representation. Whilst that belief is at odds with the clear terms of the Notice signed by the applicant, his explanation for that course of action is explicable, having regard to the fact the applicant did not have legal representation at that time. Further, it was not challenged by the Crown, who did not seek to cross-examine the applicant about his explanation.

[33] Against that background, if the applicant is able to establish there is merit in the appeal, I would be satisfied it was necessary, in the interests of justice, to set aside the Notice of Abandonment, and reinstate the application for leave to appeal.

[34] Rule 69(4) is unclear as to whether the reinstatement is to take effect from the date of the filing of the original application or from the date of the Court order. The distinction is relevant in the present case as if the latter is the correct interpretation, the applicant would now need an extension of time within which to bring the application.

[35] A consideration of the wording of the Rules supports the conclusion the former is the proper interpretation. The effect of an order setting aside the Notice of Abandonment, and reinstating the application, is that the application for leave to appeal against sentence is reinstated as at the date it was initially filed in this Court.

Leave to appeal

[36] The applicant was a mature man who engaged in a sustained, severe and premeditated attack, whilst armed with a knife, on a victim who had done nothing by way of provocation. The offence occurred against a background of a DVPO having been made less than a month earlier for the specific purpose of ensuring the applicant did not come into contact with his wife.

[37] The applicant used the knife to strike the victim immediately upon entering the hotel. He only desisted when bystanders sought to intervene in the incident. The victim sustained a life-threatening wound to the neck, and has long-lasting psychological difficulties. The injuries sustained were far more serious than those inflicted in *R v Holland*[10], *R v Douglas*[11] and *R v Mitchell*.[12] In the first two of those cases, the assault had also occurred against a background of some provocation.

[38] Whilst the applicant did not have a prior criminal history, had a good work history, and had otherwise led a blameless life, his offending was of such a serious nature that it required the imposition of a significant sentence of imprisonment, by way of both personal and general deterrence. A review of decisions involving the infliction of serious injuries by use of a weapon support a conclusion the head sentence imposed

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10 [2008] QCA 200.
11 [2004] QCA 1.
12 [2006] QCA 240.

in the present case, whilst at the upper end, was within the sentencing Judge's discretion, even for an offender with no previous convictions and after a plea of guilty.

[39] Whilst similar head sentences had been imposed in *Dempsey* and in *Beer*, on appeal, in circumstances where there had been convictions after a trial, the fact of a trial in those cases was reflected in the lack of any earlier parole eligibility date being set. The sentence in *Melissant* must also be viewed in the context of the offence being wounding with intent to cause grievous bodily harm, and the consequences of the declaration the offender be convicted of a serious violent offence.

[40] Of particular relevance is the decision of *Lyon*.[13] There, the complainant's husband struck her with a machete, having kicked open the door of the home prior to the attack. The offender and the complainant had separated prior to the offence, and the applicant was subject to a restraining order which he had breached on two prior occasions. The offender, who was 40 years of age with no prior convictions for offences of violence, was convicted of entering a dwelling with intent with circumstances of aggravation, and wounding with intent to do grievous bodily harm. He was initially sentenced to an effective head sentence of nine years imprisonment with a serious violent offence declaration. On appeal, by a majority, that sentence was set aside and a sentence of seven years and seven months imprisonment, with a serious violent offender declaration imposed in its place. That reduction occurred on account of the fact the offender had offered to plead guilty to the offence of which he was convicted prior to the trial.

[41] The applicant relied on the observations as to a range for offences of this type in *R v Holland*.[14] However, a reference to range now must be considered as a "yardstick" against which to examine sentences under consideration.[15] That yardstick must also be viewed in the context of more recent authorities of this Court.

[42] One such authority is *R v Oakes*.[16] In that case, the victim had been subjected to a sustained attack by her estranged partner, whilst armed with knives. She sustained an injury to her hand as a consequence of that attack. A sentence of seven years imprisonment with a serious violent offence declaration was not interfered with on appeal. Whilst that sentence was imposed after a trial, and in circumstances where there was limited remorse, those factors were reflected in the making of the declaration, and the lack of any earlier parole eligibility date. Importantly, Gotterson JA[17] (with whose reasons Holmes JA and White JA agreed) observed that sentences of imprisonment ranging from seven to nine years have been imposed in cases of convictions of unlawfully doing grievous bodily harm with intent after pleas of guilty.

[43] The conclusion that a head sentence of seven years imprisonment was within the proper sentencing discretion renders it unnecessary to consider the effect of Counsel's submissions for the applicant below as to what was the appropriate range. It is also unnecessary to consider the continuing applicability of the doctrine enunciated in *R v Flew*,[18] particularly in light of the decision of the High Court in *Barbaro v The Queen*.[19]

[44] It is, however, necessary to consider whether the setting of the applicant's parole eligibility date at three years failed to properly reflect the applicant's remorsefulness, co-operation, and plea of guilty. Whilst the applicant's plea of guilty was late, the

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13 [2006] QCA 146.
14 [2008] QCA 200.
15 *R v AAR* [2014] QCA 20 at [43].
16 [2012] QCA 336.
17 At [43].
18 [2008] QCA 290 at [28]; [52].
19 (2014) 236 A Crim R 116.

applicant had indicated a willingness to plead guilty to a lesser offence prior to the trial. Notwithstanding that indication, the Crown presented an indictment charging the applicant with one count of attempted murder, and one alternate count of unlawfully doing grievous bodily harm with intent to do grievous bodily harm. The jury was empanelled in respect of those offences.

[45] Although the applicant could have pleaded guilty to the alternate count of unlawfully doing grievous bodily harm with intent to cause grievous bodily harm at the time of the first arraignment, the applicant was re-arraigned, and a plea of guilty entered by him to that count, before any witnesses were called to give evidence. That course of action saved the community the cost of a trial, and saved the witnesses the trauma of giving evidence. This was particularly significant for the victim, who had sustained significant psychological injuries as a consequence of the incident.

[46] Against that background, the applicant was entitled to the benefit of that plea, even if it was late. The fixing of a parole eligibility date at a point considerably higher than the one-third mark, and closer to the usual half-way mark, did not reflect the significance of that plea, particularly in the context of an offender with no prior criminal history and an otherwise exemplary background. The failure to properly reflect these factors, in circumstances where the sentencing judge gave no explanation as to why the applicant should not receive the benefit of the co-operation shown by his plea of guilty, was an error and made the sentence as a whole manifestly excessive. It is therefore necessary to re-sentence the applicant.

[47] The comparable cases to which I have referred, and the seriousness of the offending described above warrant a sentence of seven years imprisonment. However, the factors of the applicant's co-operation following the offence; the saving of time, cost and anguish by his plea of guilty, albeit late; and his previous good character favour the setting of a parole eligibility date at the one-third mark.

Orders

[48] I would order:

1. The applicant's Notice of Abandonment filed 13 September 2014 be set aside.
2. The applicant's application for leave to appeal against his sentence, filed 29 August 2014, be reinstated as of and from that date.
3. The application for leave to appeal the sentence be granted.
4. The appeal be allowed, to the limited extent that the applicant's parole eligibility date be fixed at 1 February 2016 instead of 1 October 2016.
5. The notice of application for an extension of time within which to appeal, and the application for leave to appeal against sentence, both filed on 22 January 2015, be struck out.