SUPREME COURT OF QUEENSLAND

CITATION:	*R v Fahey, Solomon and AD* [2001] QCA 82
PARTIES:	**R** **v** **FAHEY, Joshua Joseph** (applicant) **SOLOMON, Derek James** (applicant) **AD** (applicant/appellant)
FILE NO/S:	CA No 295 of 2000 CA No 305 of 2000 CA No 345 of 2000 DC No 436 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against Sentence
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	9 March 2001
DELIVERED AT:	Brisbane
HEARING DATE:	6 February 2001
JUDGES:	McMurdo P, Thomas JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Crown's application for abridgement of time for making of application for prerogative order granted.** **2. Application to amend indictment granted; it is ordered that count one of Indictment No 436 of 2000 (Townsville Registry) be amended by inserting the word 'unlawfully' before the words "did grievous bodily harm to Stephen Brian Luke".** **3. Application for prerogative order dismissed.** **4. In Appeal No 295 of 2000: Appeal against sentence dismissed.** **5. In Appeal No 305 of 2000: Appeal against sentence dismissed.**

6. In Appeal No 345 of 2000: Leave to Appeal granted; appeal allowed; set aside the sentence of 6 years detention and instead substitute a sentence of four and one half years detention.

CATCHWORDS: CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – INTENT TO DO GRIEVOUS BODILY HARM – where appellants convicted of unlawfully doing grievous bodily harm with intent – indictment failing to include word 'unlawfully' – whether 'unlawfully' an ingredient of the offence

CRIMINAL LAW – APPEAL AND NEW TRIAL – principles upon which indictment may be amended after verdict – whether error led to any disadvantage or prejudice to the accused – whether 'material' to the merits of the case

CRIMINAL LAW – INFORMATION, INDICTMENT OR PRESENTMENT – AMENDMENT – TIME FOR AMENDMENT – where Court reassembled to consider Crown application for amendment – effect of s 572 *Criminal Code*

CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – JUVENILE OFFENDERS – APPEAL AGAINST SENTENCE – RELEVANT PRINCIPLES – whether sentences imposed manifestly excessive – where appellant A desisted from further attack – where injuries very serious

Judicial Review Act 1991 (Qld), s 43
Criminal Code, s 317, s 320, s 572
Juvenile Justice Act 1992 (Qld), s 8 , s 121(3), s 109(2)(e)

Go v The Queen (1990) 102 FLR 299, considered
Maher v The Queen (1987) 163 CLR 221, distinguished
R v Ayes [1984] 1 All ER 619, distinguished
R v Bird and Schipper (2000) 110 A Crim R 394, considered
R v Knutsen [1963] Qd R 157, 163, considered
R v McGoldrick [1995] 1 Qd R 533, distinguished
R v M (1996) 1 Qd R 553, considered
R v Rhodes & Kissling [1998] QCA 55; CA No 347, 349 and 386 of 1998, 5 March 1999, considered
R v Stevenson (1996) 60 A Crim R 259, considered
R v S [1999] QCA 499; CA No 323 of 1999,1 December 1999, considered

COUNSEL: K M McGinness for the applicant, Fahey
P Callaghan for the applicant, Solomon
A W Moynihan for the applicant/appellant, AD
N W Weston for the respondent

SOLICITORS: Legal Aid Queensland for the applicants/appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **PRESIDENT:** I agree with the reasons for judgment of Thomas JA and wish to add only this.

[2] The certified transcript in the Appeal Record Book recorded the associate as arraigning the applicants only with doing grievous bodily harm whilst the indictment actually charged doing grievous bodily harm with intent. The judges and counsel spent collectively many hours researching the legal consequences of the apparent error in the arraignment and considerable time was dedicated to the point during the hearing.

[3] After the appeal hearing, a check of the original tape recording revealed that the certified transcript in the Appeal Record Book was inaccurate and that in fact each applicant had been arraigned largely consistently with the indictment. The tape recording revealed that the words "you did intend to do some grievous bodily harm" had been wrongly omitted from the certified transcript. I had the Bureau notified of this error and an amended certified transcript was issued.

[4] The widespread practice under which the State Reporting Bureau presents an abbreviated version of arraignments, pleas and verdicts should cease, and that instead a verbatim record of these important procedures in criminal trials should be made. The other members of this Court have authorised me to say that they agree that this should be done.

