SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wiggins* [2003] QCA 367
PARTIES:	**R** **v** **WIGGINS, Kyle Peter** (applicant/appellant)
FILE NO/S:	CA No 134 of 2003 DC No 1638 of 2002 DC No 1900 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	27 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	27 August 2003
JUDGES:	McMurdo P, Dutney and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Application for leave to appeal against sentence granted. Appeal allowed and instead of the sentence imposed for the offence of grievous bodily harm substitute a sentence of six years and nine months imprisonment**
CATCHWORDS:	CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – MISCELLANOUS MATTERS – where applicant convicted of grievous bodily harm and sentenced to seven years imprisonment – where offence committed whilst applicant on suspended sentence – whether learned primary judge erred in the manner in which he approached the sentence – where learned primary judge failed to make allowance for the applicant's limited co-operation in the administration of justice *R v Bryan ex parte A-G (Qld)* [2003] QCA 133; CA Nos 339 and 319 of 2002, 19 March 2003, followed *R v Marshall* [1994] QCA 161; CA No 78 of 1994, 20 May 1004, followed

COUNSEL:	P J Callaghan for the applicant M J Copley for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: The applicant was convicted after a nine-day trial of the offence of grievous bodily harm. He was sentenced to seven years' imprisonment and 599 days was declared as presentence custody. He applies for leave to appeal against sentence and contends that the learned trial Judge erred in the manner in which he approached the sentence. He no longer contends that the sentence was manifestly excessive.

The applicant was originally charged with a count of grievous bodily harm (count 1) alternatively assault occasioning bodily harm (count 2) and grievous bodily harm with intent (count 3). During the trial the learned primary Judge ordered that there was no case to answer on count 1. The applicant was acquitted on count 2. He was also acquitted on count 3 but convicted of the alternative count of doing grievous bodily harm simpliciter. The maximum penalty is 14 years' imprisonment.

Early in the trial his counsel made admissions on his behalf as to the reliability of identifications made of him at the crime scene and admitted that he was involved in a physical altercation with the complainant at the time and place alleged in the indictment.

The matter was originally listed as a plea of guilty and there had been extensive negotiations with the prosecution as to the

final form of the indictment. The applicant had indicated that he was willing to plead guilty to one count of doing grievous bodily harm simpliciter in full discharge of the indictment. That offer was not accepted by the prosecution and it is on that count alone that he was ultimately convicted. There was, however, a factual dispute as to whether the applicant had the knife in his possession or whether he disarmed the complainant and then stabbed the complainant with the complainant's knife. Ultimately, the applicant pleaded not guilty and the matter came on for trial for his Honour.

He was 30 years old at sentence and 27 at the time of the offence. He had a significant criminal history commencing in the Childrens Court in 1989 for offences of dishonesty. He was first sentenced to terms of imprisonment for six months in 1991 for firearm and drug offences. In 1992 he was convicted of unlawfully assaulting a prisoner and later that year for assaulting a Correctional Services officer. Later that year he was again convicted of assault occasioning bodily harm. During 1996, 1997 and 1998 he was convicted of drug and property offences and was sentenced to further short periods of imprisonment or fined. In 1999 he was sentenced to serve a further period of a seven month suspended sentence imposed in 1996.

At the time of the offence the applicant was a user of amphetamines and on 6 February 2001 he purchased some from the complainant. After taking the drugs he became convinced that

they were of inferior quality because they had an adverse effect on him. The next day, when he was in the company of another man who had a pit bull terrier on a leash, he saw the complainant in the street with his wife and confronted him. An altercation ensued which was the subject of counts 1 and 2 on which the applicant was committed. On the prosecution case the applicant then produced a knife. The complainant's de facto wife was present and spoke angrily to the applicant who lunged at her with the knife. The applicant demanded a refund because of the poor quality of the drug he had purchased. The complainant pushed his wife behind him and the applicant struck the complainant twice to the face with his fist. The complainant stumbled back and the applicant struck twice at his chest. The complainant then realised he had been stabbed. The applicant threatened to kill the complainant if he was not given the refund he demanded.

The complainant suffered three stab wounds to the anterior chest wall, one to the left shoulder, one below the left nipple and another immediately below that wound. Fluid collected around his heart and major cardiac surgery was necessary without which the complainant would have died. The aortic valve which had been cut and a second area of damage amounting to a hole in the heart were repaired in the surgery. The complainant also suffered a fractured left cheekbone which required operative repair.

