SUPREME COURT OF QUEENSLAND

CITATION:	*R v McDonald* [2005] QCA 383
PARTIES:	**R** **v** **McDONALD, Neil Dallas** (applicant)
FILE NO/S:	CA No 236 of 2005 DC No 2915 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	14 October 2005
DELIVERED AT:	Brisbane
HEARING DATE:	5 October 2005
JUDGES:	McPherson and Jerrard JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence dismissed**
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 – WHEN REFUSED – applicant convicted by his own pleas of guilty to assault occasioning bodily harm and assault occasioning bodily harm whilst armed – sentenced to 15 months imprisonment suspended after five months operational for two years for the armed assault with a lesser concurrent term for the assault – applicant first assaulted complainant in a hotel then left the premises – applicant later returned and struck the complainant with a full liquor bottle – applicant had no prior convictions for violent offences – whether the sentence was manifestly excessive *R v Hays; ex parte A-G* [1999] QCA 443; CA No 271 of 1999, 29 October 1999, considered *R v Hsu & Hsu* [1998] QCA 257; CA Nos 199 and 200 of 1998, 7 August 1998, considered *R v Jasser* [2004] QCA 14; CA No 277 of 2003, 9 February 2004, considered *R v Kent* [2004] QCA 83; CA No 61 of 2004, 23 March 2004, distinguished

	R v Monro [2002] QCA 483; (2002) 135 A Crim R 256, distinguished
COUNSEL:	B P Marais for the applicant M J Copley for the respondent
SOLICITORS:	Paul Carter & Associates for the applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **McPHERSON JA:** Despite the careful submissions of Mr Marais of counsel, I consider that the sentence imposed here was not disproportionate to the offences committed.

[2] I agree with the reasons of Jerrard JA. The application for leave to appeal should be dismissed.

[3] **JERRARD JA:** On March 2005 Neil McDonald pleaded guilty to one count of unlawfully assaulting Michael Pilgrim and doing him bodily harm, and one count of unlawfully assaulting Michael Pilgrim and doing him bodily harm when armed with an offensive instrument. On 18 August 2005 Mr McDonald was sentenced to five months imprisonment on the count of assault occasioning bodily harm, and to 15 months imprisonment, suspended after five months for a period of two years, for the offence of assault occasioning bodily harm whilst armed. Both sentences are to be served concurrently. Mr McDonald has applied for leave to appeal against those sentences, arguing that each is manifestly excessive.

[4] Mr McDonald is 46, married, a concreter by profession, and he has a four year old son. He has a record of convictions for offences in respect of cannabis incurred in 1994, 1995, 2000, and 2001, of which the most serious were convictions in 1994 on two counts of supplying it to another, and one count of production. All other convictions were for possession of cannabis; those convictions are of little relevance to the offences the subject of this application.

[5] Those were both committed on 11 June 2004, when Mr McDonald had become intoxicated after a work-related function in which alcohol was consumed, after a contract was completed. Mr McDonald made offensive statements to Mr Pilgrim's partner, and Mr Pilgrim intervened, objecting to Mr McDonald's language. Mr McDonald grabbed Mr Pilgrim by the shirt front. Mr Pilgrim then seized Mr McDonald and the two men wrestled and fell to the floor. Mr McDonald ended up on top of Mr Pilgrim, said "I'm going to scratch your eyes out", and began to scratch Mr Pilgrim's face. The hotel manager and another person intervened and separated the two men, and Mr McDonald left the hotel, while still suggesting to Mr Pilgrim that they should both "go outside" and continue fighting. Police arrived and spoke to Mr McDonald, who had bought some more alcohol at the bottle shop, and Mr McDonald agreed it would be best for him to go home. Mr Pilgrim had a number of scratches to his cheek, forehead, mouth, and nose, but declined to make a complaint because he was of the view that the incident was over.

[6] About half an hour later Mr McDonald entered the hotel again, carrying a full bottle of bourbon and coke in his hand, walked up to Mr Pilgrim, and hit him just above the right eye with the bottle. It did not break, but the impact caused a cut above Mr Pilgrim's right eye along the right eyebrow. He again grabbed Mr McDonald, they

again fell to the floor, and Mr McDonald was again pulled off Mr Pilgrim and yet again escorted from the premises.

[7] Mr Pilgrim had been turning towards Mr McDonald when struck with the bottle, and his victim impact statement complained of a decreased vision in his right eye. He also complained of headaches and nightmares. The cut eyebrow was closed with two internal and six external stitches.

[8] The comparable cases to which each party referred this Court included matters in which there had been a charge of unlawful wounding; that being the predicable result of the use of a glass instrument as a club or weapon. Mr McDonald's counsel referred the Court to two cases in which a charge of assault occasioning bodily harm had been brought, where an applicant had used a bottle or a glass, but the sentences imposed in those do not much help his argument.