[5] I agree with the orders proposed by Thomas JA.

[6] **THOMAS JA:** On 9 March 2000 the three applicants (referred to as "Fahey", "Solomon" and "AD" respectively) attacked one Luke and caused him very severe injuries. AD additionally robbed him. All three were charged on an ex officio indictment which alleged –

> "that on the 9th day of March 2000 at Mackay in the State of Queensland Solomon, Fahey and AD with intent to do some grievous bodily harm to Stephen Brian Luke did grievous bodily harm to Stephen Brian Luke."

[7] The offence intended to be charged was one under s 317 of the Code,[1] the relevant part of which is as follows:

> "Any person who, with intent … to do some grievous bodily harm … to any person … unlawfully … does grievous bodily harm … to any person … is guilty of a crime …"

[8] In arraigning the three applicants, the judge's associate read the words of the indictment, although in place of the words "with intent" she used the words "you did intend". This verbal slip contains no error of substance, and no point is now made in relation to any alleged irregularity in the arraignment, the taking of pleas or the administration of the allocutus. However, whilst it might not immediately be apparent and was not noticed during the proceedings below, the indictment does not conform to the words of s 317 in that the word "unlawfully" does not precede the words "does grievous bodily harm". The point that arises is the effect of this omission on the subsequent proceedings and conviction.

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[1] The relevant form prescribed in respect of the various offences created by that section is Form 161 of the *Criminal Practice Rules* 1999.

Defective indictment

[9] It was submitted by counsel for A, and supported by counsel for Crown, that the defect is fundamental and that the indictment and subsequent proceedings are a nullity, at least in the sense that the conviction cannot withstand an appeal or prerogative review.[2] The Crown submitted in the alternative that if the omission is curable the indictment should be amended by insertion of the word "unlawfully".

[10] There is no doubt that all three intended to plead guilty to "grievous bodily harm with intent" which is the authorised short form description of the relevant offence which appears on the reverse side of the indictment. Equally there is no doubt that everyone in court believed that the applicant had pleaded guilty to that offence. The same term ("grievous bodily harm with intent") was used, correctly, by the associate when delivering the allocutus. After arraignment and plea, proceedings continued in the ordinary way with relevant facts and submissions being stated by the Crown Prosecutor and in turn by counsel for the respective applicants, all on the footing that the applicants had caused grievous bodily harm to Luke with intent to do so. The offence in due course which is recorded against the applicants in the court's verdict and judgment record is "grievous bodily harm with intent".

[11] The matter came before this court as an application by all three prisoners for leave to appeal against sentence. However, upon the present jurisdictional question being raised by counsel for AD, counsel for the Crown applied for all necessary abridgments of time for the making of an application for a prerogative order under s 43 of the *Judicial Review Act* 1991 so that the issue could be properly determined. Alternatively, the Crown applied for the amendment of the indictment. Leave should now formally be granted for the bringing of both applications.

[12] There is a defect in the indictment although none is apparent on the face of the court's official record. That record was formerly referred to as the criminal calendar[3] but is now described in the 1999 *Criminal Practice Rules* as the "verdict and judgment record".[4] The rules require the record to provide details of "the charge" which of course is the charge in the indictment.[5] The present record, having referred to the indictment by number, states the offence to be "grievous bodily harm with intent". The rules further require the inclusion of other details including "the sentence" and "the judgment". The judgment is expressed as recording a conviction in relation to the indictment earlier identified, and it proceeds to state the sentence that was imposed. Such a record is a sufficient warrant for executing the judgment noted on it.[6] The question, to be addressed is whether any amendment is necessary to the indictment, and if so whether it may now be made. Alternatively, is the indictment (and all subsequent proceedings based upon it) an incurable nullity, requiring the quashing of the indictment and the setting aside of the convictions?

Power to amend indictment after verdict

[13] In *R v McGoldrick*[7] the court noted that one of the counts on an indictment, which had been thought to contain a count of armed robbery, lacked any allegation of the

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2 *Crane v Public Prosecutor* [1921] 2 AC 299; *Maher v The Queen* (1987) 163 CLR 221, 233.

3 *Criminal Practice Rules* 1990, O.VII s 2 and 3; cf. *R v Seul, ex parte Attorney-General* [1992] 1 Qd R 203, 205.

