SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bennett* [2016] QCA 31
PARTIES:	**R** **v** **BENNETT, Mitchell Leo** (applicant)
FILE NO/S:	CA No 191 of 2015 DC No 372 of 2014 DC No 470 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport – Date of Sentence: 6 August 2015
DELIVERED ON:	23 February 2016
DELIVERED AT:	Brisbane
HEARING DATE:	9 February 2016
JUDGES:	Margaret McMurdo P and Morrison JA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal 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 two indictable offences, attempted armed robbery with personal violence and unlawful grievous bodily harm – where the applicant also pleaded guilty to 15 summary charges – where the summary charges included stealing, fraud, receiving tainted property and drug-related offences – where the complainant was a 55 year old woman – where the applicant struck the complainant on the back of her head repeatedly with a length of pipe – where the complainant suffered extensive injuries, including a compound and comminuted fracture to her left ulna – where the applicant admitted to having taken seven unprescribed Xanax tablets and also drunk a bottle of Jack Daniels on the night of the indictable offences – where the applicant had an extensive criminal history with several other offences involving violence and property – where the applicant acknowledged the link between his criminal offending and his substance abuse – where the applicant was sentenced to an effective sentence of eight years imprisonment with serious

violent offence declarations for the two indictable offences – whether the sentence imposed was manifestly excessive

Criminal Code (Qld), s 320, s 412(3)

R v Bojovic [2000] 2 Qd R 183; [1999] QCA 206, cited
R v Gadd [2013] QCA 242, cited

COUNSEL: H C Fong for the applicant
S J Farnden for the respondent

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

[1] **MARGARET McMURDO P:** The applicant pleaded guilty on 6 August 2015 to two indictable offences: attempted armed robbery with personal violence and unlawful grievous bodily harm. He also pleaded guilty to summary charges: five counts of stealing, four counts of fraud, receiving tainted property, and four drug-related offences. He was sentenced on each indictable offence to eight years imprisonment with each declared a serious violent offence. He was also sentenced to 12 months concurrent imprisonment on each summary offence. A period of 565 days was declared as time served under the sentence. He has applied for leave to appeal against sentence, contending that an eight year sentence combined with serious violent offence declarations on the indictable offences is manifestly excessive.

Antecedents

[2] The applicant was 28 at the time of the commission of the indictable offences and 30 at sentence. Although he had no convictions for like offences, he had a lengthy and relevant criminal history. In 2002 when just 15 years old he was placed on two years probation and ordered to pay $100 compensation for two counts of assault occasioning bodily harm. Numerous Queensland convictions for breaches of community based orders, street offences and property offences followed. He was initially sentenced to non-custodial sentences and then short periods of imprisonment. He was convicted of further property offences in New South Wales, and, of more concern, at the age of 19 he was convicted of assault occasioning bodily harm and sentenced to eight months imprisonment to serve two months. His longest previous sentence of imprisonment was in 2005: 16 months imprisonment for entering a building/land with intent to commit an indictable offence.

Circumstances of the offending

[3] The circumstances of the indictable offences with which this application is concerned were serious. The 55 year old complainant owned a small seafood takeaway business in Palm Beach. The applicant's partner worked there on a casual basis. She confided in the complainant about their financial troubles. In September 2013 the complainant conducted four or five training sessions with the applicant with a view to employing him but she realised it was not feasible. In November 2013 she lent his partner $500 to assist him with transport for work. The applicant would often pick up his partner from work and they had both been regular customers before the applicant's partner was employed there. On the evening before the offending the applicant arrived to collect his partner at about 8.50 pm. He spoke with the complainant about another

robbery and asked if her store had ever been robbed. She told him that other stores in the vicinity had been robbed but that it was more difficult for someone to rob her store because of its location.

