SUPREME COURT OF QUEENSLAND

CITATION:	*R v Henriott* [2004] QCA 346
PARTIES:	**R** **v** **HENRIOTT, Raymond Joseph** (applicant/appellant)
FILE NO/S:	CA No 194 of 2004 DC No 480 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED EX TEMPORE ON:	22 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	22 September 2004
JUDGES:	Jerrard JA, White and Jones JJ Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDER:	**1. Grant the application for leave to appeal sentence** **2. Allow the appeal to the extent of varying the sentence below by ordering the sentence to be suspended after the applicant has served 18 months with an operational period of five years**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATION TO REDUCE SENTENCE – where applicant sentenced to four and a half years' imprisonment for grievous bodily harm – where applicant used a weapon in the assault – where applicant sought to put before the Court non fresh evidence relating to the complainant's conduct in the course of the evening of the assault – where application refused – where applicant sole carer for three children - whether sentence excessive in circumstances *R v Braithwaite* [2004] QCA 82; CA No 371 of 2003, 26 March 2004, considered

	R v McGrady & Anor [2001] QCA 302; CA 44 of 2001, 27 July 2001, considered *R v Maniadis* [1996] QCA 242; CA No 502 of 1995, 19 July 1996, applied *R v Partridge* [1997] QCA 77; CA No 561 of 1996, 18 March 1997, considered
COUNSEL:	D Locantro (*sol*) for the applicant/appellant RG Martin for the respondent
SOLICITORS:	Locantro Lawyers for the applicant/appellant Director of Public Prosecutions (Queensland) for the respondent

WHITE J: The applicant for leave to appeal against sentence pleaded guilty in the District Court at Maroochydore to one count of doing grievous bodily harm on 17 May 2004 in respect of an assault which occurred on 10 November 2002. The delay seems to be because the matter was listed for trial and a few weeks before the trial was due to commence the applicant pleaded guilty.

Sentence was adjourned to 7 June to allow the applicant to make arrangements for the care of his two teenage children and another child in his care in the likely event that he was sentenced to a term of imprisonment. The applicant was sentenced to four and a-half years' imprisonment and he complains that that is a manifestly excessive sentence. He contends for a sentence of three years with a recommendation for post prison community based release after serving 12 months relying on the decision of this Court in *Partridge* [1997] QCA 077.

The applicant was 39 years at the time of the assault and 40 at sentence. The circumstances of the offence are that the complainant, a 16 year old boy, had an argument with the applicant's daughter's boyfriend, a youth named Bartley in the course of the evening of 9 November 2002, in and around the Alexandra Headland Surf Club. The applicant's son, aged about 15, who with another lad of a similar age, was with Bartley, rang his father to pick them up complaining of the conduct of the complainant and the group he was with.

At about 2.30 a.m. the complainant was at a 7-Eleven store at Maroochydore with others. The applicant was driving by having picked up the children and the complainant was pointed out to him. He stopped the car and Bartley called out to the complainant inviting him to fight. The complainant responded that he thought that all their problems had been sorted out.

The applicant having left the car said to the complainant, "Ever touch my son, cunt, and you're fucked" and at the same time swung a 12 inch shifting spanner and struck the complainant just below the left eye. He grabbed the complainant by the throat and pushed him backwards. The complainant thought he blacked out. He fell into a garden, sat up and recalled the applicant walking to him again but he then turned and walked back to the car.

In the applicant's outline, reference is made to conduct by the complainant and his group in the course of the evening which must have been related by his children and/or their

friends. This was placed in an affidavit sought to be put before the Court on this appeal and that application for, what might be described as, non fresh evidence has been refused. It did not have that necessary quality to show that some other sentence ought to have been imposed had that material been before the sentencing Court. See *R -v- Maniadis* [1996] QCA 242 at page 5.

This information was not conveyed in those terms to the learned sentencing Judge but perhaps something of its flavour was and I refer to the passages that appear at pages 13 and 14 of the record where the applicant's counsel was making submissions. His Honour asked:

> "There's no suggestion that the complainant had assaulted your client's daughter's boyfriend, is there?"

To which counsel replied:

> "Well, that's what my client was told, was being given grief. My client wasn't there at the time of the goings-on at Mooloolaba and Alexandra Headlands. The brief reveals a reasonable amount of contact between the two groups but the complainant denies assaulting anyone of my client's family and my client was told certain things by his family and Joe Bartley and acting on that information is behind the events that ultimately transpired."

If counsel was told of that detail he might have tactically have thought it unwise to discredit the complainant's statement but even if that information had been complained in all its fullness, as it was sought to be done before this Court and it was uncontested, it could not have justified the applicant's conduct towards the complainant.