4 1999 *Criminal Practice Rule* 62.

5 See *Criminal Practice Rules* 61 and 62.

6 Rule 62(4).

7 [1995] 1 Qd R 533.

use of or a threat to use actual violence. The indictment alleged that the accused stole $700 and at the time he was armed with a dangerous weapon but there was no allegation that actual violence had been used or threatened. The court held that the only offence thereby alleged in the indictment was stealing, and that having pleaded guilty to that count, McGoldrick had thereby been convicted of stealing. Significantly there was in that case no application for amendment of the indictment, and the court found it unnecessary to discuss whether the indictment could in any event have been amended after verdict and conviction. It is therefore distinguishable from the present matter in a number of respects.

[14] When *McGoldrick* was decided in 1994, some difference of view is to be found in the cases as to whether s 572 of the Code (as it then was) authorised such an amendment after verdict. *Baynes*[8], *Herscu*[9] and *Trifyllis*[10] held that the court could do so, but *Lewis*[11] and *Stevenson*[12] express reservations. In *Baynes*[13] the Court of Criminal Appeal directed that such an amendment be made after sentence and appeal. In that case the indictment had been inappropriately drawn to allege a joint count of rape against two men when it had been intended to charge them with separate single counts of rape. The trial had been conducted throughout as if they had been separately charged. The court directed an amendment of the indictment and of the conviction to accord with the way in which the trial had been conducted and in which the jury had been directed. In almost identical circumstances the High Court in *Mackay v The Queen*[14] upheld convictions notwithstanding the incorrect indictment. Curiously, although it was expressly noted in *Baynes*[15] that there had been no motion for arrest of judgment under s 649, the later case of *Lewis*[16] cited it as authority limited to the allowance of amendment before sentence upon motion for arrest of judgment.

[15] It is not now necessary to return to the differences of view[17] which formerly existed in relation to the availability of the power of amending the indictment after verdict under s 572 as it stood before 1997. In that year subsection 3 was inserted in the following terms:

> "If the court is satisfied no injustice will be done by amending the indictment, the court may make the order at any time before, or at any stage of, the trial on the indictment, or after verdict."[18]

[16] The second reading speech[19] suggests that the amendment was intended to remove difficulties of the kind encountered in the trial of Brian Maher[20]and to provide a power of amendment which was circumscribed only by the requirement that it not cause any injustice. The power of amendment actually given by s 572(3) would however seem to be subject to the stated requirements of s 572(1). These include that the "variance, omission or insertion" (ie the effect of the amendment) is not material to the merits

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8 [1989] 2 Qd R 431, 435-436.
9 (1991) 55 A Crim R 1, 4.
10 [1998] QCA 416, CA No 358 of 1998, 11 December 1998, [21].
11 [1994] 1 Qd R 613, 624.
12 (1997) 90 A Crim R 259, 266.
13 [1989] 2 Qd R 431, 435-436.
14 (1977) 136 CLR 465.
15 at 435.
16 [1994] 1 Qd R 613 at 623.
17 See note 8 above.
18 Act No 3 of 1997 s 102, operative from 1 July 1997.
19 4 December 1996, QPD 4895.
20 *Maher v R* (1987) 163 CLR 221.

of the case and that the accused will not be prejudiced thereby in his defence on the merits. In *Maher v The Queen*[21] the irregularity in question was not considered to be capable of amendment under s 572 because it could not be said that the variance, omission or insertion was not material to the merits of the case. The irregularity in that case was a breach of prescribed procedures involving the selection and determination of a jury on pleas of not guilty. It involved the substitution of different charges from those which the jury had been sworn to try, carrying different penalties and based upon charges laid under a different Act. That situation differs from the present case which concerns the amendment of a charge to conform to what all the parties actually understood it to be and believed to have been actually charged. This in my view conforms with the situation in *Baynes* and in *R v Mackay* rather than with that in *Maher*. In such a situation the effect of the amendment does not affect the merits of the case, and none of the accused persons was in the least prejudiced in his defence.

