SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ketchup* [2003] QCA 327
PARTIES:	**R** **v** **KETCHUP, Stella Maree** (applicant)
FILE NO/S:	CA No 116 of 2003 DC No 498 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	1 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	8 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. Grant application for leave to appeal against sentence** **2. Allow the appeal** **3. Vary the sentence imposed by an order that it be suspended after the applicant has served nine months, with an operational period of two years**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – PARITY – CO-OFFENDERS – DISCRIMINATION BETWEEN CO-OFFENDERS – where applicant sentenced to 18 months imprisonment for assault occasioning bodily harm whilst armed and in company – where applicant contends that the sentence imposed is excessive compared with that of her co-offender – where conduct of co-offender involved a greater degree of criminality – where applicant has an extensive criminal history – whether sentence should be moderated to address the disparity with the sentence imposed on the co-offender *Lowe v The Queen* (1984) 154 CLR 606, applied *Postiglione v The Queen* (1996) 189 CLR 295, referred to *R v Nagy* [2003] QCA 175; CA No 24 of 2003, 2 May 2003, discussed

COUNSEL: D R Lynch for the applicant
R G Martin for the respondent

SOLICITORS: Aboriginal and Torres Strait Islander Community Legal Services (Townsville and Surrounding Districts) Ltd for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **DAVIES JA:** I agree with the orders proposed by Jerrard JA for his reasons, and for the further reasons of Williams JA.

[2] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Jerrard JA wherein all relevant facts are set out.

[3] In *R v Nagy* [2003] QCA 175 I discussed the approach which should be adopted where the court is concerned with violence directed at persons who were obliged by their employment to confront people because of their anti-social behaviour. The complainants in this case were local authority officers whose task it was, inter alia, to deal with members of the public found drinking alcohol, and behaving in a drunken and disorderly manner, in public parks. Attacks on such officials, particularly by a group of drunken people, must be severely punished. But while that is so, the punishment imposed on each individual member of the group must reflect the degree of criminality in that particular person's conduct.

[4] Here the applicant has an unenviable criminal history, containing, as particularised in the reasons for judgment of Jerrard JA, many convictions for offences involving assault. Against that background a sentence of imprisonment was called for in this case.

[5] In the circumstances I do not regard 18 months imprisonment as manifestly excessive as the head sentence. However, for the reasons given by Jerrard JA I agree that it should be moderated to address the disparity with the sentence imposed on her co-offender Thaiday whose conduct at the time involved a greater degree of criminality.

[6] For those reasons I agree that the sentence on the applicant should be moderated as indicated by Jerrard JA in his reasons.

[7] I agree with the orders proposed by Jerrard JA.

[8] **JERRARD JA:** On 1 April 2003 Stella Ketchup pleaded guilty in the Townsville District Court to a charge of unlawfully assaulting Aryon Crawford on 11 May 2002 and doing him bodily harm, when she was armed with an offensive instrument and in company with other persons. She was sentenced to 18 months imprisonment. She has applied for leave to appeal against that sentence, arguing that it is manifestly excessive, and in the alternative that her sentence was excessive when compared with that imposed upon "the principal offender".

[9] Aryon Crawford is a security guard employed by the Townsville City Council to patrol local parks and community areas, and part of his duties involves enforcing Local Law 51 which prohibits alcohol consumption in local parks. On 11 May 2002 Mr Crawford, in company with a Mr Martinez, another security guard,

approached a group of people in Causeway Park in Townsville. The applicant was one of that group and she had a cask of wine. One of the male members of that group said to Messrs Crawford and Martinez:

"You work for fucking Tony Mooney, don't you"?;

and the applicant said

"You're not going to take our alcohol" -

and having stood up, accused both Mr Crawford and Mr Martinez of having assaulted her and some other people with their torches on the previous night. The Crown informed the learned sentencing judge that accusation could not have been true, because both Crawford and Martinez only work during the day time. That statement was not challenged on the applicant's behalf.

[10] Having made that accusation the applicant threw some leaves and dirt into Mr Crawford's face, and one of the men pushed Mr Crawford in the stomach, causing him to step backwards; and another female member of the group pushed Mr Crawford twice. The group then began to move towards both Mr Crawford and Mr Martinez, and the applicant called either "Let's get them" or "Let's bash them". She then picked up a stick from the ground and handed it to a male group member, one Aloysius Thaiday. Mr Thaiday went immediately to the vehicle in which the two security officers had arrived, and began hitting it; and damaged the windscreen. Both security officers then went over to Mr Thaiday and pushed him away, following which several other male members of the group picked up sticks, a person swung a stick at Mr Martinez and when Mr Crawford went to the assistance of Mr Martinez, Mr Crawford was hit on the back of his head by Mr Thaiday with a stick. This was not the stick the applicant had handed Mr Thaiday, which he had dropped after being pushed away from the vehicle. Mr Thaiday hit Mr Martinez on the back again, and someone threw leaves and dirt into Mr Crawford's face again. At this stage the applicant called out "Let's double them", which the prosecution contended on her sentence was a suggestion that the security officers be assaulted by two persons on one. Mr Crawford succeeded in getting to the patrol vehicle, manoeuvring it across the road, and picking up Mr Martinez.