[9] In *R v Morgan Hsu & Mao Hsu* [1998] QCA 257, this Court heard appeals in which both applicants had pleaded guilty to two counts of assault occasioning bodily harm while armed. They were brothers, and in the course of a feud between two families, they attacked their victims (who were also brothers) in a hotel lounge. Mao Hsu was carrying a revolver and he hit one victim with that gun, and Morgan Hsu hit the other complainant's brother with an empty beer bottle on the back of the head. The bottle broke and that complainant, who was then set upon by three or four other supporters of the Hsu family, was punched and kicked all over his head and shoulders. That complainant suffered a swollen and bruised left eye and lacerations to his left eyebrow and ear. He also had scalp and neck wounds that needed stitches. Morgan Hsu also hit the second complainant – the one Mao Hsu hit with the handgun – on the head with a drinking glass which broke on impact, and that complainant then suffered a 15cm graze to the back of the head, multiple lacerations to his left fifth finger which was fractured; and he had multiple minor abrasions to his right elbow and upper arm resulting from the fracas. He needed stitches to his head and finger area.

[10] Both those applicants had no prior convictions, and the sentencing judge sentenced them each to two years imprisonment with parole recommended after eight months. Their applications were allowed, simply because the learned sentencing judge had taken into account a fact which was in dispute, namely that the judge considered the applicants had engaged in a gangster style raid on the club. The applicants had submitted to the sentencing judge that they had been drinking at their home beforehand and had gone to the hotel with no intention of causing trouble, and it was for that reason that this Court held the judge was in error in sentencing them on the finding that what had happened was a "gangster style raid." This Court re-sentenced those applicants, and was persuaded to the view that the sentences imposed were slightly heavier than would ordinarily be imposed, and sentenced Morgan Hsu to 12 months imprisonment suspended after four months for a two year operational period, and Mao Hsu to 18 months imprisonment suspended after six months for a two year operational period. The sentences imposed on Mr McDonald fall at the mid-point between those two sentences. The Hsu brothers were not charged with the aggravating circumstance of being in company, although that seems to have been revealed by the facts placed before the learned judge, and the different sentences imposed on each of Mao and Morgan Hsu were explained by this Court as due to Mao Hsu being 26, and having encouraged his younger brother Morgan Hsu to commit the offences.

[11] Morgan Hsu was 20, and committed two offences of assault occasioning bodily harm. He was armed with a bottle for one offence, and with a glass for the other, but his age and absence of any previous convictions makes his sentence comparable with the sentence imposed on Mr McDonald. In *R v Hsu & Hsu,* McMurdo P wrote:

> "As has been said by this Court on other occasions, while these offences are serious and courts must deal seriously with this type of offence, particularly where beer glasses or bottles are involved, it is not invariable that a custodial sentence is imposed, although it often, indeed usually, is. That does not mean, of course, that where there are special circumstances warranting a fully suspended sentence or a non-custodial sentence, such a sentence cannot be imposed but such cases are unusual."

[12] Mr McDonald's counsel did not succeed in persuading the learned sentencing judge that his case was unusual, and that has not been demonstrated on this appeal. Accordingly that decision supports the sentences imposed, rather than demonstrating that they are manifestly excessive.

[13] Mr McDonald's counsel also referred to *R v Hays; ex parte A-G* [1999] QCA 443, in which this Court allowed an appeal by the Attorney-General against a sentence of 240 hours community service imposed for the offence of unlawful wounding. That respondent was 24, had no relevant criminal history, and was very remorseful. The joint judgment of Davies JA and Jones J reads:[1]

> "This is yet another of many cases which have come before this Court in which one person has wounded another with a broken beer glass. The Attorney referred to no less than 11 appeals to this Court in the last decade concerning a sentence for unlawful wounding involving mostly beer glasses, but on one occasion a beer jug and another, a bottle. We will only add at this stage that all of them resulted in a sentence of imprisonment, the sentences varying between 12 months and three years."

In that case the respondent had hit the complainant on the chin with a glass, following an exchange of hostile remarks, and this Court imposed a sentence of 18 months imprisonment wholly suspended, that complete suspension being due to the fact that the respondent had already performed 58 hours of the ordered community service, and that it was an Attorney's appeal. Those two matters, and his mitigating circumstances, were said to render the case sufficiently unusual to require complete suspension of the imprisonment. The joint judgment had earlier referred to six of the 11 appeals in like cases, remarking[2] that:

> "…all of them were sentences for unlawful wounding involving the use of a beer glass or, on one occasion each, a beer jug (*Robertson* [CA No 103 of 1989, 18 July 1989]) and a beer bottle (*Bouma* [CA No 261 of 1988, 2 February 1989]) and resulted in sentences of between one and three years imprisonment."