[17] One may envisage cases where a defective indictment has a material effect upon the conduct of the defence or where the case of an accused person is differently presented or influenced in some way by the error. In such cases it is difficult to think that the discretion conferred by s 572 could properly be exercised, as the injustice in failing to set aside such proceedings based upon the faulty indictment would be apparent. Presumably fresh proceedings would be necessary if the Crown saw fit to continue. However there is nothing of this kind in the present matter. Counsel for Solomon and Fahey both indicated that they supported the Crown's application to amend the indictment, in which case the matter could proceed as originally intended, namely as an application for leave to appeal against their respective sentences. Counsel for AD however adhered to the submission that the proceedings are a nullity and cannot be cured by amendment.

[18] I do not suggest that the omission of the word "unlawfully" from the indictment is a minor omission. On the contrary, it is an ingredient of the offence of grievous bodily harm under s 320, and in turn of the aggravated charge of grievous bodily harm with intent under s 317. The function of the word "unlawfully" in s 320 was considered by Philp J in *R v Knutsen*[22]. His Honour concluded that it requires the Crown to prove that the doing of the grievous bodily harm is contrary to law and not excused. Proof that an act is "contrary to law" is broadly based, and resort may be had to the common law.[23] In the present case the unlawfulness of the attack was not in doubt.

[19] The submission for AD is that the indictment omits an element or ingredient of the offence and that this is fatal. Some reliance was placed upon *John L Pty Ltd v Attorney-General (NSW)*[24] in which an information which failed to identify a "material particular" was held to be defective. That case was concerned with the requirements of an information to ground a summary offence. Broadly speaking the function of an information has been seen as fulfilling two requirements, first informing the court of the identity of the offence and second providing the accused with the substance of the charge.[25] It was recognised as a common law requirement that the information should condescend to identifying the essential factual ingredients of the actual offence. The

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21 (1987) 163 CLR 221, 233.
22 [1963] Qd R 157, 163.
23 Ibid p 163.
24 (1987) 163 CLR 508.
25 Ibid p 519.

John L case would seem to be an instance of an information which failed to tell the defendant what was alleged against him. It alleged that he had made a misleading statement about intended future conduct, but failed to specify any material particular of what was said to be false or misleading. The case is perhaps not far from the borderline of cases where a sufficient general allegation might be cured by the provision of particulars. But in any event, the basis of the defect that invalidated the information here lies in the disadvantage suffered by the defendant by reason of an information that failed to tell him what the prosecution alleged against him.

[20] *McGoldrick*[26] was cited in favour of the submission, but as mentioned earlier, no question was raised in that case concerning the power of amendment, and the court decided the case on the footing that the accused had entered a valid plea to the lesser charge that the indictment actually contained. That is not the position here: AD intended to plead to grievous bodily harm with intent, and thought that he had done so.

[21] Reference is also made to *R v Ayres*[27] which tends to go against counsel's submission. The accused was in that case charged with a common law conspiracy to defraud when the only appropriate charge was a statutory conspiracy. Their Lordships considered that the misdescription of the offence as a common law conspiracy to defraud had in the circumstances "not the slightest practical significance". It was held that there was a material irregularity in the course of the trial but that the proviso should be applied, having regard to the following test:

> "But, if the statement and particulars of offence can be seen fairly to relate to and to be intended to charge a known and subsisting criminal offence but plead it in terms which are inaccurate, incomplete or otherwise imperfect, then the question whether a conviction on that indictment can properly be affirmed under the proviso must depend on whether, in all the circumstances, it can be said with confidence that the particular error in the pleading cannot in any way have prejudiced or embarrassed the defendant."[28]

[22] The effect of procedural irregularities upon subsequent convictions was considered by this court in *R v M*.[29] After reviewing some of the cases the following observations were made:

> "In each case it is necessary to examine the substance and effect of the procedural breach. If there is a defect in the constitution of the court, the authorities suggest that the conviction will be set aside whether it might be thought to have affected the result or not. This is to be distinguished from procedural errors in the course of a trial by a duly constituted court. In such cases one examines whether the error might have affected the determinative process or the opportunity of acquittal for the accused, or even more generally if it might have affected the quality of the trial. The perception of such potential effects may suggest a miscarriage of justice in which case it will lead to the setting aside of the conviction. In this respect the effect of such a procedural error may not be very dissimilar to other errors committed in the course of a trial such as errors in the summing up. The appeal court examines closely the effect of the particular error on the trial as a whole." (Ibid p 541).

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26 [1995] 1 Qd R 533.
27 [1984] 1 All ER 619, 626-627.
28 Ibid p 626.
29 [1996] 1 Qd R 532, 533-535, 540-542.

