SUPREME COURT OF QUEENSLAND

CITATION:	*R v Harvey* [2003] QCA 286
PARTIES:	**R** **v** **HARVEY, Murray Wayne** (applicant)
FILE NO/S:	CA No 112 of 2003 DC No 44 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED EX TEMPORE ON:	10 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	10 July 2003
JUDGES:	Davies, Williams and Jerrard JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDERS:	**1. Allow the application for leave to appeal against sentence** **2. Vary the sentence imposed by an order that the sentence of two years imprisonment be suspended after the applicant has served 12 months, with an operational period of three years**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where applicant convicted at trial of doing grievous bodily harm – where applicant contends that sentence imposed should have been partly suspended having regard to his youth and prior good behaviour – where mitigating circumstances in relevant case authority not present in applicant's case – where changes to *Corrective Services Act* 2000 (Qld) require applicant to serve two thirds of sentence before he can apply for release on remission or conditional release – whether sentence manifestly excessive in the circumstances *Corrective Services Act* 2000 (Qld), s 134 *R v Dodd* [1998] QCA 323; CA No 241 of 1998, 17 September 1998, distinguished *R v Francisco* [1999] QCA 212; CA No 59 of 1999, 8 June 1999, distinguished *R v Grimley* [2000] QCA 064; CA No 362 of 1999, 14 March

2000, considered

COUNSEL: The applicant appeared on his own behalf
M R Byrne for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

JERRARD JA: Murray Harvey was convicted in the Maroochydore District Court on 21st March 2003 by the verdict of a jury of having unlawfully done grievous bodily harm to Jason Clarke on 2 September 2001 at Noosa Heads, in Queensland. He was sentenced to two years imprisonment and has applied for leave to appeal against that sentence. He contends the sentence is manifestly excessive because no part of it was suspended having regard to his youth and prior good behaviour.

Mr Harvey was 28 when he committed the offence, and 29 when sentenced. He had no prior convictions and had spent no time in custody. The view of the evidence led at his trial, which is most consistent with his conviction, is that he punched Jason Clarke once, to the jaw.

Mr Clarke had been asked to leave Barney's Bar and Bistro at Noosa Heads, when Mr Harvey was then working as a barman. Mr Clarke had left, perhaps with some assistance from Mr Harvey and wished to re-enter. Mr Clarke was looking elsewhere during the moments in which Mr Harvey stepped towards him and hit him with force. Mr Clarke, who was noticeably intoxicated and doing nothing to defend himself, fell unconscious to the pavement. He suffered a broken jaw and a broken tooth, swelling of the left side of his face and some loss of

sensation to the lower left face. Permanent consequences may include a mildly affected bite, altered sensation to the left lower lip and the implantation of a fixation plate to the jaw.

The jury's verdict probably rejected Mr Harvey's account of events in which he claimed an apprehension that Mr Clarke was going to assault him and had therefore "hit him first". Mr Harvey was not affected by liquor.

Mr Harvey comes originally from New Zealand where he served for a year in the Army Reserve and had been employed in forestry. He was working as a security officer on the Gold Coast when convicted. The learned trial Judge, who has extensive experience, described Mr Harvey's blow to Mr Clarke as a very hard one and advised Mr Harvey that he could well have been facing a much more serious charge. The Judge presumably had the possibility of manslaughter in mind, and his Honour's sentencing remarks concluded with the observation that the message needed to go out that serious gratuitous violence would be severely punished.

The only issue raised by the application is whether portion of the sentence should have been suspended. An examination of other decisions of this Court, to which his Honour was referred, suggests a sentence of two years with no portion suspended is higher than some others this Court has either imposed, or not disturbed, in cases where one blow was struck, and without a weapon, but that does not necessarily make this sentence manifestly excessive.

In the matter of Dodd, CA No 241 of 1998, a 26 year old applicant with no relevant prior history, had his application for leave refused, where he was convicted on his own plea of doing grievous bodily harm to a complainant by a single punch. He had been sentenced to 18 months imprisonment, with consideration for release on parole recommended after six months.

In the matter of Francisco, CA No 59 of 1999, that applicant had his sentence of two years imprisonment altered on appeal to one of two years imprisonment suspended after serving what was really three and a half months, and suspended for an operational period of three years. Mr Francisco had been convicted by a jury and like the present applicant, was a 29 year old security officer with no prior convictions who had hit one blow to a complainant who had been previously ejected from premises and who was wanting to re-enter. Unlike Mr Harvey, Mr Francisco was approached from behind and thought the complainant was threatening him. He "lashed out" and hit his victim, who fell to the pavement and suffered a subdural haematoma.

The sentence imposed on Mr Dodd was after the mitigating circumstance of a plea of guilty, and the one in the matter of Francisco had the mitigating circumstance that the complainant approached him and the videotaped blow was thrown with a sideways movement of the forearm. Those features make the sentence imposed in those two cases distinguishable from the present. However in a matter of Grimley, CA No 362 of 1999,

this Court reduced a sentence of two and a half years imposed, after a trial on a 46 year old offender who had a prior conviction in 1993 for assault occasioning bodily harm. Mr Grimley hit his victim one blow, which broke the victim's jaw in two places. A majority of this Court considered the sentence high by comparison with other sentences and that using the sentence in Dodd as a yardstick, it was appropriate to reduce that of Mr Grimley by one-third, to a sentence of 20 months.

The difference between the 20 months imposed in Grimley and the 24 months ordered here, would not normally justify appellate intervention. However the respondent has drawn the Court's attention to the amended provisions of Section 134 of the Corrective Services Act 2000 (Qld) which have the effect that the possibility of release on parole after serving half the sentence is now not available to a person sentenced to two years imprisonment or less. A person serving a two year sentence of imprisonment now for an offence committed after July 2001 only has the possibility of release on remission or conditional release and release of this variety is only available after two-thirds of the sentence has been served. The learned sentencing Judge was not reminded of this matter, which does make the sentence imposed in Grimley, where parole was possible after 10 months, a significantly more moderate one.

In those circumstances, the respondent concedes that it is appropriate to vary the sentence imposed by an order that the

sentence of two years imprisonment be suspended after the applicant has served 12 months, with an operational period of three years. That sentence as varied will have a significant ongoing deterrent effect and I would make that order.

DAVIES JA: I agree.

WILLIAMS JA: I agree.

DAVIES JA: The order is as indicated by Justice Jerrard.
