SUPREME COURT OF QUEENSLAND

CITATION:	*R v Fall* [2016] QCA 327
PARTIES:	**R** **v** **FALL, Samuel Jacob** (applicant)
FILE NOS:	CA No 127 of 2016 DC No 558 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 5 May 2016
DELIVERED ON:	9 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	20 October 2016
JUDGES:	Fraser and Philippides JJA and Jackson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal against sentence is granted.** **2. The appeal is allowed.** **3. For the offence of doing grievous bodily harm (count 1) the applicant is sentenced to a period of imprisonment of two years six months suspended after eight months with an operational period of three years.** **4. For the offence of assault occasioning bodily harm in company (count 2) the applicant is sentenced to a period of imprisonment of two years, suspended after eight months, with an operational period of three years.** **5. The sentences on counts 1 and 2 are 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 and his co-offenders were involved in a fight – where the applicant was 19 at the time of the incident, had no relevant criminal history, was unlikely to reoffend and was remorseful – where the applicant was sentenced for doing grievous bodily harm to a period of three years' imprisonment, suspended after 12 months, with an operational period of three

years and six months – where the applicant was sentenced for assault occasioning bodily harm in company for a period of two years' imprisonment, suspended after 12 months, with an operational period of three years and six months, to be served concurrently – where the applicant would serve only two months less in custody prior to suspension or parole than one of his co-offenders who was the principal offender and inflicted the grievous bodily harm, was 21 at the time of the incident and had previous convictions involving dishonesty and violence – whether the sentences were manifestly excessive – whether the sentences engaged the parity principle

Penalties and Sentences Act 1992 (Qld), s 9

Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, cited
R v Amituanai (1995) 78 A Crim 588; [1995] QCA 80, considered
R v Dobinson [2006] QCA 357, distinguished
R v Fisher (2008) 189 A Crim R 16; [2008] QCA 307, considered
R v Floyd [2014] 1 Qd R 348; [2013] QCA 74, cited
R v OS [2016] QCA 278, cited

COUNSEL: M J Byrne QC for the applicant
S J Farnden for the respondent

SOLICITORS: Peter Shields Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Jackson J and the orders proposed by his Honour.

[2] **PHILIPPIDES JA:** I agree with the reasons for judgment of Jackson J and the orders proposed by his Honour.

[3] **JACKSON J:** On 5 May 2016, the applicant was convicted and sentenced for offences of doing grievous bodily harm and assault occasioning bodily harm in company. The sentence for the offence of doing grievous bodily harm was a period of three years' imprisonment, suspended after 12 months, with an operational period of three years and six months. The sentence for the offence of assault occasioning bodily harm in company was a period of two years' imprisonment, suspended after 12 months, with an operational period of three years and six months. The applicant applies for leave to appeal against both sentences.

[4] Both offences were committed on 28 December 2014 after 10.30 pm outside Limes Hotel in Fortitude Valley ("the hotel"). Earlier, there was a physical altercation inside the hotel between some friends of the complainants and a group involving the applicant and his co-offenders. The complainants had pulled their friends away from the incident.

[5] The complainants as well as the applicant and his co-offenders were evicted from the hotel. The complainants crossed the road and sat in an alcove under a building opposite the hotel. The applicant and three co-offenders approached the complainants. They recognised the complainants as having been involved in the hotel incident. The complainants moved to walk away saying they didn't want any trouble. One of the applicant's co-offenders, Mr Riki, walked up to one of the complainants, Mr Ekin, and punched him with closed fist to the right cheek. Ekin did not retaliate.

[6] The applicant moved towards the two complainants aggressively, yelling and hitting his hands together. The complainants attempted to run away. The applicant and his co-offenders chased them and a brawl ensued.

[7] Ekin was punched multiple times by one group of the co-offenders and knocked to the ground. He curled up to try to protect himself. He was kicked three or four times to the head and punched multiple times to the body while on the ground.

[8] Meanwhile, another complainant, Mr Milianis, was being punched by another group of the co-offenders, including the applicant.

[9] Ekin managed to get back to his feet and he and Milianis backed away onto Constance Street.

[10] The applicant and his co-offenders again approached them. Riki punched Ekin, knocking him to the ground unconscious. Milianis tackled Riki to the ground.

[11] The applicant and co-offenders then grabbed Milianis and started to punch him. The applicant threw a number of punches while Milianis was standing. Milianis tried to run away and the group ran after him. One of them grabbed Milianis and threw him to the ground. While he was on the ground the applicant and co-offenders kicked him a number of times. A co-offender punched Milianis numerous times to the head. At some point Milianis bit into his own tongue.

[12] Meanwhile, Ekin was still lying on the ground. Riki approached him again and stomped on his head.

[13] The applicant and some of the co-offenders walked and stood a few metres away. One of them ran back and punched Milianis another three or four times in the head.