[23] In the present case, as in *M*, it is quite plain that the applicant incurred no disadvantage whatever from the occurrence of the error. No miscarriage of justice can be perceived. Cases in which courts have had to consider whether a badly drawn indictment is capable of amendment are by no means uncommon. Decisions in different jurisdictions may turn upon the particular words of the legislation dealing with the power of amendment. For this reason I have paid primary attention to decisions under the Queensland Criminal Code. These include *R v Kubik,*[30] *Herscu,*[31] *R v Rhodes & Kissling,*[32] *R v Trifyllis,*[33] and *R v Stevenson.*[34]

[24] In *Rhodes & Kissling*[35] the court (de Jersey CJ, McMurdo P and McPherson JA) upheld a conviction which McPherson JA identified as "the converse of *R v Baynes*". Two individuals had been incorrectly charged in separate counts when they should have been charged jointly. As it was clearly understood at trial that both had been charged with the same offence the view was taken that there could be no prejudice to either, and the conviction was upheld. The question whether the record of the court should be clarified by amendment of the indictment was however not raised. The decision is based on the perception that there was no miscarriage of justice.

[25] In *R v Stevenson*[36] the court (by majority) concluded that an indictment failed to make clear what constituted the offence, by reason of its omission to state the person from whom performance of services was intended to be gained. Although recognised as badly drawn the indictment was held to be capable of amendment.

[26] In the United Kingdom since the 1970s, succeeding editions of *Archbold's Criminal Pleading Evidence in Practice* have noted the tendency of courts to relax the technicalities of criminal pleading.[37] In *R v Radley*[38] Widgery LCJ stated that:

> "The tendency in the last 10 years has been to relax the technicalities of criminal pleading, bearing in mind that injustice to the defendant from any proposed amendment must be refuted."

[27] In *Go v The Queen*[39] (a decision of the Northern Territory Court of Criminal Appeal) the court confirmed the correctness of a grant of leave to amend the indictment on the sixth day of a trial. In an intended charge of robbery, the indictment failed to allege the use of violence to prevent or overcome resistance. The decision might at first glance seem inconsistent with *McGoldrick*, but it is to be remembered that no application was made to amend the indictment in *McGoldrick*, and the court did not deal with the question whether an amendment might have been allowed. In *Go* the accused was at material times under the impression that she had been charged with the more serious charge of robbery rather than mere stealing. The court saw no

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30 [1995] QCA 275, CA No 153 of 1995, 16 June 1995.
31 (1991) 55 A Crim R 1, 4.
32 [1999] QCA 55, CA No 347, 349 and 386 of 1998, 5 March 1999.
33 [1998] QCA 416, CA No 358 of 1998, 11 December 1998.
34 (1997) 90 A Crim R 259.
35 Above at note 32.
36 Above at note 34.
37 cf 40th edition (1979) at para 50; compare 42nd edition (1985) para 1 – 66 where it is stated with reference to effect of the *Indictments Act* 1915, that "There have been a number of decisions as to the circumstances in which it is proper for the judge to order an amendment of the indictment. The appellate courts have shown an increasing willingness to allow amendments of substance to be made, and the latest decisions cannot be reconciled with certain of the earlier ones."
38 (1974) 58 Crim App R 394, 402.
39 (1990) 102 FLR 299.

injustice in permitting an amendment to take the charge "up" rather than "down". The decision appears to have been based essentially upon the fact that "neither the accused nor her counsel was ever under any deception as to what the real allegations were. In many cases it may well be a very important matter bearing on the question of injustice if the charge is amended upward. But I do not think it applies here."[40] The court also noted that "it took no one by surprise and the evidence upon which the Crown relied had been foreshadowed and then called by the learned Crown Prosecutor."[41] There are some differences between the relevant provisions of the *Criminal Code Act* 1983 (NT) and those of the *Criminal Code*, but I do not think that these would have produced any different result in this State.

Whether the power should be exercised

[28] The present circumstances satisfy the requirements of both s 572(1) and s 572(3). In particular, it appears that words that ought to have been inserted in the indictment have been omitted; the omission is not material to the merits of the case; the accused person was not prejudiced by reason of the amendment in his defence on the merits; and in terms of s 572(3), no injustice will be done by amending the indictment.