Fortunately, because of the prompt and capable medical attention available the complainant appears to have largely recovered from these potentially fatal wounds. At trial he

complained only of some ongoing chest problems and a need to be careful not to over exert himself.

The offence breached a suspended sentence of two months' imprisonment imposed for breach of a bail undertaking on 26 December 2000 which was operational for 12 months.

The prosecutor at sentence asked for a sentence of not less than seven years' imprisonment with a declaration that the conviction was a serious violent offence. Defence counsel at sentence contended that six years without a serious violent offence declaration was the appropriate sentence.

A letter indicating the applicant had some prospects of employment upon his release and certificates of programs the applicant completed during his lengthy period of presentence custody including stress management, substance abuse programs and TAFE subjects were tendered at sentence. His counsel submitted at sentence that the assaults in prison occurred at the time when the applicant was a young man who was sexually assaulted by a notorious prisoner. At the conclusion of his counsel's submissions the applicant with the consent of his Honour directly addressed the Judge and expressed remorse. He said that since his release from prison in 1994 he had committed no acts of violence and was strongly against the carrying of weapons and had not and did not carry weapons.

In his sentencing remarks the learned primary Judge stated that he was comfortably satisfied that the applicant

voluntarily ingested proscribed drugs and that these had an adverse effect on him on the day before the commission of this offence and that the applicant genuinely believed he had been supplied with bad drugs by the complainant. As a result, the applicant deliberately went in public armed with a knife His Honour described the applicant as a strapping male, 20 centimetres taller than the complainant. His Honour was prepared to accept that his meeting that day with the complainant and his de facto wife, whom he described as "only a slip of a girl", was fortuitous, not deliberate and nor was he deliberately in the company of a male friend with a pit bull terrier. After having received the better of a fist fight when there was no real threat to him from the complainant the applicant then produced the knife and deliberately and recklessly stabbed him twice in the chest and then in the shoulder. Because of the adverse effect of voluntary consumption of proscribed drugs the applicant did not intend to cause grievous bodily harm and did not direct his mind to any intention.

Acts of violence with a weapon in public places require a deterrent sentences. His Honour noted:

> "In relation to any allowance for cooperation in the administration of justice in my view it is clearly not appropriate to make any such allowance."

His Honour also rejected the applicant's claim of remorse. The person primarily responsible for the delay in this case was the applicant although the applicant could not receive an

extra penalty for exercising his constitutional right to a trial. His Honour considered making but declined to make a declaration that the conviction was of a serious violent offence. A sentence of three months for wilful destruction was ordered to be served concurrently with the seven years' imprisonment which was in term cumulative on the two months suspended sentence. His Honour declared that 599 days of presentence custody was time served under the sentence.

The applicant now concedes that in the light of sentences imposed recently for offences of this type involving a weapon in a public place: namely, *R v Bryan ex parte A-G* [2003] QCA 18; CA No 410 of 2002, 5 February 2003 and *R v Lewis ex parte A-G* [2003] QCA 133; CA No 339 of 2002 and CA No 319 of 2002, 25 March 2003, the sentence imposed here cannot be said to be manifestly excessive. The applicant's sole contention now is that his Honour erred in failing to make any allowance at all for the limited cooperation in the administration of justice here.

In *R v Marshall* [1994] QCA 161; CA No 78 of 1994, 20 May 1994, this Court held that:

> "An offender's offer to plead guilty to the only offence of which he is subsequently convicted is a relevant matter to be brought to account in the exercise of the sentencing discretion consiste nt with s 13 of the *Penalties and Sentences Act* 1992 (Qld)."

I respectfully agree with that observation. It is true that the facts that the applicant wished to contest were ultimately found against him by the Judge after trial but nevertheless

his preparedness to plead guilty at a relatively early stage to the only charge of which he was ultimately convicted and his further cooperation by his admissions during the trial entitled him to some small moderation of his sentence. His Honour's stated failure to take this into account means that the sentencing discretion has miscarried. This Court must now resentence giving appropriate weight to that factor.

In my view a very modest discount of three months' imprisonment should be given for the real but extremely limited cooperation in the administration of justice here.

I would grant the application for leave to appeal. Allow the appeal and instead of the sentence of seven years' imprisonment imposed for the offence of grievous bodily harm substitute a sentence of six years and nine months' imprisonment.

DUTNEY J: I agree.

PHILIPPIDES J: I agree.

THE PRESIDENT: Those are the orders of the Court.
