SUPREME COURT OF QUEENSLAND

CITATION:	*R v West* [2006] QCA 252
PARTIES:	**R** **v** **WEST, Nathaniel Kenneth** (applicant/appellant)
FILE NO/S:	CA No 3 of 2006 DC No 207 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Rockhampton
DELIVERED ON:	14 July 2006
DELIVERED AT:	Brisbane
HEARING DATE:	9 June 2006
JUDGES:	McMurdo P, Holmes JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal against sentence granted** **2. Appeal against sentence allowed** **3. On count 1 substitute three years imprisonment for four years imprisonment** **4. Orders imposed at first instance are otherwise confirmed**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSONS - APPLICATIONS TO REDUCE SENTENCE - WHEN GRANTED - PARTICULAR OFFENCES - OFFENCES AGAINST THE PERSON - GENERALLY - where applicant was sentenced to four years imprisonment on one count of assault occasioning bodily harm and six months imprisonment on one count of unlawful use of a motor vehicle, to be served concurrently - where applicant has a lengthy criminal history but is remorseful and believes that he has a problem with alcohol - where trial judge and counsel at sentence incorrectly believed that s 157(3) *Penalties and Sentences Act* 1992 (Qld) required a parole recommendation to be imposed and that this could not be for a date before 9 September 2007 - where applicant

claims that his sentence was manifestly excessive and that trial judge did not sufficiently take mitigating factors into account - whether trial judge sufficiently took into account mitigating factors such as applicant's remorse and plea of guilty

Criminal Code 1899 (Qld), s 339
Penalties and Sentences Act 1992 (Qld), s 156A, s 157(3), s 157(4)

R v Fifita [2005] 1 Qd R 51, applied
R v Gander [2005] 2 Qd R 317, applied
R v Hadland [2000] QCA 182; CA No 368 of 1999, 16 May 2000, considered
R v Summers; ex parte A-G (Qld) [2004] QCA 275; CA No 131 of 2004, 3 August 2004, applied

COUNSEL: A W Moynihan for applicant
R G Martin SC for respondent

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

[1] **McMURDO P:** The applicant pleaded guilty on 8 September 2005 in the District Court at Rockhampton to one count of assault occasioning bodily harm and one count of unlawful use of a motor vehicle. The offences occurred on 18 December 2004 and the complainant in each case was his then partner. He was sentenced to four years imprisonment on the first count and to six months imprisonment on the second count. Those sentences were concurrent with each other but were ordered to be served on the expiration of the period of imprisonment for which the applicant was then liable. The judge recommended the applicant be considered for post-prison community-based release from 9 September 2007. The judge further recommended that the applicant be assisted and encouraged to attend Alcoholics Anonymous meetings and that he be assessed with respect to his individual risks and needs in relation to a programme about alcoholism. Three days of pre-sentence custody were declared as time already served under the sentence. Mr Moynihan, who appears for the applicant, contends that the sentence was manifestly excessive and that the judge did not sufficiently take into account mitigating factors.

[2] The applicant was born in Cherbourg in south-east Queensland. He was 39 at the time of the offences and 40 at sentence. He had a reasonably lengthy criminal history. Between 1983 and 1990 it included principally street and minor dishonesty offences which resulted in non-custodial sentences including probation. Of more concern is that in 1991 he was convicted with others of doing grievous bodily harm and sentenced to six and a half years imprisonment. He was convicted of further offences during that term of imprisonment including being unlawfully at large, wilful damage to property and breach of leave of absence. In 2001 he was sentenced to four months imprisonment for entering a dwelling and committing an indictable offence on 17 July 1999. Of particular relevance is his conviction on 7 February 2002 for wounding and three counts of assault occasioning bodily harm while armed on 5 October 2000 for which he was sentenced to an effective term of two years imprisonment suspended after nine months with an operational period of four years. Later that year he was also convicted of a related matter of breaching a

domestic violence order. He was next convicted on 20 December 2002 of two counts of assault occasioning bodily harm whilst armed and one count of assault occasioning bodily harm. These offences constituted a breach of the February suspended sentence. He was sentenced to two and a half years imprisonment on the December offences, concurrent with each other but cumulative with the order that he serve the whole of the balance of the suspended sentence imposed on 7 February 2002. On 20 January 2003 he was convicted of breaching a domestic violence order on 15 July 2002 and sentenced to 14 days concurrent imprisonment. All his convictions for offences of violence since 2002 have involved threats or attacks on his de facto partners.

