SUPREME COURT OF QUEENSLAND

CITATION:	*R v Abednego* [2004] QCA 377
PARTIES:	**R** **v** **ABEDNEGO, David Frank** (applicant)
FILE NO/S:	CA No 248 of 2004 DC No 1174 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	12 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	4 October 2004
JUDGES:	Williams JA, Jones and Chesterman JJ Separate reasons for judgment of each member of the Court, Williams JA and Jones J concurring as to the orders made, Chesterman J dissenting in part
ORDERS:	**1. Grant leave to appeal against sentence** **2. Allow the appeal** **3. Set aside the sentence below and order that the applicant be sentenced to six months imprisonment to be suspended after he has served three months of that term with an operational period of twelve months**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPLICATION TO REDUCE SENTENCE – OFFENCES AGAINST THE PERSON – where applicant pleaded guilty to assault occasioning bodily harm whilst armed and in company – where applicant sentenced to two years imprisonment suspended after six months with operational period of four years – whether sentence is manifestly excessive – whether sentence fell outside range of sentences given by other judgments of court – whether the consideration of deterrence should give rise to a custodial sentence *R v Conochie; ex parte A-G (Qld)* [1999] QCA 199; CA No 107 of 1999, 28 May 1999, cited

R v Dempsey and Perks; ex parte A-G [1999] QCA 520; CA Nos 328 and 329 of 1999, 17 December 1999, cited
R v Denham; ex parte A-G (Qld) [2003] QCA 74; CA No 376 of 2002, 28 February 2003, cited
R v Haughton [1997] QCA 281; CA No 219 of 1997, 6 August 1997, considered
R v Hsu & Hsu [1998] QCA 257; CA Nos 199 and 200 of 1998, 7 August 1998, considered
R v Irving [2004] QCA 305, CA No 246 of 2004, 20 August 2004, considered
R v Van Ling [2003] QCA 382, CA No 109 of 2003, 5 September 2003, considered

COUNSEL: K M McGinness for the applicant
M R Byrne for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **WILLIAMS JA:** The background facts to this application for leave to appeal against sentence are set out in the reasons for judgment of Jones J which I have had the advantage of reading.

[2] Immediately prior to the events in question it could be said that the applicant was a young man, aged 20, with no previous criminal history, and a good employment record. His involvement in the events leading up to the commission of the serious offence of assault occasioning bodily harm whilst armed and in company are set out in the reasons for judgment of Jones J. What, in my opinion, makes the offence serious, and calls for a sentence involving an actual period in custody, is the fact that he armed himself with part of a metal steering wheel lock prior to leaving the motor vehicle. Thus when he entered the yard of the complainant's house he was in a position to use that weapon if the occasion arose. It appears that the learned sentencing judge approached the matter on the basis that the applicant and Lacey confronted the complainant, not for an aggressive purpose, but for the purpose of talking over the events which had occurred earlier that day. But the fact that the applicant was already armed meant that he was able to strike what could be regarded as pre-emptive blows once he perceived an act of aggression on the part of the complainant.

[3] In those circumstances, notwithstanding his age and previous good character, an actual custodial sentence was called for. However, as is demonstrated by Jones J in his reasons, the sentence actually imposed was not supported by other decisions of this court.

[4] As the event appears to have been a one-off episode not in keeping with the applicant's general character, a probation order would appear not to be called for. In the circumstances a sentence containing a good behaviour requirement for a period of time is more appropriate.

[5] In the circumstances I agree with the orders proposed by Jones J.

[6] **JONES J:** The applicant pleaded guilty to one count of assault occasioning bodily harm whilst armed and in company. He was armed with part of a metal steering

lock and he was in the company of his friend, Jay Lacey. For that offence he was sentenced to two years imprisonment to be suspended after six months. He seeks leave to appeal against that sentence on the ground that it is manifestly excessive.

[7] The applicant was born on 7 December 1982 and was 20 years of age at the time of the offence. He is now 21 years old.

[8] The incident occurred at or about 6.30pm on 6 June 2003 at the residential address of the complainant. About one and a half hours earlier the complainant had had an altercation with Jay Lacey. Lacey had sought to bring to the complainant's attention the fact that one of his children had spat on Lacey's car and his children were playing "chicken" with his vehicle when he drove along their street. Rather than remonstrating with the children as Lacey expected, the complainant abused Lacey and pushed him away. This reaction surprised Lacey but caused him further concern because he frequently visited that area to visit his girlfriend who lived nearby to the complainant's residence.