[11] The facts described in the previous paragraph are something of a melding of the information put forward by the Crown Prosecutor during the sentence, and that supplied by the applicant's counsel. Her role in what had occurred was identified by both Mr Crawford and Mr Martinez to some police officers who had arrived at the scene very soon after the assaults; and when an attempt was made to arrest her she jumped into a nearby tidal drain, and swam out a short distance, inviting the police to come and get her if they wanted her. They did not, but located her some hours later and she was subsequently arrested. The factual basis on which she was sentenced was that she herself had not used any weapon or struck any blows, but had on at least one occasion thrown dirt and leaves into Mr Crawford's face, and had instigated the assault on Mr Crawford by the statement she had made, already described. Mr Thaiday, who had pleaded guilty before a different judge on 27 February 2003, was sentenced to 15 months imprisonment which was ordered to be suspended for an operational period of two years after Mr Thaiday had served three months. Mr Thaiday was sentenced for the actual use of a stick when assaulting Mr Crawford, and the difference between the two sentences is one of the applicant's main grounds.

[12] The applicant was born on 29 May 1965 on Palm Island. She was educated to grade eight level there, left Palm Island in 1986, moved to Mt Isa and lived there for three years, and since then has been living in Townsville. The submissions made on her behalf prior to sentence included the information that of her four children, those aged 20 and 14 were independent, and the younger two were in the care of an aunt. Stella Ketchup's barrister described Stella Ketchup as living almost exclusively on the street, and only occasionally staying at the Aitkenvale Hostel or the Echlin Street Rehabilitation Centre. The offending behaviour for which she was sentenced occurred around 2.00 p.m. on 11 May 2002, and she had been drinking alcohol all morning.

[13] She has five prior convictions for assault occasioning bodily harm. The first was incurred on 27 January 1983 for an offence committed on 8 December 1982. She was fined $150.00. The next conviction was on 2 November 1989, for an offence committed on 13 September 1989. She was fined $160.00. The next conviction was on 10 January 1997 for an offence committed on 23 May 1995. That assault was committed at Hanran Park in Townsville, and was described by the Crown Prosecutor in the sentencing procedure on 1 April 2003 as an assault upon another person "who spent time in the park", and which involved kicking a person who was sitting down in the right eye, and two or three times in the head region. For that offence she was sentenced to 200 hours community service.

[14] She was then sentenced on 14 January 1997 for another offence of assault occasioning bodily harm, committed on 18 November 1996. She was sentenced to two months imprisonment to be suspended for 12 months. Finally, on 14 December 1998 she was sentenced in the Townsville District Court for assault occasioning bodily harm while in company, which offence was committed on 27 June 1998. She was sentenced to imprisonment for two years, that sentence to be suspended after she had served nine months and for an operational period of two years. No details of that offence have been provided. Her counsel made the point during his submissions that the suspension of a portion of that imprisonment may have had a salutary effect upon her, in that the next conduct for which she was convicted was for behaving in a disorderly manner on 25 July 2000, whereas prior to that suspended sentence being imposed her history in the previous three and a half years had included offending behaviour on 23 May 1995 (assault occasioning bodily harm); insulting language and obstructing police (14 November 1995); assault occasioning bodily harm, obstructing police and behaving in a disorderly manner (18 November 1996); and being found without a lawful excuse in a dwelling house (on 12 June 1998). These are chiefly what are called "street" offences, and interposed with those were offences for breaching bail.

[15] She also has convictions for other "street" offences after her release from prison, following the sentence of nine months. These were the offence of behaving in a disorderly manner on 25 July 2000 already described; using insulting words, and obstructing police (on 11 May 2002), on the occasion of the assault the sentence for which is the subject of this appeal; and behaving in a disorderly manner on 13 July 2002 and again on 18 August 2002. This record of convictions is consistent with the description that her barrister gave of her.

[16] The prosecution was able to give the judge a description of the circumstances of only the offence of assault occasioning bodily harm committed on 23 May 1995. The sentence the subject of this appeal was for a shorter total period of

imprisonment than that imposed by the same court on 14 December 1998, when a portion of the sentence was suspended. Although the applicant most certainly did not assault anyone herself on 11 May 2002, she certainly counselled the assaults which occurred, and gave Mr Thaiday a stick to enable him to commit an assault. The sentence imposed on her compared with her prior sentence on 14 December 1998 does not appear manifestly excessive per se, but in the absence of any information about the earlier offence it is impossible to say the offences are equally serious.