[3] The applicant was on parole when he committed the present offences on 18 December 2004. He was arrested that day and has been in custody since. His parole was suspended on 20 December 2004 and on 11 January 2005 it was revoked. According to the most recent Sentence Calculation Details handed up during the hearing of this application, his present full time discharge date is 30 June 2010 and, as noted, he is eligible for parole on 9 October 2007.

[4] The circumstances of his present offending were as follows. On Friday 17 December 2004 the applicant and the 28 year old female complainant had been in a de facto relationship for about three or four months. They arrived in Rockhampton from Woorabinda where they had attended a funeral. The complainant wanted to stay in Rockhampton overnight before travelling to Childers. The applicant wished to visit his family in Townsville. They agreed that she would go to Childers in her car and the applicant would travel by bus to Townsville. They stayed the night in Rockhampton with the applicant's cousin and family. When the complainant woke the next morning she found the applicant and her Keycard were missing. She checked her account balance by telephone and found that $200 had been withdrawn without her authority. She learnt that the applicant was drinking at another relative's house. At about 8.00 am she went to see him and asked for the return of her money. She said she did not want him to travel to Childers with her. They argued. He threatened to physically harm her. He was drinking alcohol and told her she should also drink alcohol. She told him she did not drink alcohol and would not remain at the house whilst he was drinking. She reluctantly agreed to drive the applicant and others to another home.

[5] She stopped on the way at a telephone box to phone her mother. The applicant cut off her call, took her phone card, threw it on the ground and ordered her back in the car. She picked up the card and telephoned her sister. The applicant remained in the phone box with her. He took her car keys and forced them against her throat. She screamed. He took the receiver and hung up. He grabbed her hair and pulled her backwards out of the phone box, ordering her back to the car. She refused. He let go of her hair and walked in front of her, punching her to the left eye and causing her to step backwards. He then punched her twice to the face so that she fell over, landing on her elbows and knees. He was wearing boots. He kicked her twice to the face. He then tried to punch her again but missed and overbalanced so that she was able to get up and run to a nearby shop. He got into her car and drove away. The complainant was taken to hospital and treated.

[6] The complainant suffered multiple lacerations and soft tissue bruising. Her face was painful and swollen. Her lip and temple injuries were cleaned and glued. An elbow injury required suturing. She had a broken upper incisor tooth. The

photographs of the complainant's injuries were tendered at sentence and I have viewed them.

[7] The applicant drove the complainant's car to a local caravan park at about 3.30 pm. He told an acquaintance that he wanted to travel to Townsville in a car he had bought in Brisbane but did not have a licence. The acquaintance offered to drive him to Townsville and they left at about 4.00 pm. They were intercepted by police at about 5.20 pm near St Lawrence. The applicant was arrested and charged.

[8] The complainant's victim impact statement explained that she was a school officer at an Aboriginal and Islander Independent Community School. She met the applicant through her mother, an Indigenous Support Officer at Wolston Correctional Centre. The complainant supported his efforts to rehabilitate and reintegrate into the community. They eventually formed a de facto relationship. He lived in her home with her mother, nephew and her. The relationship went well whilst he maintained a sober lifestyle. In mid-December 2004 she took leave from her job to travel with the applicant to attend the funeral at Woorabinda of an elder in his family. This offence occurred when they returned to Rockhampton after the funeral and the applicant became intoxicated. She had never before experienced violence and was terrified by the applicant's conduct. He threatened to kill her and splatter her across the concrete. She feared for her life and was shocked by the violence and persistence of his attack. She was physically ill from the pain. She felt humiliated at the hospital. The bruising and swelling took four weeks to subside and she suffered severe embarrassment. Unsurprisingly she has continued to suffer mental and emotional trauma following the attack and feels violated by the abuse of the trust she placed in the applicant. She remains physically frightened of him.