[9] Lacey returned to his home and met up with the applicant. There was a discussion about the incident and what could be done about it. In the result Lacey and the applicant decided to go to the complainant's house and talk to him to try and smooth things over so that there would be no problems between Lacey and the complainant.[1] As Lacey said in his record of interview, the complainant knew him and his girlfriend and her parents, and he "wanted everything to be sweet".[2]

[10] This statement of intention and rationalising appears to have been accepted by the learned sentencing judge who said –

> "It is also possible, in my view, to approach this difficulty with a view that you may have accompanied Mr Lacey, not for an aggressive purpose, but for a purpose of deterrence against possible aggression, and by that presence making it possible for Mr Lacey to have a talk with [the complainant]."[3]

The reference to "deterrence against possible aggression" is relevant also to explain why the applicant was armed with part of a metal steering wheel lock. In the initial discussions, Lacey had indicated that the complainant, who was of larger stature than Lacey, had reacted aggressively towards him. On this return visit Lacey was accompanied by the applicant and by a third person, Skye Frankic. However Frankic did not enter the complainant's property, and had no contact with the complainant. The applicant admitted taking the part of the wheel lock from Lacey's car not with any intention of using it but because he was not a very good fighter and he panicked. He wanted to deter any potential aggression towards himself and the others.

[11] His Honour appears to have accepted that explanation when he said –

> "There is no evidence of precisely what was the purpose other than the suggestion that lest there be trouble, your presence may have assisted in either preventing that happening or have minimised it. In other words, as the case appears, there is no direct evidence of any

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1 Appeal Record 14/10
2 Appeal Record 82/10
3 Record 42/1-10

> preconceived plan to injure or assault [the complainant]. However, as I have said, you did carry with you the lock."[4]

[12] How the weapon came to be used is a matter of some dispute, but his Honour indicated that he was prepared to act on the submissions made on the applicant's behalf.[5] The applicant's remarks in the record of interview are not particularly articulate but his description of the event contains the following elements. When he went to the complainant's door he was getting really angry and being calmed down by Lacey. When the complainant answered the door to the applicant's knocking there was a discussion during which the complainant manifested some aggression towards the younger man. The discussion also included the applicant saying to the complainant not to hit Lacey again or he would be standing up for Lacey. The complainant took off his jacket and offered to fight. The applicant in his record of interview said that the complainant "just [came] towards me and I've just pulled out the bat and I just, yes, I just hit him".[6] The applicant struck the complainant two blows with the wheel lock causing the complainant to fall to the ground. As the complainant was getting to his feet the applicant kicked him. At all events the applicant states that he believed that the complainant taking off his jacket and coming towards the applicant was "as if [the complainant] was going to attack [him]."[7]

[13] Mr Lacey in his record interview described the movement of the complainant towards the applicant as "he's just lunged at [the applicant]".[8]

[14] That narrative was largely in accordance with the complainant's evidence at the committal hearing except that the complainant does not agree that he lunged towards the applicant. His evidence at the committal hearing was as follows:

> "When you say that you took your jacket off in preparation for what you have said might happen? ---"I knew we were going to have a fight."

He was then asked

> "So at any stage do you recall lunging towards Mr-----? ---No."
> "So, you're saying you got your jacket off to get ready? ---Yes."
> "Is that right? ---Yes, because he was confronting me. He was coming up to me, yes, on my left-hand side."

[15] Whatever were the actions of the complainant, the applicant does admit that he used excessive force in his reaction and that as a consequence the complainant suffered significant injuries. These included a fracture of the left mandible with residual jaw trismus, loss of some teeth and a minor closed head injury. These injuries resulted in the complainant being unable to work for seven months. He suffered also with a post-traumatic stress disorder, the resolution of which was complicated by employment, legal and marital issues.

[16] There was much to be said for the character and antecedents of the applicant. He has no prior convictions and is apparently a person of placid temperament. He is a member of a highly respected Torres Strait Islander family. He is highly regarded by his peers and his current employer who expressed the hope that the applicant

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4 Record 41/1-10
5 Record 42/20
6 Record 73/35
7 Record 73/55
8 Record 81/22

would continue with his employment.[9] There is no doubting the high level of the applicant's remorse for his actions. He voluntarily approached the police to admit his action. He and his family made a genuine offer to provide compensation for the complainant.

[17] The learned judge's finding that the aggravating features of being armed and being in company were for protective, rather than aggressive purposes reflects a significant amelioration in the criminality of the applicant's conduct. There is no doubt that the manner in which these young men decided to handle the confrontation with the complainant was naïve, if not foolish. Knowing that the complainant had earlier acted with aggression the obvious course would have been to stay away or to communicate without confrontation. But it is clear on the material that the reason for going was to make peace. This, as it appears to me, is a significant distinguishing feature between the circumstances here and those in the number of comparable decisions to which this court has been referred. It also sets the background against which the deterrent aspect of punishment has to be considered.