[29] It is in my view desirable that the indictment be amended (as it was in *Baynes*) in preference to mere confirmation of the conviction (as appears to have occurred in *Mackay* and in *Rhodes & Kissling*), as there is a latent inconsistency in the court's record which asserts that there has been a conviction on the indictment in its present form.

[30] For the above reasons the present error was not incurable, and the indictment should be amended. It is ordered that Indictment No 436 of 2000 (Townsville Registry) be amended by inserting the word "unlawfully" before the words "did grievous bodily harm to Stephen Brian Luke" in count 1.

Applications for leave to appeal against sentence

[31] The incident with which we are primarily concerned occurred outside a McDonald's restaurant in Mackay at about 11.30 pm on 9 March 2000. Mr Luke, a 24 year old man, was seated outside the restaurant while the three applicants were standing around the area. On the version stated by respective counsel for AD and Solomon, Luke said something to AD to the effect that he should not be hanging around the streets, which produced the immediate response from AD, "Get fucked. What is it to you, you cunt", upon which Luke clipped him behind the ear. AD then started punching Luke and shortly afterwards Solomon and Fahey joined in. S punched Luke a number of times while Fahey picked up a brick from a nearby garden bed and then struck Luke with the brick on the rear left-side of the head causing him to immediately fall to the ground. While Luke was motionless on the ground all three applicants proceeded repeatedly to kick Luke's head. After a time, while Solomon and Fahey continued to kick Luke's head, AD reached into Luke's back pocket and took his wallet. AD then said to the other two, "That's enough" and walked away from the scene, leaving Solomon and Fahey who continued to kick Luke's head. In addition to the kicks both Solomon and Fahey were seen to jump on Luke's head, physically stomping with both feet. Eventually they walked away around the corner. They then returned and again stomped on Luke's head once or twice in the course of which

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40 Ibid p 310.
41 Ibid p 309.

Fahey apparently slipped in a pool of blood near the complainant's head. They were then chased away by a bouncer, and prevented from departing further by some citizens until police arrived.

[32] Luke was unconscious and gasping for air. He was quickly removed by ambulance. He suffered serious head injury and post-traumatic amnesia. At the time of the hearing he was still an in-patient at the Princess Alexandra Hospital in Brisbane. He suffered multiple intra-cranial haemorrhages and an extra-dural and intra-cerebral haemorrhage associated with a fractured base of the skull, as well as facial fractures. Despite all appropriate treatment he suffers a chronic organic brain syndrome with severe cognitive deficits, memory deficits and inability to walk. He is totally dependent for all personal cares including bathing, dressing, meal preparation and community access. His condition is permanent. He will never undertake a normal lifestyle and is totally dependent in all areas and will require long-term care.

[33] The sentences imposed were respectively:

(a) On AD – six years' detention, with concurrent detention of three years on the robbery count and of 12 months on breach of a probation order that had been made only six days earlier;

(b) On Fahey – 10 years' imprisonment, with concurrent sentences of 12 months' imprisonment on charges of attempted stealing, wilful damage and unlawful use;

(c) On Solomon – 10 years' imprisonment, with concurrent sentences of 18 months for assaults occasioning bodily harm, 12 months on stealing and housebreaking offences and 18 months for breach of a probation order.

[34] At the time of commission of the principal offence, AD was 13 years old, Fahey was 17 years and three weeks, and Solomon was 17 years and two months. AD therefore fell to be sentenced under the regime of the *Juvenile Justice Act* 1992, while Fahey and Solomon fell to be sentenced under the *Penalties and Sentences Act* 1992. Apart from the different principles which the courts are required to observe under the respective systems, it should be noted that the maximum sentence available in the case of AD was 10 years' detention[42] while that available under s 317 of the Code in respect of Fahey and Solomon was imprisonment for life.

[35] It will be necessary from this point to discuss factors relevant to the particular offender.

The case of the applicant AD

[36] The broad submission is that the learned sentencing judge placed too much weight upon factors of punishment and general deterrence, at the cost of rehabilitation of juvenile offenders, and in particular without due consideration of the view that constructive rehabilitation protects the community better than long-term prison sentences. Sadly the present case is not one which presents good reason for optimism on this score, though it is highly desirable that the avenue of rehabilitation be left open to the applicant. He has for some time led a street lifestyle and the network of his associates is said to include many people who live a "pro-criminal" lifestyle. The pre-sentence report suggests that he shows little insight into his behaviour. It also

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42 *Juvenile Justice Act* ss 8, 121(3).

notes however that he responds exceptionally well to "structure" and has, since detained, become heavily engaged in numerous educational and recreational activities.