[9] The prosecutor emphasized that many of the applicant's previous violent offences had been committed on his domestic partners. He had been given multiple opportunities in the past to rehabilitate but he continued to reoffend. In those circumstances deterrence required a salutary penalty of three and a half to four and a half years imprisonment for the offence of assault occasioning bodily harm and a concurrent lesser term for the offence of unlawful use of a motor vehicle. He conceded that the committal proceedings were conducted entirely by tendered statements so that the complainant was not cross-examined and the guilty plea was timely.

[10] The applicant's counsel at sentence stated that the applicant appreciated that his conduct was grossly wrong and was thoroughly ashamed of his actions which he knew were triggered by alcoholism. During his previous periods of incarceration he has received little or no assistance for alcoholism. His parents were alcoholics and he was raised by his grandmother in Cherbourg in a climate of alcohol abuse and domestic violence. He started drinking at 12 years of age. He has lost and continues to lose many close members of his family to alcohol related illnesses. He left school halfway through Grade 8 and worked in rural labouring jobs. He was on medication for a heart condition. He suffered injuries to his lower spine and knee when playing football as a young man. He has insight into his alcoholism and realizes that if he does not overcome this addiction he will spend his life in and out of gaol. He deeply regrets the loss of a loving relationship with the complainant through his actions. He has no recollection of the incident. Whilst he accepts full responsibility for his actions, he is shocked that he could have behaved in such a

way to the complainant whom he described as "a beautiful woman". He instructed his counsel that he could not describe his sorrow for what the complainant feels about what he did to her. Through his conduct of the criminal proceedings against him he hoped to minimize her trauma. He emphasized that she should not be concerned for her safety in the future as far as he is concerned: he holds her in the highest regard and is thoroughly ashamed of his actions.

[11] The applicant addressed the judge directly stating "[m]y major problem is alcohol and I'm asking right here now that if, I don't know, maybe I could have some help about it, hey?"

[12] During discussion in the sentencing hearing defence counsel agreed with the prosecutor's submission that the judge had to make a recommendation for parole eligibility and that under s 157(4)(b) *Penalties and Sentences Act* 1992 (Qld) ("the Act"), because of the prior cancellation of parole the earliest recommendation that could be made was 9 September 2007. The judge also indicated that he considered the applicant's prospects of release on parole were bleak because of his history.

[13] In his sentencing remarks the judge demonstrated his familiarity with the serious aspects of the applicant's offending and his Honour's compassionate understanding of the mitigating factors and of the role of the applicant's alcohol addiction in both the present offences and in the applicant's past offending.

[14] Mr Moynihan submits that, despite the very serious aspects of the assault and the applicant's previous history, comparable sentences do not support a four year cumulative term of imprisonment for an offence of assault occasioning bodily harm simpliciter. He also submits that the judge did not genuinely moderate the sentence to reflect the mitigating factors by the parole recommendation here because he considered a parole recommendation mandatory but illusory. Mr Moynihan contends that instead the head sentence should have been moderated to reflect the mitigating factors and that a cumulative sentence of between 18 months and two years should have been imposed.

[15] Counsel for the respondent, Mr R G Martin SC, emphasizes that the applicant had a history of committing like offences for which he was initially sentenced to two years imprisonment and was then given a cumulative sentence of two and a half years imprisonment but that these sentences failed to deter the applicant from reoffending. Personal deterrence was paramount. The applicant committed the present offence on parole only four months after release. He contends that the sentence is supported by this Court's decision in *R v Hadland*.[1]

[16] It is common ground that the judge and both counsel at sentence proceeded on the incorrect assumption that s 157(3) of the Act required the imposition of a recommendation for parole and that this could not be given before 9 September 2007. In reality, because the earlier sentence did not include a recommendation for parole eligibility, the judge here had a discretion whether or not to make a parole recommendation; if he decided to make a recommendation for parole eligibility he could do so at any time. See *R v Fifita*[2] and *R v Gander*.[3]

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1 [2000] QCA 182; CA No 368 of 1999, 16 May 2000.
2 [2005] 1 Qd R 51, 57, [16].
3 [2005] 2 Qd R 317, 323, [25].