[18] There can be no doubt that ordinarily a person who arms himself or herself to go to the residence of another person for the purpose of assaulting another that a term of imprisonment with time actually served would be considered. Where, however, a weapon is picked up without thought or where if taken is used instinctively or defensively then other considerations apply. Such was the situation in the case *R v Haughton*[10] which was relied upon by both the applicant and the respondent as a comparable decision. *Haughton* concerned a 25 year old offender who in circumstances of a marriage breakdown assaulted firstly his wife and then later a next-door neighbour who had come to her aid. The offender threw an axe at the neighbour striking him on the chest and causing significant injury. The Court of Appeal reduced a sentence of 15 months imprisonment to one of six months imprisonment plus probation to take account of the offender's personal circumstances and lack of any deliberation in choosing to pick up the axe. The offender's conduct in assaulting his wife and the neighbour continued over a period of time and persisted after the wife had left the scene. The circumstances appear to me to have been more serious than those in the subject appeal.

[19] Both applicant and respondent also relied upon the case of *R v Hsu & Hsu*[11] which concerns two offenders from a family which was involved in a feud with another family, and which led to a dispute at a bar in the early hours of the morning. One of the offenders had secreted a revolver in his trousers and indicated an intention to show it or to use it. However, the other offender started the fight by hitting the complainant over the head with an empty beer bottle causing it to smash and to wound the complainant. The offender then produced the handgun and hit the complainant with the bottom of the handle. The learned primary judge describing the incident as a "gangster-style" raid imposed a penalty of two years imprisonment with eligibility for parole after eight months. On appeal the description of the conduct as "gangster-style" was found to be in error and the penalty was reduced in the case of the worse offender to 18 months imprisonment with eligibility for parole after six months and for the other offender 12 months imprisonment with eligibility

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9 Exhibit C

10 [1997] QCA 281

11 [1998] QCA 257

after four months. The conduct of each of these offenders would seem to be significantly worse than the conduct in the subject appeal.

[20] On behalf of the applicant the court was referred also to three appeals by the Attorney-General – *R v Dempsey*;[12] *R v Denham*[13] and *R v Conochie*.[14] Each of these detailed offending behaviour which was more deliberately offensive and with serious consequences for the complainants none of whose conduct had in any way provoked the assault. It is sufficient to say that in each case there was no imposition of a penalty which required service of time in actual custody.

[21] On behalf of the respondent the court was referred to *R v Irving*[15] where the offender and co-offender pleaded guilty to three counts of assault occasioning bodily harm plus other lesser offences upon two complainants aged 28 years and 23 years respectively. This was an unprovoked assault on two strangers whom the offenders regarded as homosexuals. Each was sentenced to six months imprisonment to be followed by a probation order for two years. On appeal emphasis was given to a number of mitigating factors. In his reasons for dismissing the appeal, McPherson JA (Jerrard JA and Dutney J agreeing) said –

> "It is a mistake to suppose that the applicant's youth clothes him some form of immunity from a sentence imposing a term in prison in a case of this kind. It is true that for young persons, such a sentence remains, in principle, a penalty of last resort, but, as the President pointed out in *R v Ryan ex parte Attorney-General* (CA 187 of 2000), the application of that principle is in the case of offences of violence causing physical harm to a person, expressly qualified by the provisions of s 9(3) of the *Penalties and Sentences Act*."

[22] In *R v Van Ling*[16] the offender was initially convicted of unlawfully doing grievous bodily harm and was sentenced to four years imprisonment. The offender participated in a plan, in the execution of which the victim was assaulted outside his home by a number of men using aluminium poles as weapons. On appeal that conviction was quashed and a conviction for assault occasioning bodily harm was substituted. The penalty imposed for these offences was eight months imprisonment. The circumstances were quite different to those now being considered but I have found no value in attempting to compare the penalties ultimately imposed.

[23] Whilst the applicant here did use excessive force, the violence was not premeditated, expected, or wished for by the applicant. It could, on the submissions advanced by the applicant (and apparently accepted by the learned trial Judge) be characterised as a reaction to the complainant's conduct and thus a provoked response. This, as I have indicated above, is a distinguishing feature with the above cases where the assaults were entirely unprovoked. What makes the applicant's conduct most culpable is the fact that notwithstanding his intention not to use it, he took the wheel lock to the complainant's house. Moreover it was used forcefully once employed.

