SUPREME COURT OF QUEENSLAND

CITATION:	*R v M* [2003] QCA 378
PARTIES:	**R** **v** **M** (applicant)
FILE NO/S:	CA No 239 of 2003 CC No 122 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Childrens Court at Brisbane
DELIVERED EX TEMPORE ON:	1 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	1 September 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 refused** **Conviction not recorded**
CATCHWORDS:	CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – JUVENILE OFFENDERS – DETENTION IN TRAINING CENTRE AND OTHER REFORMATORY SENTENCES – where applicant pleaded guilty to grievous bodily harm – where applicant sentenced to 12 months detention suspended after serving 6 months – where applicant has no previous convictions – whether learned primary judge took into account all mitigating factors - whether sentence manifestly excessive in all the circumstances *Juvenile Justice Act* 1992 (Qld), s 109 *R v Amituanai* [1994] QCA 80; CA No 524 of 1994, 28 March 1995, applied *R v GB & LB* [1999] QCA 46; CA No 443 of 1998, 26 February 1999, applied *R v M* [1996] 1 QdR 650, applied

COUNSEL:	A J Rafter for the applicant C W Heaton for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: The applicant, a juvenile at the time of the commission of the offence, pleaded guilty to one count of grievous bodily harm on 20 June 2003. A presentence report was ordered. He was subsequently sentenced to 12 months' detention to be released after serving 50 per cent of that sentence. He contends the sentence was manifestly excessive.

He was 16 and a-half at the time of the offence and 17 at sentence. He had no previous convictions and his only contact with the authorities was that he had been once cautioned in relation to a minor drug matter.

The complainant was a 19 year old young man who spent the evening of 19 July 2002 in company with his 23 year old male friend drinking at the Moreton Bay Hotel. They left in the early hours of the morning. The applicant, who had himself consumed a small amount of spirits earlier that evening, was approached by the complainant and his friend and assaulted without provocation. There were no witnesses to this incident. The applicant then joined his group of friends in a nearby car park and complained to them about the assault. Shortly afterwards, the complainant and his friend entered that same car park. The applicant told his friends that they were the men who had earlier assaulted him. The complainant's friend became aggressive and appeared intoxicated. He

challenged one youth in the applicant's group to a fight and approached him, despite this youth saying he was not interested in fighting. A verbal slanging match developed between these two and the brother of the youth also became involved. They told the complainant's friend to leave but he then became involved in a verbal exchange with two young women in the applicant's group of friends. The complainant then approached to assist his friend. A City Safe car entered the car park and the complainant and his friend began to leave. As they walked off, one of the youths in the applicant's group shouted, "Why don't you go and fight someone your own age?" The complainant's friend then returned to the car park and threw punches at the applicant's friend and pushed a young female. The brother then again came to assist and, this time, hit the complainant's friend to the head and a struggle ensued between these two. The complainant rushed at the brother, swearing at him, and the brother fled behind a car and called for help with the complainant in pursuit.

It was against this background and at this time that the applicant armed himself with a car steering lock and, as the complainant ran past him chasing the brother, the applicant hit the complainant in the face with the lock.

The officer inside the City Safe car immediately came to the complainant's assistance and a paramedic quickly arrived. The group of youths, which included the applicant, immediately fled. The applicant was later interviewed by police and admitted his involvement as I have outlined.

At the committal proceedings, the complainant and his friend admitted to drinking copious quantities of alcohol from 6 p.m. until 10.30 a.m. the following morning. They were provocative in their behaviour and were throwing stubbies at the heads of other youths around the hotel. The complainant's friend conceded in cross-examination that he had taken off his shirt to prepare for a fight with the juveniles congregating in the nearby car park. Crown witnesses called at the committal stated that both the complainant and his friend were the aggressors during the altercation with the juveniles in the car park. Another Crown witness was sufficiently concerned by the behaviour of the complainant and his friend to arm himself in a similar manner as the applicant.

Unfortunately for all concerned, the complainant received very serious injuries. After being struck to the face, he immediately fell to the ground bleeding. He did not recover consciousness for five days. He suffered multiple fractures to the forehead, left cheek bone, bridge of the nose and, because of his fall, the left pelvic bone. His eye was damaged and he has been left with a permanent visual disability so that he has only nine per cent vision in that eye. He has lost his sense of smell and has significant scarring.