[4] The following night, Sunday 12 January 2014, the applicant's partner was working with the complainant. Shortly before 9.00 pm the complainant, who was at the back of the shop, saw someone enter the back door at speed. She did not recognise this man who was dressed in black and immediately struck her to the back of her head four to six times with something. She could not see the weapon but witnesses described it as a metal pole or rod about a metre long with the thickness of a golf club. He demanded money each time he struck her, and became increasingly angry with each demand. He was wearing a dark "hoodie" jumper and a balaclava or t-shirt with holes cut out on his face. She ran to the front of the store and the applicant pursued her. He continued to hit her with the weapon on her upper back and shoulders. When she reached the cash register she had nowhere to run and turned to face him. He hit her to her face and head. She fell down onto milk crates but he continued to assault her with the weapon. She held up her arm to protect her face; her arm was badly broken in the attack. Witnesses from nearby small businesses heard her scream and came to her assistance. They described the assailant as holding the weapon with two hands, raising it above his head, and persistently striking the complainant. The applicant's partner who was present during the offending made no attempt to assist him or to communicate with him.

[5] Once two men from a neighbouring restaurant entered the store, the applicant ran off without any money. Witnesses assisted the complainant until the ambulance and police arrived. At the rear of the store police found a bicycle belonging to the applicant and his partner, a carry bag containing a machete, clothing including a black t-shirt with cut out eye and mouth holes, and a length of pipe.

[6] The complainant was treated at hospital for multiple bruises and a full thickness laceration to her left ear, penetrating through to the cartilage, which required surgery to clean and suture. She also suffered a compound and comminuted fracture to her left ulna. Her skin was pierced by bone fragments and the bone had splintered into several pieces. Without surgery the fracture carried a high risk of infection and the likely non-union of the bones would have resulted in permanent deformity and disability. The complainant underwent an open reduction and fixation surgery to repair the fracture which included the insertion of a metal plate and seven screws. She was treated with antibiotics, pain relief and a tetanus booster. She suffered benign paroxysmal positional vertigo, a disorder of the inner ear causing dizziness, for which she was given anti-nausea medication. She was not discharged from hospital until more than a week later.

[7] The applicant's partner told police that he had been recording and re-watching news and newspaper reports about the attack on the complainant and laughing about reports that the complainant said her assailant "should burn in hell." She allowed police to search their property.

[8] On 20 January the applicant participated in his first interview with police about the matter. He said he had taken seven unprescribed Xanax tablets after smoking cannabis during the day and blacked out until about midnight. He made no admissions. The following day he participated in a second interview and admitted lying in the first interview. He told them that he committed the offence. Whilst he maintained that he

had taken Xanax tablets, he added that he had also drunk a bottle of Jack Daniels. He borrowed a neighbour's bike and cycled the nine minutes to the store. He rode around for a time because he could not bring himself to commit the offence. He denied going to the store intending to rob the complainant. He could not remember wearing a balaclava or mask and claimed to have grabbed the pole used as a weapon from the garden bed. He asserted that he swung it only twice, and the second blow was to defend himself from the complainant who was attacking him with a weapon. He said she was probably taller than him. He claimed not to recall any other details. He told police he had never been diagnosed with mental health issues but sometimes heard voices and he needed help with "lots of stuff." He denied needing money and could offer no explanation for committing the offences.

[9] The summary offences were as follows. In 2010 he stole a washing machine valued at $600 from underneath a unit complex, used it as security to obtain a personal loan of $120 from a pawnbroker and later collected it from the pawnbroker, again falsely claiming it was his. In 2012 he rented a Playstation 3 controller and video game which he later pawned to obtain a personal loan of $16. He rented a LG wireless home theatre system which he later pawned for $100. He also rented a Sony Playstation 3 which he later pawned for $120. Police questioned him about these matters on 26 June 2013.

[10] On 15 August 2013 he stole a purse containing various cards and $160 cash from a 72 year old woman at a Coles supermarket checkout. Police located some of these items in the execution of the search warrant of his premises on 18 January 2014. He claimed to have obtained the bag from St Vincent de Paul but Coles' CCTV footage showed him stealing the purse.