[37] Section 109(2)(e) of the *Juvenile Justice Act* requires the court to give special consideration to the principle that a detention order should be imposed as a last resort and for the shortest appropriate period.

[38] This applicant's underprivileged and dysfunctional background forms an organic part of the story. He has had few opportunities to lead what might be regarded as a more normal existence with associated social values. Of course he remains responsible for his own actions, but this must be assessed against a background with negative familial support. His pattern of committing offences (prior to the present serious offence) was largely directed towards meeting his basic welfare needs. He was exposed for an extended period to violence and adverse adult influences through his drug-dependent mother. The consequences include poor anger management, drug and alcohol abuse, lack of schooling and lack of acceptable alternative activities.

[39] It was conceded that a period of detention was inevitable. The burden of the appeal is that six years was too long a period.

[40] Upon his arrest AD indicated that he did not want to be interviewed. However in due course he pleaded guilty and he is entitled to a benefit upon sentence for having done so.

[41] The most influential factor supporting a reduction of sentence in this case is the fact that he voluntarily desisted from continuing this attack and even attempted in a limited fashion to persuade his companions to stop. He should not be regarded as criminally responsible for the savage conduct displayed by Fahey and Solomon after that point. AD's case is therefore distinguishable from that of Fahey and Solomon on the basis of his lesser actual contribution to the crime as well as by reason of the fact that he is to be sentenced with different sentencing considerations in mind. This includes the factor that the maximum sentence available in his case is considerably less than that in the cases of Fahey and Solomon.

[42] The present case is a very serious example of grievous bodily harm with intent, particularly in view of the gross consequences to the victim.[43] It is not suggested that the victim was at fault, and it is noted that the hostilities proceeded from a gross over-reaction first by AD and later by Fahey and Solomon to the complainant's mild admonition.

[43] The case which is perhaps of most relevance in the present matter is *R v S*.[44] The offender was 15 years old and had some criminal history, mainly consisting of entering dwellings with intent. He did not have a history of offences of violence.

[44] He was charged with grievous bodily harm without the aggravating factor of intending to cause it. The effects upon the victim were very serious but not as pronounced or far-reaching as those in the present case. S was dealt with at the same time on an additional eight counts, six of which were housebreaking. By majority this court reduced his sentence to one of four and a half years' detention with a recommendation for release after serving 50 per cent of that period. The Chief Justice who dissented, considered that the appropriate sentence would have been five

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43 *R v Amituani* 78 A Crim R 588.

44 [1999] QCA 499, CA No 323 of 1999, 1 December 1999.

years with a similar recommendation for release after serving 50 per cent. S's violence was perhaps more protracted than that of AD, and his attack was entirely unprovoked. In most respects however the present case is a more serious one than S apart from the circumstance that he is some years younger (13 years old at the time). In *R v S* the court examined more than 20 sentences imposed on young offenders for grievous bodily harm. Some of the cases concerned juvenile offenders but most were young male adults. I formed the view that the past sentences on the young male adults reflected an inappropriately low level, particularly in light of the growing community revulsion against crimes of violence and the legislative recognition in the 1997 amendments to the *Penalties and Sentences Act*.

[45] It is not necessary to review those cases again. Suffice to say that having regard to the age of this applicant, the fact that he (unlike his co-offenders) voluntarily desisted from further attack, his unfortunate background and the requirements of the *Juvenile Justice Act*, I consider that the sentence of six years' detention of which he is obliged to serve 70 per cent before release is manifestly excessive. It contains almost twice the custodial content of the sentence imposed upon S. In my view the appropriate sentence in his case should be one of 4 and a half years, without any recommendation for early release. That is to say, he will be obliged to serve 70 per cent of that detention.