[14] That joint judgment then described the sentence of 200 hours community service in the matter of *Vickery* [1992] QCA 147, increased on the Attorney's appeal to 12

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1 In para [6]
2 At [16]

months imprisonment; the sentence in *Melano* [1995] 2 Qd R 186, in which this Court dismissed an Attorney's appeal against a 15 month sentence of imprisonment suspended after three months; that in *Darwin* [1996] QCA 211, in which this Court refused leave to appeal against an 18 months sentence of imprisonment with parole after six months; in *Maguire* [1997] QCA 38, in which the Court refused leave to appeal against the sentence of two years imprisonment; and in *Anders* [1997] QCA 211, in which a sentence of one year to be served by way of an intensive correction order was increased on appeal to this Court to one of 18 months imprisonment. After that review, the joint judgment records:

> "A review of these cases shows, in our view, that this Court has considered general deterrence of such importance in cases of this kind as to require that a term of imprisonment be imposed even where, as in this case, the conduct was unpremeditated, the offender is young and not previously been sentenced to gaol."[3]

[15] It is clear from those statements that had the beer bottle broken, and the charge been one of unlawful wounding, the sentence imposed on Mr McDonald for that offence, if one of 15 months suspended after serving five, would have been, if anything, at the lower end of the scale. Unlawful wounding carries a seven year maximum sentence of imprisonment, and assault occasioning bodily harm while armed carries a maximum of 10 years.

[16] Mr McDonald's counsel also referred to *R v Monro* [2002] QCA 483, in which the charge brought was also one of assault occasioning bodily harm. That offender was sentenced to four months imprisonment, suspended immediately for an operational period of 18 months. His complaint on appeal was against the recording of a conviction. That applicant had been a member of the Queensland Police Service, working as a Police Prosecutor, and he had irritated – probably harassed – the female complainant in a Brisbane hotel. After she had asked him on two occasions in the clearest terms to leave her alone, pushing him away, he had struck her on the side of the face when holding a glass, causing an injury to her cheek. He was sentenced on the basis that he did not deliberately strike her with the glass, but rather that he deliberately struck her while holding it. It did not break.

[17] He was 26 years old with a good work history, and had been a volunteer in the Army Reserve, the Surf Lifesaving movement and with police youth clubs. He gave an undertaking at his sentence to resign from the Queensland Police Service, from which he had been suspended without pay after being committed for trial. The judgment of the President, with which the other members of the Court agreed, remarked that comparable cases, many of which had preceded the increase in the maximum penalty for that offence, indicated that non-custodial options may have also been within the proper sentencing range, but that the sentence imposed was by no means manifestly excessive. Compared to Mr McDonald, that applicant had pleaded guilty to one offence only, and Mr McDonald plainly used the bottle with which he struck Mr Pilgrim as a weapon. That sentence does not show that Mr McDonald's sentences were manifestly excessive.

[18] The respondent DPP referred the Court to the decisions in *R v Jasser* [2004] QCA 14 and *R v Kent* [2004] QCA 83. In *Jasser* that applicant had been convicted of unlawfully wounding after a three day trial, and sentenced to 21 months

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[3] At [22]

imprisonment. He had struck his victim on the cheek with a glass, after some pushing and shoving and exchanging of words between them. His appeal against conviction was dismissed; likewise his application for leave to appeal against sentence. Davies JA, whose judgment was relevantly that of the court, recorded that the applicant was a 33 year old man of Ethiopian origin who had suffered in consequence of imprisonment in Ethiopia during a war there, and who had had to struggle with, and who had coped reasonably well with, the process of migration to a new country and a strange language. His Honour also accepted that that applicant might find it more difficult to cope with prison life than a native of this country would, but that nevertheless the sentence imposed was at the lower end of the range for offences of that kind. Those remarks suggest that the sentence for assault occasioning bodily harm while armed, imposed on Mr McDonald, was appropriate; it was only by good fortune that the bottle did not break.

[19] Finally, in the matter of *R v Kent* that applicant was sentenced to 18 months imprisonment suspended after three months for unlawful wounding, to which he had pleaded guilty. He had been teased in a hotel by the complainant, who formed the opinion that he had been discourteous to her, and after discussing her grievances with the barmaid, the complainant went up to that applicant and punched him with full force with her closed fist on the nose. That applicant responded by grabbing the complainant, asking why she hit him, and then striking her in the face with the glass which broke on impact and cut her.

[20] That applicant was 48 years old and had a minor criminal history in Victoria, resulting only in fines, and had a good work record. He produced favourable references from apparently responsible citizens. I add that Mr McDonald produced references of that kind and placed those before the learned sentencing judge.

[21] Mr Kent was dealt with by this Court on the basis that his offence was a sudden and hot-blooded reaction to what was plainly an unprovoked painful assault, but that cases of that kind had been viewed seriously by this Court, because of the likely serious consequences of such a blow and because of the prevalence of incidents of that kind. Reference was made to the decisions in *Toohey* [2001] QCA 149, *Orreal* [2002] QCA 547, and the decision in *Jasser*. This Court held that despite Mr Kent's co-operation and guilty plea, there were no special circumstances requiring that his sentence be further suspended, and his application was dismissed. His offence, although unlawful wounding, was committed in more favourable circumstances than Mr McDonald's, because Mr McDonald attacked an unsuspecting man with a weapon half an hour after he had earlier unlawfully assaulted that same man. It has not been shown that the sentences imposed were manifestly excessive, despite Mr McDonald's good references, good work history, family circumstances, and absence of any previous convictions for offences of violence.

[22] I would dismiss the application for leave to appeal.

[23] **DOUGLAS J**: I have had the advantage of reading the reasons for judgment of McPherson and Jerrard JJA and agree with their Honours and the orders proposed.