[11] Police also found a Queensland driver's license which was not in his name and which had been stolen, and about 22 cannabis plants. One was growing in hydroponic equipment. Relatively small quantities of cannabis leaf, seeds and stalks were also found, together with a coffee grinder with green leafy residue, a homemade water pipe smelling of burnt cannabis and a set of scales. He admitted the plants and equipment were his.

The sentence proceeding

[12] The prosecutor at sentence emphasised that the applicant was on bail when he committed the indictable offences; he had failed to appear on the stealing charge relating to the theft of the purse so that a bench warrant had been issued for his arrest.[1] His criminal history showed that he had been subject to court orders for almost the entirety of his long criminal history, but still he continued to offend. He was a recidivist who had committed offences involving both violence and property; he had failed to rehabilitate over the past 15 years. His plea of guilty was an early one. His offending had now seriously escalated. He used the weapon with great force, inflicting an extreme injury to the complainant's arm. This was a particularly serious example of a protracted act of violence.

[13] The victim impact statement demonstrated the lasting detrimental effect of the offending on the complainant who was present in court.[2] Since the offending she had been unable to sleep at night. Her arm was still sore and the appearance of her ear had changed. She had trouble moving her neck and was in constant pain in her right shoulder and lower back. She could not sit or stand for long. She did not know what

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1 T1-10, 27-30.
2 Exhibit 8, AB 95.

employment she would be able to find and had suffered financial loss. She had been unable to work since the attack and survived on a modest Centrelink payment. She was not happy about receiving welfare but it was her only option. Her treating chiropractor advised that she should obtain trauma counselling because she was so tense. She wanted the applicant to receive a lengthy term of imprisonment so that the community was protected from this very violent young man with a drug issue.

[14] The prosecutor submitted that the offending constituted a very serious example of both grievous bodily harm and attempted robbery with actual violence and warranted declarations that those offences were serious violent offences.[3] The prosecutor handed up some material to the judge which was sealed.[4] This Court has perused that material. It is of very short compass and the parties agree that its only relevance is to demonstrate that the applicant pleaded guilty at an early stage and, after his initial false account, appeared to co-operate with the authorities.

[15] Defence counsel at sentence handed up a psychiatric report from Dr Jonathan Mann who examined the applicant in June 2015 and reviewed the relevant material relating to the offending.[5] He considered the applicant suffered from a panic disorder within the anxiety spectrum disorder. This would have been exacerbated by his 19 months in pre-sentence custody. He experienced mild paranoia and was worried about his sentencing hearing. He had abused alcohol and cannabis for most of his life and this was probably as a form of self-medication for his panic disorder. He suffered from alcohol and cannabis dependence at various times throughout his adult life and had received very little treatment or support. It was encouraging that he had now undertaken appropriate courses whilst in custody to help him gain control over his substance abuse. He did not suffer from post-traumatic stress disorder or from any intellectual or learning disability and there was no evidence of an acquired brain injury. Since his arrest he had engaged fully with the rehabilitation programs available and had refocussed his life on achieving positive goals. He was committed to addressing his substance abuse and accepted that alcohol and cannabis had contributed towards his aggressive behaviour. If he is successful in abstaining from alcohol and cannabis completely in the future, he would represent a significantly reduced risk to the community. He appeared committed to avoiding future disruptive or negative influences and to developing a more pro-social network. He also expressed regret and remorse at the suffering he caused to the complainant.