[14] Security from the hotel intervened. The applicant and co-offenders fled the scene on foot.

[15] The episode lasted for approximately three minutes.

[16] Ekin suffered a number of injuries about his head, including displaced fractures through the jaw of the right mandible and at the parasymphysis of the left mandible. He had several damaged teeth and lacerations to the tongue and lower lip. He had a laceration at the midline of the forehead, shoulder abrasions and pain.

[17] Ekin was surgically treated by an open reduction and internal fixation of the displaced fractures including the insertion of plates and screws. Two teeth were surgically removed and another repositioned. Ten stitches were applied to the forehead laceration and three to four to his lip.

[18] As result of his injuries, Ekin has received and will continue to receive extensive dental treatment which is expensive.

[19] Ekin's victim impact statement refers to his ongoing and future treatment and his experiences of nightmares, sleep deprivation, anxiety and loss of confidence. He feels he will never be able to put the incident behind him and that it has changed his life forever.

[20] Milianis received a partial thickness laceration to the superior surface of his tongue. He also suffered abrasions to his knees and elbows and swelling to around his face and head. The lacerations were treated conservatively and the abrasions were washed and dressed.

[21] Milianis was unable to eat solid food for a couple of weeks without pain and lost the benefit of the holidays he was on at the time of the assault. He now avoids going out to Fortitude Valley unless accompanied by several friends because he is "scared of getting bashed".

[22] At sentence, it was admitted that the applicant and his group had the common unlawful purpose of assaulting the two complainants and all blows and injuries were occasioned as a probable consequence of that purpose. It was also admitted that the applicant assisted and encouraged others who struck Ekin. It was further admitted that he either struck the blows that caused the injuries to Milianis or assisted and encouraged others who struck those blows. Accordingly, the applicant was responsible for both the offence of dong grievous bodily harm to Ekin and the offence of assault occasioning bodily harm to Milianis.[1]

[23] At the time of the offences the applicant was a 19 year old member of the Australian Defence Force ("ADF") as a soldier in the 1st Brigade of the 7th Battalion of the Australian Army. He was on leave in Brisbane and was out with a group of old school friends.

[24] He had no relevant previous criminal history. He came from a good family background, had been educated to Grade 12 and decided to go into the Army.

[25] His Company Commander, Platoon Commander and Acting Platoon Sergeant gave strong references. The latter described him as "well liked" and someone "who constantly strives to do the best he can while bringing out the best from those he works with". He described the applicant as having a "promising career" with the ADF. His Platoon Commander had recommended him for promotion. All of that was lost by his conviction, imprisonment and consequent discharge from the Army. It is noticeable that each of the applicant's Company Commander, Platoon Commander and Acting Platoon Sargent described the applicant's genuine remorse and acceptance of responsibility for his actions.

[26] Consistently with those opinions, the applicant attended four psychological sessions through the Mental Health and Psychology Service at the ADF Health Centre in South Australia, where he was stationed. The sessions were calculated to assist the applicant to develop skills to manage his emotions and impulse drives, including anger and risk-taking behaviours. As well, the applicant attended drug and alcohol counselling at the same health centre a number of times. Reports from both services described the applicant as engaging well and one of them stated that the applicant appeared to be "deeply aware" of the effect the incident may have on his life, career and family.

[27] The applicant's plea in mitigation was supported by further references from close family members, teachers from the secondary school he attended and a family friend who is a sporting coach. They recounted the unblemished nature of his life until the

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1 See *Criminal Code* (Qld), ss 7 and 8.

offences in question and the embarrassment and remorse he feels, as well as the concern he has expressed for the complainants and their families. That was supplemented by an apology.

[28] This material supports the conclusion that this incident was out of character. The applicant described it as an episode when "misguided male bravado" got the better of him.

[29] A report from Ross Chapman, a registered psychologist, was obtained for the purpose of the sentence. He opined that there was no indication of any prevailing psychological condition or pathology in the applicant's case. However his "personality traits display a need to put the situational requirements of his social group ahead of his own needs and, at times, effective [judgement]." He concluded that the applicant was "highly unlikely to [reoffend] by behaving in a violent manner in the future."

[30] The applicant's co-offender, Riki, was sentenced by the same sentencing judge some months before the applicant. As outlined above, Riki was the chief actor in inflicting blows and kicks upon Ekin who was most seriously injured. Riki was 21 at the time of the relevant offences.

[31] He had a prior criminal history, including a prior sentence for an offence of assault occasioning bodily harm committed on 1 January 2012. On 9 September 2013, the District Court ordered that no conviction be recorded for that offence and made a community service order of 120 hours.

[32] For the present offences, the learned judge sentenced Riki for the offence of doing grievous bodily harm to a period of four years' imprisonment, suspended after 14 months, with an operational period of five years. For the offence of assault occasioning bodily harm, he was sentenced to a period of three years' imprisonment with a parole release date fixed at 14 months.