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12 [1999] QCA 520
13 [2003] QCA 74
14 [1999] QCA 199
15 [2004] QCA 305
16 [2003] QCA 382

[24] A comparison of the applicant's conduct in the circumstances shows that a head sentence of two years imprisonment is outside the sentencing range particularly having regard to the findings made as to the applicant's purpose in going to the complainant's residence. Counsel appearing for the respondent could not refer the court to a decision of comparable conduct where a head sentence of this level was imposed. Consequently I would hold that his Honour's discretion has miscarried, and that the application for leave be granted and the appeal be allowed.

[25] Accepting that the applicant's intended purpose in being at the complainant's residence was essentially to prevent or to minimise trouble, I do not accept that consideration of deterrence, personal or general, required any significant period of custody. A sentence of six months imprisonment would, in my view, achieve the purposes of punishment and deterrence relevant to these circumstances. I would further order that the sentence be suspended after the applicant has served three months imprisonment to take account of his cooperation and his timely guilty plea.

[26] I would therefore order that the sentence below be set aside. In lieu I would order that the applicant be sentenced to six months imprisonment to be suspended after he has served three months of that term with an operational period of twelve months.

[27] **CHESTERMAN J:** The facts relevant to this application for leave to appeal against sentence are set out in the reasons for judgment of Jones J.

[28] The submissions addressed to the court on behalf of the applicant focused entirely upon his personal circumstances. There is much to be said in his favour and the points have been fully rehearsed in the reasons of Jones J. The applicant was young; he had no criminal history; he comes from a good family and has their support; he was evidently remorseful and co-operated fully with the police and the prosecuting authorities; it is most unlikely, as far as one can ever tell, that he will re-offend. Notwithstanding his good upbringing and law-abiding nature the applicant committed a crime which was both serious and violent. It is a mistake when passing sentence for a court to concentrate on the personal circumstances of the applicant (or any accused person) without paying equal regard to the circumstances of the offence. If a court does so it runs the risk of imposing a sentence which is not just in *all* the circumstances.

[29] The applicant went in the company of two other men to the complainant's home. Although he protests that his intention was to keep the peace and prevent violence between his friend Lacey and the complainant the reality is that he armed himself with a steel bar. He would not have taken the weapon unless he thought the occasion to use it might arise, and unless he intended to use it if he thought it was necessary. He knew of the complainant's propensity for aggression. It was because he thought there might be trouble that he accompanied Lacey to the complainant's house.

[30] The complainant was quite viciously assaulted on his own property, just outside his front door. The applicant did not leave when it was obvious that the complainant was not prepared to talk calmly to Lacey. The complainant made it plain he resented their presence on his property and wished them gone. Instead of leaving the applicant struck the complainant twice on the head. Each blow was severe and caused substantial injuries. His jaw was broken, some teeth were knocked out and he sustained some slight brain damage. He was unable to work for seven months.

[31] There is reason to doubt the applicant's claim that he went to the complainant's house to keep the peace. Not only did he arm himself with a steel bar but he admits to being angry with the complainant when he arrived. He had to be 'calmed down' by Lacey. The applicant struck the complainant at the first sign of aggression. He made no attempt to placate the complainant or to leave. Moreover after he had struck the complainant to the ground he kicked him.

[32] The applicant was sentenced to a term of two years imprisonment to be suspended after six months with an operational period of four years. The applicant's counsel directed the court's attention to a number of cases in which persons convicted of assault occasioning bodily harm whilst armed and in company attracted lesser sentences. It was submitted that a lesser sentence such as an Intensive Correction Order or a wholly suspended term of imprisonment were appropriate sentences. Whether that is so or not is beside the point. The court is not concerned with whether another sentence may have been appropriate or even more appropriate than the one under challenge. The court's only task is to examine whether the sentence imposed is inappropriate in the sense that it is outside the range of permissible sentences for the offence and the circumstances in which it was committed.

[33] I am prepared to accept that a head sentence of two years, though partly suspended, together with the lengthy operational period of four years is excessive and beyond the range of appropriate sentences given the significant mitigating factors of the applicant's personal circumstances. I cannot accept that a sentence of six months actual custody is in any way excessive or inappropriate for an offence of this kind. The offence involved the complainant, who was unarmed, being assaulted in his own property by the applicant who had taken a steel bar to use as a weapon when he expected that the complainant might react unfavourably to his presence and that of Lacey. He used the weapon at the first pretext and used it with force. Against this depiction of criminal violence the applicant's good character and remorse go only so far.

[34] I would grant the application for leave to appeal and allow the appeal. For the sentence imposed I would substitute one of 12 months imprisonment to be suspended after six months. I would impose an operational period of 18 months.