[16] His counsel emphasised the applicant's cannabis and alcohol abuse and its relationship to his offending. She tendered a large number of certificates evidencing the many rehabilitation courses he had completed since he was incarcerated.[6] He was employed in the prison as a cleaner. He hoped when released to obtain formal qualifications as a chef. He now had insight into his addictions and was committed to addressing his substance abuse which he understood contributed to his aggressive behaviour.[7] Counsel tendered a letter from the applicant to the judge in which the applicant accepted his responsibility for the offending and apologised to the court, the police and his victims. He claimed that he was essentially a good man who had an all-consuming addiction to drugs. He was now committed to leading a drug-free lifestyle and wanted to address his substance abuse and reintegrate into the community through

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3 T1-15.
4 Exhibit 11. See T1-18.
5 Exhibit 12, AB 102-108.
6 Exhibit 13, AB 109-115.
7 T1-21.

community-based rehabilitation programs, court ordered parole or a suspended sentence. He emphasised his remorse and his desire to apologise to society for his crimes.[8] Defence counsel asked the judge to impose a head sentence in the order of six to seven years imprisonment with a recommendation for parole eligibility after one third.[9]

[17] In sentencing the applicant the judge noted that the indictable offences were very serious instances of that type of offending. The applicant was on bail and the subject of a bench warrant at the time. He also had to be sentenced for 14 summary offences. His Honour referred to the fact that the applicant was a mature man with an extensive criminal history. He was a moderate level recidivist who had failed to rehabilitate over 15 years. He had pleaded guilty at an early time indicating remorse and assistance in the administration of justice. He had expressed remorse to Dr Mann and to the judge and apologised to his victim and others. Despite his efforts to rehabilitate in prison, he appreciated that he was at risk of relapsing into substance abuse and re-offending when released. His recidivist criminal history made his rehabilitation prospects "somewhat pessimistic."[10] This was an appropriate case in which to impose a sentence on each indictable offence to reflect the totality of the applicant's offending. The offences involved gratuitous violence with a weapon in a persistent serious violent aggressive attack. The applicant only stopped his attack when witnesses intervened. The complainant was extremely fortunate not to have been more seriously injured. His Honour referred to the victim impact statement and her extensive injuries. The applicant acted alone. There was a degree of planning. The effect of substances may explain but cannot excuse the offending. These circumstances warranted the making of a serious violent offender declaration. The judge recommended that when released on parole the applicant participate in substance abuse education programs and directed that Dr Mann's report be provided to the Department of Corrective Services.

The applicant's contentions

[18] The applicant's counsel in his submissions to this Court conceded that the offending was serious and warranted a heavy term of imprisonment. He contended that comparable cases demonstrated the effective sentence for all the offending of eight years imprisonment with serious offence declarations was manifestly excessive. He initially contended in his written submissions that there should be no serious violence offence declarations and that sentences of seven years imprisonment should be substituted. But in his oral submissions he conceded that, in light of the respondent's reliance on *R v Gadd*,[11] declarations were open. He maintained his submission that sentences of seven years imprisonment should be substituted for the sentences of eight years imprisonment.

Conclusion

[19] In determining whether the sentence for the totality of the applicant's latest offending was manifestly excessive this Court must consider whether in light of the declaration, it is manifestly excessive for him to have to serve six years of imprisonment before parole eligibility: see *R v Bojovic*.[12]

[20] The primary judge rightly identified the aspects of this offending which made them serious examples of offences of this kind, and that the applicant was a mature

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8 Exhibit 14, AB 117-118.
9 T1-23.
10 AB 65.
11 [2013] QCA 242.
12 [2000] 2 Qd R 183, [30] – [33].

recidivist offender with a lengthy criminal history, including a concerning prior conviction for violence when he was 19. Unsurprisingly, the terrifying attack on the complainant has left her with lasting physical and emotional injuries. In the applicant's favour was his timely guilty plea, co-operation with the authorities, and that he has made prolonged and apparently genuine attempts since his incarceration to rehabilitate. His statements to Dr Mann and his letter to the judge suggest that he has real insight into the impact of substance abuse on his offending, is motivated to change, and is genuinely remorseful for his past criminal actions. As Dr Mann states, if, when he is released from prison, he successfully refrains from substance abuse he is much less likely to re-offend. But as the primary judge identified, there is no reason to be optimistic that the applicant will succeed in escaping his substance abuse, given his constant lapses with resulting offending over the past 15 years.