[33] The sentencing remarks identified that Riki's conviction for the earlier offence of assault occasioning bodily harm was not as serious as the present offences, but showed that the present offences were not an isolated incident. Her Honour accepted that Riki was otherwise a "sober … decent and likeable fellow" and a "good father" to his son. However, the protection of the community demanded a sentence of deterrence. As well, Riki's own record identified a need to deter him personally from further violence.

[34] In sentencing the applicant, her Honour referred to Riki's sentence and its relationship to the applicant's sentence as follows:

> "Your criminality is less serious than that of [Riki] and your antecedents more favourable, but the margin is not substantial. You did not strike the first blow. That is true, but you escalated the situation after that punch by [Riki] by encouraging him to continue. I accept the submission that you were a major contributor to both offences … You also actively assisted [Riki's] assault – a further assault by immobilising Mr [Milianis] who had tried to prevent it. You were also the principal offender, of course, in the assault of Mr [Milianis]. You kicked and punched him, a helpless man on the ground."

[35] The learned judge accurately summarised the circumstances, observed that the applicant was young with no previous history, that there had been a timely or early plea of guilty and that there were reasonable prospects of rehabilitation. Her Honour then remarked:

> "Despite the weighty matters in your favour, the nature and gravity of the offences make general deterrence very important. The Court is required to be more lenient with youthful offenders who have good prospects, but that consideration does not outweigh the need for just punishment and clear condemnation of very serious violence."

[36] Her Honour continued later:

> "The cases cited demonstrate a spectrum of sentences. Each is referable to its own facts. Having regard to the sentence [of Riki] and your role in the offences as well as the mitigation, the sentence will be one of three years' imprisonment suspended after 12 months."

[37] The grounds of the application are that the sentences imposed for both offences are manifestly excessive or give rise to a justifiable sense of grievance in relation to the sentence imposed on Riki, the applicant's co-accused.

[38] The principal contention is that the consideration of parity should lead this court to interfere with the sentences. The applicant's counsel submits that Riki was two years older, had previous convictions involving dishonesty and violence, was the person who started the violence and inflicted the grievous bodily harm (including by stomping on Ekin's head while he was unconscious) and was a person whose criminal history identified a need for personal deterrence.

[39] Having regard to those differences, the applicant's counsel submits that the difference of only two months in the periods to be actually served in custody prior to suspension or parole engages the parity principle by reference to the statements made in *Postiglione v The Queen*[2] and *R v Floyd*.[3] A recent judgment on the application of the principle in this court is *R v OS*.[4]

[40] In support of the ground that the sentence was in any event manifestly excessive, the applicant's counsel refers to *R v Dobinson*.[5] Dobinson was sentenced to three years' imprisonment suspended after 12 months for an offence of doing grievous bodily harm and (to lesser, concurrent terms) for two offences (on a subsequent occasion) of performing negligent acts causing harm and drink-driving. Further, after the offences for which he was sentenced were committed but before sentence, Dobinson was convicted for a common assault committed whilst on bail.

[41] Dobinson's offence of doing grievous bodily harm was committed by him and two co-offenders. The complainant had been seriously injured by kicks to the body that caused serious damage to his spleen requiring five weeks hospitalisation. However, Dobinson was sentenced on the basis that he had not done the kicking.

[42] Having regard to the prior convictions and later offences, Dobinson's offence of doing grievous bodily harm was not a one-off or out of character action. The applicant's counsel submits, rightly, that Dobinson is a more serious case than the applicant's offending. The respondent submits that Dobinson was comparable, but in my view, it was clearly more serious both because of the extent of the injuries inflicted on the complainant and because of Dobinson's prior and subsequent offences for conduct of a similar or comparable kind.

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2 (1997) 189 CLR 295, 301-302.
3 [2014] 1 Qd R 348, [33].
4 [2016] QCA 278, [51]-[56].
5 [2006] QCA 357.

[43] The respondent also submits that *R v Amituanai*[6] is comparable to the current sentence. Amituanai kicked the complainant to the head a single time using a martial arts kick, causing a very serious brain injury. He was 26 years old. He was sentenced to three years with a recommendation for early release after serving nine months. *Amituanai* was also a more serious case than the present, because of the extent of the injuries sustained by the complainant.

[44] The judgments in *Amituanai*[7] make it clear that in cases of this kind the extent of the injury sustained is likely to have a significant effect on penalty, even though there may not be a great deal to distinguish between the criminality of the offenders in terms of the acts or omissions that caused that injury. The respondent's submissions failed to acknowledge this potentially important factor, which is accounted for by the sentencing concept or principle of vindication,[8] in treating other cases as comparable.

