SUPREME COURT OF QUEENSLAND

CITATION:	*R v Pitt* [2017] QCA 13
PARTIES:	**R** **v** **PITT, Edward Robert Lawrence** (applicant)
FILE NO/S:	CA No 215 of 2016 DC No 836 of 2016 DC No 862 of 2016 DC No 1387 of 2016 DC No 1394 of 2016 DC No 1395 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 15 July 2016
DELIVERED ON:	17 February 2017
DELIVERED AT:	Brisbane
HEARING DATE:	2 February 2017
JUDGES:	Holmes CJ and Philip McMurdo JA and Bond J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – where the offender pleaded guilty to a charge of doing grievous bodily harm upon his then partner – where the complainant suffered severe facial injuries and a severe traumatic brain injury – where the complainant suffered severely reduced quality of life as a result of the attack – where the offender was 18 years at the time of the offence – where the offender had some prospect of rehabilitation – where the offender was sentenced to six years' imprisonment for the offence – where the offence was declared to be a domestic violent offence – where the offence was declared to be a serious violent offence – whether the sentence was manifestly excessive, particularly by reason of the declaration that the offence was a serious violent offence *Penalties and Sentences Act* 1992 (Qld), s 161B(3)

R v Aplin [2014] QCA 332, considered
R v McDougall and Collas [2007] 2 Qd R 87; [2006] QCA 365, considered
R v Orchard [2005] QCA 141, cited
R v Richardson [2010] QCA 216, cited
R v Smith [2016] QCA 9, considered
R v Tahir; Ex parte Attorney-General (Qld) [2013] QCA 294, considered

COUNSEL: C Reid for the applicant
M R Byrne QC, with C Webber, for the respondent

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

[1] **HOLMES CJ:** I agree with the reasons of P McMurdo JA and the order he proposes.

[2] **PHILIP McMURDO JA:** On 15 July 2016 the applicant was sentenced to a term of six years' imprisonment for doing grievous bodily harm. There was a declaration that this was a serious violent offence.[1] The victim was the woman who was his then partner and the offence was declared to be also a domestic violent offence.[2] He had served nearly a year in pre-sentence custody. He applies for leave to appeal against that sentence on the ground that it is manifestly excessive. As that case was argued, it focused upon the serious violent offence declaration.

The facts of the offence

[3] The applicant pleaded guilty to this and other lesser and unrelated offences for which he was sentenced at the same hearing. On all charges the facts were agreed and set out in schedules which were tendered.

[4] The applicant believed that the complainant had been having sex with another man. In the early hours of 4 July 2015, the applicant assaulted the complainant in a locked bedroom. Soon afterwards, she was found on the bedroom floor, unconscious but breathing, by the applicant's mother who had heard yelling from the room. The complainant required urgent and extensive medical treatment. She was so badly injured that she did not provide a statement to police officers before her death, from an unrelated incident, in January 2016.

[5] After being found by the applicant's mother, the complainant was transported to the Redcliffe Hospital where several injuries were observed: a right side subdural haematoma, a midline shift of the brain (3 mm), a large haematoma to the left eye and cheek, blood in the mouth and a reduced level of consciousness. She was then transferred to the intensive care unit of the Royal Brisbane and Women's Hospital for ongoing specialist management. She remained in the intensive care unit until 23 July 2015. A tracheostomy was inserted on 17 July 2015 which was not

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1 under s 161B(3) of the *Penalties and Sentences Act* 1992 (Qld).
2 under s 12A of that Act.

removed until 5 August 2015. About a fortnight later she was discharged to the Brain Injury Rehabilitation Unit at the Princess Alexandra Hospital.

[6] Her treating specialist at the RBWH, in a report which was tendered to the sentencing judge, said that the complainant suffered a "severe traumatic brain injury [which] resulted in a prolonged reduced level of consciousness and slow recovery". He wrote that if the complainant had been left untreated, "her life was likely endangered from her reduced level of consciousness and aspiration pneumonia leading to respiratory compromise and likely death."

[7] The effect of this assault was also described by the complainant's mother in a statement which was tendered. She described the complainant's attempts to recover from her injuries including her attending rehabilitation "to learn how to walk and talk again". She said that although the complainant slowly improved, she did not fully recover and "never regained the ability to be independent again". She required 24 hour care which was provided by her mother and sisters. Without assistance she was unable to use public transport, shop or attend medical appointments or even to walk to a bathroom. The complainant became forgetful and her personality changed. She would become agitated when her speech could not be understood. And the complainant's condition caused considerable distress for her mother and siblings and their children.