Two days later, the applicant was arrested and found in possession of the spanner. He denied any involvement in the assault and declined to be interviewed.

The complainant suffered a closed head injury, a fractured left eye socket (which amounted to grievous bodily harm), contusions and lacerations to his face. He also suffered immediately, loss of visual acuity. His injuries required surgery which involved placement of metal plates and screws in his face. He suffered decreased capacity to chew. He has facial scarring and a permanent residual loss of visual acuity due to optic nerve damage. He suffers ongoing headaches.

He was a promising rugby league player to which he has been unable to return. More serious was the effect on his career. He was an apprentice carpenter but because of his eye injury was unable to read measurements accurately and was dismissed. He has been unable since then, it seems, to find satisfactory employment.

Reference is made to the relative heights in the applicant's outline. Of the applicant at 5 foot 4 inches and the complainant at 6 foot 3 inches. Nothing very much seems to have been made of that disparity, simply to draw it to the Court's attention.

The applicant complains that the learned sentencing Judge gave undue weight to his criminal history and insufficient weight

to his attempts to rehabilitate himself and noted that he had committed no crimes of violence.

The learned sentencing Judge said of the applicant's criminal history at record 18:

> "At the time this offence was committed, you were 39 years of age. You have an extensive criminal history going back some 20 years. That criminal history consists mainly of offences of dishonesty and drug offences."

In fact, included was a conviction in New South Wales probably in 1993 for sexual intercourse without consent for which the applicant received a term of imprisonment of two and a-half years. Such an offence, as Mr Locantro who appears for the applicant concedes, is one of violence. It is the case, however, that there are no other acts of violence of a similar type to the present.

It is also the case, as the applicant contends, that there have been periods of years where he has been convicted of no criminally offending behaviour and it seems they have principally been traffic offences and one 2002 offence in Queensland for minor drug and weapons offences for which no conviction was recorded and that has been since his release from prison in respect of the offence to which I gave detailed attention.

However, this was an assault by a mature man on a boy using a heavy spanner, without warning. It occurred in a public place. It caused very substantial injury and has had

continuing consequences. It was a late plea justifying, as Mr Martin for the Crown contends, only a modest discount.

The case of Partridge relied on by the applicant does have a number of features similar to the present but with one very significant difference. There the Court expressly proceeded on the basis that no weapon was involved. Here a heavy tool which became a dangerous weapon was deliberately taken from the car and used in an unprovoked attack on a youth. Particularly here when his children were in the car the applicant ought to have paused when the complainant added in response to the call from Bartley to fight that he thought that everything had been resolved.

The cases referred to by Mr Martin are more serious than here. The matter of *Braithwaite* [2004] QCA 82 was a case where a term of imprisonment of six years was imposed in respect of a serious assault upon a police officer. In that case no weapon was involved.

The other case of *McGrady* [2001] QCA 302, after a trial, the appellant was sentenced to six years' imprisonment for an assault in company with a weapon. He had prior criminal convictions including one for violence. The evidence did not suggest that there had been any enduring consequences for the complainant in that case.

Here, as I have said, there was a serious attack with serious ongoing consequences for the complainant committed by a person

with a lengthy criminal history albeit with only one conviction for a violent offence and then almost 10 years previously.

I cannot conclude that the learned sentencing Judge's discretion miscarried so as to make the sentence manifestly excessive in so far as the head sentence is concerned although I would note that that sentence of four and a-half years is at the high end of the range.

However, there was an important matter personal to the applicant which ought to have attracted particular mention and consequences before the sentence. He was the sole carer for three children now aged 16, 15 and 14. The mother is no longer involved in their care. He arranged for his 78 year old mother to come to look after them whilst he was incarcerated. We have learnt today that her ill health makes it necessary for her no longer to undertake that task. They remain, therefore, to their own devices.

Although views might differ about the applicant's parenting responsibility in allowing his young charges to be out on the streets and beach well after midnight it is not doubted that he cares for them and that they surely need him. Certainty is clearly required about when he might be able to resume caring for them and this was always the case even though the Court below learnt that his elderly mother was to look after them.

To give effect to this, I would suspend the sentence after serving 18 months with an operational period of five years. Accordingly, the orders which I would make are to the grant the application; allow the appeal to the extent of varying the sentence below by ordering the sentence to be suspended after the applicant has served 18 months with an operational period of five years.

JERRARD JA: I agree with the reasons for judgment and order as proposed by Justice White.

JONES J: I also agree.

JERRARD JA: Those orders will be the orders of the Court.