[17] The applicant is a mature man, now 40 years old. He has a bad criminal history which shows him to be a recidivist offender who, when intoxicated, persists in serious attacks upon his female partners. Although he has insight after the event into the dreadful effect of alcohol upon him, he has not been able to control his anti-social behaviour by continuous abstinence. The pattern is that he drinks alcohol, becomes intoxicated, attacks his partners in a most vicious manner and is remorseful, abstaining until next time. The community correction authorities gave him a further opportunity to rehabilitate by his most recent release on parole. He was indeed fortunate to have had the support of the complainant but he treated her with disdain when he commenced drinking alcohol, the inevitable trigger to his recidivist violent offending. He committed the present assault offence but four months into that parole period. These circumstances make the present case much more serious than those referred to by Mr Moynihan as supporting his contention that sentences for the offence of assault occasioning bodily harm simpliciter rarely exceed 18 months imprisonment.

[18] Mr Moynihan submits that the most comparable recent decision is *R v Summers; ex parte Attorney-General (Qld)*.[4] Summers was sentenced to 12 months imprisonment after he pleaded guilty to one count of assault occasioning bodily harm whilst armed with an offensive instrument. The maximum penalty for that offence was 10 years imprisonment whereas in the present case the maximum penalty was seven years imprisonment. Summers had a criminal history including convictions in 2001 for three counts of assault occasioning bodily harm whilst armed and one count of assault occasioning bodily harm simpliciter for which he was sentenced to three years imprisonment with a recommendation for parole after 12 months. The earlier offence involved a prolonged and protracted assault on his de facto partner in which he severely beat her and behaved in a bizarre, degrading and disrespectful manner, threatening her with a knife and striking her with a hammer and a tyre lever. By the time of his sentence on those offences he had become engaged to the complainant. She collected him from prison for weekend leave. He became angry with her over pending court proceedings in which she was a complainant in a rape case. He repeatedly struck her with a hammer to the head, abdomen and buttocks, punched and kneed her in the groin and squeezed her around the throat so that she had difficulty breathing. She was terrified, in extreme pain and thought she was going to die. The sustained attack lasted over an hour. She suffered bruising to the head and face, finger and chest and ribs, a subconjunctival haemorrhage over the left eye, petechiae over the front of the neck and breast, scratches and bruises to the lower right arm and abrasions, scratches and bruising to the abdomen and a contusion to the buttock. The judge noted that Summers had served almost the full period of the 2001 sentence and had been continually in custody since his commission of the more recent assault offence. The judge considered that Summers would not be granted future parole but that he should serve a further 12 months in actual custody and so imposed a sentence of 12 months imprisonment. The prosecutor at sentence and the respondent before this Court contended that a cumulative sentence of four years imprisonment, possibly with a declaration that it was a serious violent offence, should have been substituted for the 12 month sentence imposed at first instance. This Court referred to *Hadland* and *R v Bell*[5] and *R v C*,[6] concluding that they clearly demonstrated that the sentence

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4 [2004] QCA 275; CA No 131 of 2004, 3 August 2004.
5 [2000] QCA 485; CA No 235 of 2000, 23 November 2000.
6 [2000] QCA 154; CA No 34 of 2000, 3 May 2000.

imposed of 12 months imprisonment was manifestly inadequate. The Court determined that a sentence of three years cumulative imprisonment with a recommendation for post-prison community-based release eligibility on 6 October 2005 reflected as much as the Court was able the intention of the experienced sentencing judge who did not consider that a declaration under s 161B of the Act was warranted.