[8] As the sentencing judge noted, it was unclear whether there had been a single blow or a series of blows by the applicant although the latter was more likely. But on any view the severity of the attack upon the complainant could be inferred from her very serious injuries.

The applicant's history and circumstances

[9] The applicant was aged 18 years at the time of this offence and 19 when sentenced. He had previous convictions for offences of violence. On 7 November 2014, he had pleaded guilty in the District Court to two offences: one of aggravated robbery, for which he was sentenced to two years' imprisonment suspended after serving 133 days, and another of attempted robbery for which he was imprisoned for those 133 days and ordered to be released on probation for a period of two years. Both of those offences involved street robberies or muggings with the use of actual violence. In the first case, the applicant grabbed a man's shirt and demanded money from him before punching him and throwing him to the ground. The offence was interrupted when a police car drove by. The other offence occurred at night in a street where the complainant was chased, punched and knocked unconscious by the applicant who then stole items from his bag. The sentencing judge in the present case described each of these offences as an aggravating factor. He ordered that the balance of the suspended term of imprisonment, amounting to one year and 232 days, be activated and served concurrently with the term the subject of this application. On the other offence, he revoked the probation order and resentenced the applicant to a term of 12 months' imprisonment to be served concurrently with the other terms.

[10] At the sentencing hearing, the applicant also pleaded guilty to offences of breaching bail, wilful damage to property, possession of utensils or pipes, failing to take reasonable care and precaution in respect of a syringe and entering premises with intent to commit an indictable offence. For some of those he received periods of one or two

months' (concurrent) imprisonment and for others he was convicted but not further punished.

The reasons of the sentencing judge

[11] The sentencing judge referred to the mitigating circumstances of the applicant's plea of guilty, his relative youth and the fact that he had been custody for almost a year. He noted that the applicant was an indigenous man who had grown up in difficult circumstances without good support from his parents, his education had been poor and he had not worked. He had used drugs and prior to this offence had been using ice. The judge noted that he had the support of his sister who had provided a reference and who had attended the hearing.

[12] His Honour then reasoned as follows:

> "Sadly, there's not much information before me that can assist me as to whether you've got prospects for rehabilitation. However, given your age, one hopes that there's a chance for you, ultimately, to be able to stay out of trouble when you get out of prison. I'd be of that mind. I'm treating the plea of guilty as a timely one and that is a factor in the sentence I need to impose.
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> I've been referred to a number of decisions of the Court of Appeal. I have to, in particularly, give regard to whether or not a serious violent offender declaration should be made. I'm come to the conclusion that one should be made in the circumstances of this case. I do that in spite of your age, but I conclude that the extreme violence which is indicated by the extent of brain damage suffered by the complainant, the severity of the consequences for her and the fact that grievous bodily harm is a serious offence, taken with your criminal history for violent offending – relatively recent criminal history for violent offending – leads me to conclude that the factor of your age and that there is some prospect for rehabilitation given that, can't outweigh those other matters.
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> In determining what sentence I should impose on the charge grievous bodily harm, which I also mention is in the context of domestic violence, I've had regard to the comparable sentences that have been referred to me. As often the case, there's no directly comparable sentence and, to some extent, your head sentence needs to be moderated because of your age and also because you have pleaded guilty, and given the declaration I'm indicated I'll be making, consideration needs to be given in the head sentence to that timely plea. Taking those matters into account but also weighing your criminal history, I intend to impose a head sentence of six years' imprisonment."

[13] The decisions of this court to which his Honour referred were *R v Tahir; Ex parte Attorney-General (Qld)*,[3] *R v Aplin*[4] and *R v Smith*.[5]

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3 [2013] QCA 294.
4 [2014] QCA 332.
5 [2016] QCA 9.

[14] In *Tahir*, a 21 year old offender who had been in a relationship with the victim struck her several times with an empty bottle before pulling a knife across her mouth, cutting through the full thickness of her mouth and severing some of her tongue. This attack was stopped only by the intervention of neighbours. He was originally sentenced to eight and a half years' imprisonment with a parole eligibility set at two years and 10 months. This court varied that to a term of seven years with a declaration of a serious violent offence.