The Prosecutor at sentence rightly described the case as one involving the use of excessive force in aiding self defence.

The complainant's handwritten victim impact statement outlines the extensive and ongoing difficulties this young man has faced as a result of the applicant's crime.

The presentence report was very favourable to the applicant. He has had a positive school history with no behavioural difficulties. Since leaving school in year 11, he has worked, attended two TAFE courses and assisted his family and friends with tasks such as lawn mowing, painting and odd jobs. He has a good work ethic. He has no connections with young people involved in criminal activity and no history of drug or alcohol abuse. The writer opined that the applicant acted out of fear and naivety when placed in a stressful situation and confronted with an extraordinary experience. He displayed a high level of remorse and did not intend to injure anybody. He was shocked and distressed when he saw the injuries he had caused. He did not go out with his friends for about seven months because of his horror at what he had done and has avoided parties and large groups since. He deeply regrets his actions and knows that it was unacceptable to the community and must have a legal consequence. He lost confidence and became emotional and withdrawn, staying at home, but has gradually returned to normal. The writer of the report indicated that the applicant was a suitable candidate for a probation, community service or conditional release order and was at a low risk of reoffending. The writer considered that community based sentencing options were more appropriate for the applicant given his age, the isolated nature of the offence, the lack of criminal history, juvenile justice

principles, his appropriate conduct since offending and his suitability for community based orders.

The applicant was employed at the time of sentence and a number of excellent school references and certificates were handed up on his behalf. The Court has had the opportunity to view those matters today. They suggest that his conduct on this occasion appears to be out of character and an immature overreaction to the situation he found himself in at the time.

The learned sentencing Judge was, however, right to be concerned about the dire consequences of this offence upon the complainant. This is a pertinent factor in the sentencing process in offences of this sort, see *R v Amituani* [1994] QCA 80; CA No 524 of 1994, 28 March 1995 and also the principles of juvenile justice sentencing set out in s 109, especially subsection (h).

His Honour considered the presentence report and all the matters in favour of the applicant which suggested positive prospects of rehabilitation. His Honour was also alive to the aggressive behaviour of the complainant and his companion but, in the end, his Honour was persuaded that, because the applicant had armed himself with a steering lock and used it with devastating consequences for the complainant, a custodial sentence was required.

Under the *Juvenile Justice Act* 1992 (Qld), a Court sentencing a juvenile must have regard to the principles of juvenile

justice which, unlike the principles applicable to the sentencing of adults for offences of violence, include that detention is to be the last resort when sentencing a child for a criminal offence. Despite the many mitigating factors here, the end result is that the complainant will have to live with the consequences of the applicant's crime for the rest of his life. He has lost sight in one eye and has permanently lost his sense of smell and has facial scarring. These, in combination, are devastating permanent disabilities for a 19 year old man. They are relevant to the sentencing process, see *R v Amituani* [1994] QCA 80; CA No 524 of 1994, 28 March 1995, and were a factor absent in the matters relied upon by the applicant as comparable, namely, *R v M* [1996] 1 QdR 650, *R v A & S* [2001] 2 QdR 62, *R v Forde and Pittau* CA Nos 112 and 114 of 1997, 2 May 1997, *R v GB & LB* [1999] QCA 46; CA No 443 of 1998, 26 February 1999.

The incident is an extremely unfortunate one for both the complainant and the applicant but the applicant has excellent prospects of rehabilitation so that when he is released he should be able to rebuild his young life, something which may be more difficult for the unfortunate complainant.

In the circumstances, it cannot be said that the sentence imposed was manifestly excessive or that his Honour in any other way erred in the sentencing process.

The application for leave to appeal against sentence should be refused.

DUTNEY J: I agree.

PHILIPPIDES J: The circumstances of this case are such that, notwithstanding the matters of mitigation, a period of actual detention was warranted. I agree that the period of detention imposed by the sentence was within the appropriate sentencing discretion and that the application should be dismissed.

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THE PRESIDENT: The Court thinks that because of his excellent prospects of rehabilitation a conviction should not be recorded.