[19] *Summers* was an Attorney-General's appeal; the substituted sentence was a modest one at the lower end of the applicable range. It does not establish that this sentence was manifestly excessive.

[20] Mr Martin SC refers primarily to *Hadland*. Hadland was convicted by a jury of assault occasioning bodily harm. He was sentenced to four years imprisonment cumulative on an existing three year sentence and declared to be a serious violent offender. He committed the offence after having been on parole for but six days. He was then subject to a sentence of two years and three months for the offence of assault occasioning bodily harm and to a further nine month cumulative sentence for common assault collectively making for a three year term of imprisonment. He had formed a relationship with the complainant in the most recent offence whilst in custody. He assaulted her by striking her on the head and rupturing an ear drum. He had a history of assaults on women with whom he had relationships. This Court concluded that the sentence imposed was within range.

[21] In the present case, the applicant's previous history and established recidivist offending against his female partners whilst intoxicated necessitated the imposition of a substantial term of imprisonment. That term of imprisonment must be cumulative: s 156A of the Act. Whilst his plea of guilty, remorse and principles of totality bearing in mind the cumulative nature of the sentence required some moderation, this was certainly a very serious example of an offence against s 339(1) *Criminal Code*. The maximum penalty was seven years imprisonment. It is self-evident that if the applicant is to overcome his alcoholism and avoid future like offending he must abstain from alcohol. To succeed in that task he will greatly benefit from a prolonged period of intense supervision and support in the community. The judge did, however, exercise his discretion on a wrong basis, incorrectly accepting counsel's assertions that he was required to make a recommendation for parole and that he could not do so before 9 September 2007 and believing that any such recommendation was likely to be illusory because of the appellant's history. This Court should now exercise its own discretion and sentence the applicant. A sentence adequately reflecting the serious aspects of the assault but with appropriate moderation because of the cumulative nature of the sentence and the applicant's remorse and co-operation with the administration of justice is one of three years imprisonment with a recommendation for parole eligibility on 9 September 2007. If the applicant is ever to succeed he will benefit from a lengthy period of intense supervision and support in the community.

[22] I would grant the application for leave to appeal against sentence, allow the appeal and on count 1 substitute three years imprisonment for four years imprisonment. I would otherwise confirm the orders imposed at first instance.

[23] **HOLMES JA:** I have read the reasons for judgment of the President. I agree with her Honour's reasons and the orders proposed.

[24] **MACKENZIE J:** I have had the opportunity of reading the reasons for judgment of the President and agree with them. I only wish to comment on one matter.

[25] It was submitted on the applicant's behalf that, on the basis of analysis of recent authority, it was rare for an offender convicted of assault occasioning bodily harm without a circumstance of aggravation under s 339(1) *Criminal Code* 1899 (Qld) (which has a maximum sentence of seven years) to be sentenced to more than 18 months imprisonment. Where sentences of between 18 months and four years imprisonment had been imposed, the offences were typically ones with formal circumstances of aggravation and a level of harm often approaching grievous bodily harm (subject to a 10 year maximum sentence under s 339(3)).

[26] It was acknowledged on the applicant's behalf that the present offence was a serious one and that the fact that the applicant was on parole with his history of violent offending marked it as one of the rare cases of assault occasioning bodily harm simpliciter where a notional head sentence would exceed 18 months imprisonment. However, it was submitted that, scaling back from *Summers* [2004] QCA 275, where the offence was an aggravated offence, the notional head sentence should not have exceeded two and a half years. The facts and issues in *Summers* are succinctly set out in the President's reasons.

[27] If this submission carries with it the implication that there is some necessary compression of the range of sentencing appropriate to offences of assault occasioning bodily harm simpliciter, to a level below that ordinarily imposed for an aggravated offence, I do not agree. The unfortunate reality is that, because of the applicant's affliction referred to in the President's reasons, he has accumulated a history of violence including offences, of which the present one is a frightening example, where there is a domestic or acquaintanceship element.

[28] I agree with the orders proposed by the President for the reasons she gives.