[15] In *Aplin*, this court dismissed an application for leave to appeal a sentence of nine years' imprisonment with a declaration of a serious violent offence. The applicant was in his mid-20s and had a relevant criminal history. The complainant suffered severe head injuries which were at least as serious as those in the present case. That applicant pleaded guilty but only after his trial had commenced. His extensive criminal history included many offences in which he had assaulted at times his mother, his then girlfriend and other women, usually by punching and on one occasion by using a wooden table which broke during an attack on the victim.

[16] In *Smith* this court refused an application for leave to appeal a sentence of seven years with parole eligibility after 2.5 years. The offender had done grievous bodily harm to his de facto partner, repeatedly punching and kicking her. Her injuries were very serious but not as bad as those in the present case. That offender was aged 44 and had previous convictions for violence against women.

[17] *Tahir* and *Aplin* could be said to be yet more serious offences than the present case. *Smith* is more similar to the present case but its relevance is limited because it was not a sentence imposed by this court and it should not be supposed that a higher sentence could not have been imposed in that case.

Declaration of a serious violent offence

[18] The result of the declaration was to defer the applicant's eligibility for parole until he had served more than 57 months of his 72 month term. The discretion to make the declaration was conferred by s 161B(3) of the *Penalties and Sentences Act* 1992 (Qld). The Act does not specify the relevant considerations for the exercise of the discretion but they are established by decisions of this court, particularly *R v McDougall and Collas*.[6] In that case the Court (Jerrard, Keane and Holmes JJA) made several observations as to the exercise of this discretion including that "the considerations which may be taken into account in the exercise of the discretion are the same as those which may be taken into account in relation to other aspects of sentencing" and that "it will usually be necessary that declarations be reserved for the more serious offences that, by their nature, warrant them".[7]

The Court continued:[8]

> "The considerations which may lead a sentencing judge to conclude that there is good reason to postpone the date of eligibility for parole would usually be concerned with circumstances which aggravate the offence in a way which suggests that the protection of the public or adequate punishment requires a longer period in actual custody before eligibility for parole than would otherwise be required by the

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6 [2007] 2 Qd R 87; [2006] QCA 365.
7 [2007] 2 Qd R 87, 96 [19].
8 [2007] 2 Qd R 87, 97 [21].

> Act having regard to the term of imprisonment imposed. In that way, the exercise of the discretion will usually reflect an appreciation by the sentencing judge that the offence is a more than usually serious, or violent, example of the offence in question and, so, outside 'the norm' for that type of offence." (footnotes omitted)

[19] In the passage from the reasons of the sentencing judge which is set out above, his Honour identified the relevant considerations as what he described as the extreme violence by the applicant, the severity of the consequences for the complainant and the applicant's recent criminal history for violent offending, put against the mitigating factors of his age and "some prospect for rehabilitation". It was submitted for the applicant that the relevant considerations also included the fact that no weapon was used and that the injuries may have been caused by "one blow or a series of blows". But it was not submitted that his Honour overlooked those considerations: rather it was said that those matters, taken with the applicant's age, meant that this was not a case for a declaration.

[20] The applicant's submissions referred to the dicta of McPherson JA in *R v Orchard*[9] and White JA in *R v Richardson*[10] which questioned the relevance of an offender's criminal history for violent offending in the exercise of this discretion. But it was not submitted that this court should hold that the sentencing judge was wrong to refer to that as a relevant consideration. The majority of the court in *Orchard* apparently considered that the offender's criminal history was relevant in this respect.[11] Again the applicant's argument is not that there was an identifiable error in the exercise of the discretion, but rather that the existence of an error appears from a manifestly excessive sentence.

[21] The applicant's argument cannot be accepted. Although the sentencing judge might have imposed a sentence which did not include a declaration of a serious violent offence, it was open to him to make the declaration. The offence was more than usually serious because of the very serious injuries and disabilities resulting from them and what might be inferred as the severity of the applicant's attack upon her. The mitigating factors were relevant but not sufficient to preclude the making of the declaration and this sentence is not manifestly excessive.

Order

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

[23] **BOND J:** I agree with Justice McMurdo.

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9 [2005] QCA 141 [6]-[7].
10 [2010] QCA 216 [41]-[42].
11 [2005] QCA 141 [26] and [40].