[17] The 18 month sentence imposed in 2003 does appear a severe one when compared with at least one other sentence for a similar offence imposed by this court, in the matter of *R v Nagy* [2003] QCA 175. Mr Nagy was one of a group of persons who assaulted another on 25 December 2001. He personally hit the complainant, who at one stage of the assault was held by the arms by Mr Nagy's companion while Mr Nagy and others hit the complainant in the head. When the complainant fell to the ground he was repeatedly kicked in the back, stomach, and head areas by members of the group. That offending behaviour had occurred on a railway platform at Bald Hills Station at about 10.30 p.m. on the night of Christmas Day. Mr Nagy was one of a group, and the complainant had become involved with the group when the complainant attempted to intercede on behalf of another male whom the group were surrounding.

[18] The complainant in the matter of Nagy had to be taken to hospital by ambulance. He had a bruised forehead, a cut on the left elbow, a swollen and broken nose, a bruised jaw, grazed knees and elbow, and some loss of consciousness and amnesia. X-rays showed a small fracture of his jaw. He recalled being kicked many times in the head. Mr Nagy was 19 years old when he committed that offence, and had been released from prison only five days earlier. He had been sentenced to four months imprisonment and three years probation on 9 October 2001, for numerous "break and enter" offences, and for other offences committed as a juvenile. He was accordingly on probation when that serious assault in company took place.

[19] On appeal this court considered that a sentence of two years imprisonment was quite appropriate for that offence committed by him. That sentence itself had been arrived at after partly discounting what would otherwise have been imposed by reason of a plea of guilty. Mr Nagy's offending behaviour seems a good deal more serious than that of the applicant, although no weapons were used in the assault in which Mr Nagy took part. The applicant's procuring the use of a weapon and her five prior convictions for similar offences justify the sentence imposed on her in comparison with that imposed on Mr Nagy.

[20] There remains her ground of application based on the disparity between her sentence and that imposed on Mr Thaiday. This court has been informed that he was a 25 year old man whose criminal history included a conviction on 1 October 1998 for common assault, which was committed on 7 September 1998. He was fined $100.00. He was also convicted on 20 January 2000 for an offence of wilful damage committed on 18 December 1999, and on 6 November 2001 convicted of an offence of entering a dwelling house and committing an indictable offence. That offending behaviour was on 26 October 2001. He also had two prior convictions for breaching domestic violence restraining orders, the first conviction being on 8 March 2001 for behaviour occurring on 4 January 2001, and the second on 4 September 2002 for behaviour occurring on 3 September 2002. On the latter

occasion he was also convicted of an offence of common assault. On each charge, that is, breaching the domestic violence order and for common assault, he was sentenced to one month imprisonment. He also had other convictions for "street" offences and for breaching the *Bail Act*. It appears that he too suffers from the effects of addiction to alcohol.

[21] The learned judge sentencing Stella Ketchup explained the difference between her sentence and that imposed on Mr Thaiday as being due to her being older, more mature, and having a more serious criminal history. Accepting that she was older, there seems no particular basis for assuming that she is a more mature person than he is, and as submitted on her behalf, at the age of 25, Mr Thaiday would be unlikely to be particularly, or at all, dependent upon Stella Ketchup for guidance or advice.

[22] Mr Thaiday used a weapon to commit the assault on Mr Crawford, and the applicant counselled and aided him in doing that. Ordinarily a sentence imposed on a counsellor or procurer will be no more, and is often less than, a sentence imposed on the active offender committing the offence; but this depends on many factors. A disparity in prior established offending behaviour is one of those factors which can explain why in some circumstances the actual offender will receive less. In *R v Nagy,* Williams JA noted that the reasoning of the High Court in *Lowe v The Queen* (1984) 154 CLR 606 recognised that equal justice required that as between co-offenders there should not be a marked disparity which gave rise to a justifiable sense of grievance, but that when there were sufficient factors supporting different treatment then no justifiable sense of grievance could flow from the fact that one offender received a heavier sentence.

[23] That judgment of Williams JA recognises that the decision in *Lowe,* confirmed by *Postiglione v The Queen* (1996) 189 CLR 295 (especially at 301 and 313), establishes that a sentence should be reduced where there is that marked a disparity that it gives rise to justifiable grievance, notwithstanding that it is otherwise appropriate and within the permissible range of sentencing options. Here Mr Thaiday's two convictions for assault and two convictions for breaching domestic violence restraining orders are sufficiently serious matters for the applicant to have a justifiable sense of grievance at her sentence of 18 months imprisonment with none of it suspended, compared with his of 15 months imprisonment suspended after three months, when he actually used a weapon and committed an assault.

[24] If her sentence of 18 months was suspended after nine months, with an operational period of two years, the effect would be to impose a deterrent sentence upon her of a sort which has previously benefited both her and the community. In the circumstances her application for leave to appeal against sentence should be allowed, and the sentence imposed varied by an order that it be suspended after she has served nine months, with an operational period of two years.