[45] Another of the cases relied on by the respondent is *R v Fisher*.[9] Fisher was the principal actor and one of four co-offenders involved in an assault on a complainant who sustained a number of fractures to the face from being kicked in the head by Fisher numerous times while on the ground. There was a fracture of the left orbit, fracture of the nasal bone, fracture of the anterior wall of the left maxillary sinus, haematomas on the cheek and left maxillary sinus and a fracture of the 11th rib posterially. Surgery was undertaken to repair the fracture of the left orbital floor and relieve pressure on the left infra orbital nerve. The teeth were repaired but after one year the repair failed. The complainant was suffering from post-traumatic stress disorder and at the time of sentence was still suffering psychological symptoms. Fisher was 19 years old, had a prior criminal history of trespass, attempting to enter premises and unlawful use and possession of vehicles. He had shown no remorse, lied about his involvement in the incident and did not enter an early plea. The judge described him as having only slight prospects of rehabilitation. He was sentenced to four years' imprisonment with a parole eligibility date after he had served one third.

[46] While Fisher bears a superficial comparison with the present case, on analysis the complainant's injuries in that case were worse, but more importantly Fisher's individual role in the offending and personal circumstances (including criminal history) were much less favourable than those of the applicant.

[47] Ultimately, the applicant's counsel submits that the appropriate sentence for this offence of doing grievous bodily harm is a period of imprisonment of two years and six months suspended after six months. Necessarily, he submits that the sentence for the offence of assault occasioning bodily harm should be suspended also after six months.

[48] The respondent's counsel accurately submits that the learned sentencing judge took into account the "lesser criminality and more favourable antecedents" of the applicant in comparison to Riki by both reducing the head sentence and the amount of time in actual custody to be served. She submits that "despite the relatively small difference in terms of criminality [the applicant's] head sentence was significantly reduced" from the head sentence applying to Riki.

[49] Further, the respondent's counsel submits that the orders suspending both of the applicant's sentences without supervision acknowledge the applicant's "lack of criminal history and the material addressing his rehabilitation efforts", whereas on

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6 (1995) 78 A Crim 588.
7 *R v Amituanai* (1995) 78 A Crim R 588, 589 and 596-597.
8 See also s 9(3)(d) of the *Penalties and Sentences Act* 1992 (Qld).
9 (2008) 189 A Crim R 16.

the offence of assault occasioning bodily harm for Riki the learned sentencing judge fixed a parole release date of 14 months, leaving him one year and 10 months to be served on parole rather than with the benefit of a suspended sentence.

[50] In my view, having regard to the circumstances of the offences and the applicant's age and antecedents, the sentence imposed of three years suspended after 12 months was a heavy one.

[51] Drawing the threads together, in my view, there is substance in the applicant's submission that the two month difference in the time actually to be served as between the applicant and Riki does not properly reflect the more serious offending and less favourable antecedents in Riki's case. In my view, that is not really answered by the circumstance that for Riki's sentence on the conviction of assault occasioning bodily harm he will be supervised on parole months after his release at 14 months. Second, in my view, the sentence imposed on the applicant for the offence of doing grievous bodily harm appears to be heavy.

[52] The role of this court on an application for leave to appeal and appeal against sentence is restricted by the principles that apply to an appeal against a discretionary decision, although the court may interfere in an appropriate case involving co-offenders on the ground of parity or where the sentence is manifestly excessive. There is relatively wide-ranging recognition in the case law that the varied circumstances of offences and offenders in cases of this kind precludes the formulation of bands or ranges applicable to particular kinds of offending. This carries with it an acceptance of the extent of the discretion of a sentencing judge.

[53] Even so, I have come to the conclusion that the applicant's sentences are erroneous on the ground of parity as between the applicant's sentences and those imposed on Riki, having regard to the applicant's lesser role in the offence of doing grievous bodily harm, his lack of any relevant criminal history, his strong personal circumstances and low risk of reoffending. Accordingly, this court should exercise the sentencing discretion afresh, having regard primarily to the factors identified under s 9(3) of the *Penalties and Sentences Act* 1992 (Qld).

[54] I would set aside the sentences. For the offence of doing grievous bodily harm, I would sentence the applicant to a period of imprisonment of two years six months, suspended after eight months, with an operational period of three years. For the offence of assault occasioning bodily harm I would sentence the applicant to a period of imprisonment of two years, suspended after eight months, with an operational period of three years. The sentences should be served concurrently.

[55] Accordingly I would order that:

1. The application for leave to appeal against sentence is granted.
2. The appeal is allowed.
3. For the offence of doing grievous bodily harm (count 1) the applicant is sentenced to a period of imprisonment of two years six months suspended after eight months with an operational period of three years.
4. For the offence of assault occasioning bodily harm in company (count 2) the applicant is sentenced to a period of imprisonment of two years, suspended after eight months, with an operational period of three years.
5. The sentences on counts 1 and 2 are to be served concurrently.