The case of the applicant Solomon

[46] Solomon was on probation and on bail at the time of the offence. He did not agree to any interview with the police, but subsequently entered a plea of guilty at the committal proceedings. The main point urged in his behalf, as I understand it, is that the 10 year sentence fails to give proper credit for the plea of guilty. The submission is that in order to arrive at a sentence of 10 years the starting point before discount for the plea must have been too high; and that having regard to *R v Bird and Schipper*[45] and authorities mentioned therein,[46] a starting range of 15 years would be more appropriate for offences such as attempted murder after a trial. However it seems to me that the assumption that one should find some benchmark for non-youthful adult offenders on the present offence and then reduce it by five years because of youth and plea of guilty is unhelpful and inaccurate. It is possible to consider the present matter directly by reference to cases involving youthful adult offenders, recognising that sentences for pre-1997 offences are not necessarily reliable indicators for offences of violence. Also one should not lose sight of the fact that the maximum penalty for this offence is life imprisonment.

[47] In *Schipper* the court substituted a sentence of nine years' imprisonment on a count of grievous bodily harm with intent, with a serious violent offender declaration. Schipper was only one year older than the present applicant and the complainant had made a surprisingly good recovery. The extreme and irremediable harm that the present applicants have caused is a factor that weighs heavily in the sentence. In some respects the present applicant's conduct was not as serious as that in *Schipper*, but these factors are in my view outweighed by the important element of harm that I have just mentioned. I do not regard *Schipper* as authority that supports the conclusion that the present sentence is manifestly excessive.

[48] It is true that the present applicant Solomon is a very young adult, but I do not think that the sentence that was imposed is out of balance with other sentences imposed

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45 (2000) 110 A Crim R 394.

46 including *R v Hardie* [1999] QCA 352, *R v Lepp* CA 229 of 1998.

upon offenders of comparable age, a number of which are discussed in *Bird and Schipper*[47] and in *R v S.*[48] The present applicant had prior convictions for offences of violence, and was on probation at the time of the offence. Other criminality was revealed in other counts upon which he was dealt with at the same time. In a case as serious as this I do not think it can be said that the sentence of 10 years' imprisonment was manifestly excessive.

The case of the applicant Fahey

[49] This applicant's case has many similarities with that of the applicant S. Both had significant criminal histories including offences of violence. Both participated in the protracted head-kicking and head-stomping. Both became involved in this extreme violence with no better excuse than a slight opportunity to engage in it.

[50] The main point of distinction relied upon by counsel for Fahey to distinguish his case from that of the applicant Solomon is Fahey's intellectual impairment. He suffered from Attention Deficit Disorder at an early age and as the result of intellectual impairment has had a disrupted schooling and a limited employment history. Despite this he has made some efforts to improve his educational level. A number of personal references were tendered attesting to his more positive qualities. He had successfully completed a prior probation order. Both he and the applicant Solomon had consumed a large quantity of alcohol and a cigarette of marijuana prior to committing the offence, but I fail to see how this can be regarded as a circumstance of mitigation. It was submitted that Fahey has exhibited remorse, but the pre-sentence report observes that there was no detected remorse or insight into his past offending behaviour. It is common ground however that he has genuine psychological problems which require further examination and treatment. Unlike his co-offenders he co-operated with police at an early stage and made useful admissions including his use of the brick and of the kicking.

[51] The submissions for Fahey proceeded to suggest that insufficient distinction exists between the sentences imposed on this applicant and upon the applicant Solomon, and that an issue of parity arises if both have the same sentence. However when one takes into account the circumstance that Fahey was the person who obtained the brick and used it to administer the disabling blow to the victim's head I see nothing inappropriate in the imposition of the same sentence upon both Fahey and Solomon.

Orders

1. The Crown's application for abridgement of time for making an application for prerogative order is granted

2. The application to amend the indictment is granted and it is ordered that: count one of Indictment No 436 of 2000 (Townsville Registry) be amended by inserting the word 'unlawfully' before the words "did grievous bodily harm to Stephen Brian Luke"

3. The application for prerogative order is dismissed.

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47 (2000) 110 A Crim R 394.

48 CA 323 of 1999, 1 December 1999.

4. In Appeal No 295 of 2000: Appeal against sentence dismissed

5. In Appeal No 305 of 2000: Appeal against sentence dismissed

6. In Appeal No 345 of 2000: Leave to Appeal granted; appeal allowed; set aside the sentence of 6 years detention and instead substitute a sentence of four and one-half years detention.

[52] **MULLINS J**: I agree with the reasons of and the orders proposed by Thomas JA.