[21] In *Gadd* the applicant pleaded guilty to burglary by breaking with violence while armed in company; unlawful wounding with intent to maim; armed robbery in company with wounding and assault occasioning bodily harm while armed in company. He was sentenced to eight years imprisonment with a serious violent offence declaration and applied for leave to appeal, contending his sentence was manifestly excessive. Gadd and an unidentified person broke into the complainants' home whilst they were absent, looking for money and drugs. The offenders disguised themselves with clothing over their heads. Gadd was armed with a loaded gun. When the complainants returned, the male complainant was pushed to the floor and the female complainant was threatened with a Jim Beam bottle. Gadd demanded "pot" and money and shot the male complainant in the leg from a distance of about 12 inches. Luckily the injury was not serious enough to amount to grievous bodily harm. The male complainant gave them some marijuana, which he later claimed was valued at $6,000. Gadd demanded more and told the male complainant to open a safe in the bedroom. During a struggle, the male complainant suffered injuries to his head. He broke free and called police. Gadd and his associate drove off at speed in a hire car. Gadd was 43 years old with a serious criminal history including a prior conviction for break enter and steal and another for grievous bodily harm arising out of a scuffle in a drug dispute during which Gadd was stabbed in the stomach before he shot that complainant in the chest. This Court determined that the effective eight year sentence for this offending, including the serious violent offence declaration, was not manifestly excessive.

[22] It is true that *Gadd* is not factually identical to this case but nor were any of the cases placed before the primary judge or this Court. Gadd's offending was more serious than the applicant's in that a loaded firearm was discharged and Gadd was in company. On the other hand, the actual injuries inflicted on the complainant in this case were more serious, as reflected in the charge of grievous bodily harm, and this applicant fell to be sentenced on an additional 14 not insignificant unrelated summary offences.

[23] The maximum penalty for the offence of attempted robbery whilst armed with personal violence is life imprisonment.[13] The maximum penalty for the offence of unlawful grievous bodily harm is 14 years imprisonment.[14] This unquestionably violent offending was a serious example of both offences. It involved the infliction of a high level of violence at night, on an older woman in an attempt to steal her money over a prolonged period, even after she had fallen down. The complainant's past kindness to him and his partner made his offending particularly despicable. In making the

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13 *Criminal Code* (Qld) s 412(3).

14 *Criminal Code* (Qld) s 320.

declaration that the offences were serious violent offences, the primary judge acted in a way which was open to him and in accordance with the principles explained in *R v McDougall and Collas*.[15] The predominant sentencing considerations were personal and general deterrence and community protection, tempered by rehabilitation prospects and recognition of the early guilty pleas. A weighing up of these competing considerations could have resulted in a differently structured sentence with a considerably earlier parole eligibility date. But when consideration is given to *Gadd*, it is clear that the applicant cannot demonstrate that the admittedly high sentence imposed here was manifestly excessive, even with the serious violence offence declarations, and after a timely guilty plea. Had the applicant been convicted after a trial, his sentence would have been considerably higher. The community must hope that the applicant is genuine in his desire to now refrain from substance abuse and to lead a law abiding life once released from prison. Dr Mann's report and the applicant's letter to the primary judge suggest that he has genuine remorse and insight into his past failings and its effect on his victims and the broader community. As the primary judge appeared to recognise, it presently appears he will be a promising candidate for parole once he becomes eligible. If so, he will need sound supervision and appropriate support to ensure he does not fall back into substance abuse, the primary cause of his offending. Whilst I wish him well in his rehabilitative efforts, for the reasons I have given his application for leave to appeal must be refused.

[24] **MORRISON JA:** I have read the reasons of Margaret McMurdo P and agree with those reasons and the order her Honour proposes.

[25] **DAUBNEY J:** I agree with the reasons of McMurdo P and with the proposed order.

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15 [2007] 2 Qd R 87, [19]–[21].