SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dobinson* [2006] QCA 357
PARTIES:	**R** **v** **DOBINSON, Justin John** (applicant)
FILE NO:	CA No 178 of 2006 DC No 55 of 2006 DC No 221 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	15 September 2006
DELIVERED AT:	Brisbane
HEARING DATE:	29 August 2006
JUDGES:	Jerrard JA, Atkinson and Douglas JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application dismissed**
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 REFUSED – GENERALLY – where applicant pleaded guilty to one count of grievous bodily harm, two counts of negligent acts causing harm, and one count of drink driving – where co-accused in respect of grievous bodily harm count received a different sentence – whether the sentence was manifestly excessive in all of the circumstances *Penalties and Sentences Act 1992* (Qld), s 9(1)(c), s 9(2), s 9(3) *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld) *R v Price* [2006] QCA 180; CA No 38 of 2006, 26 May 2006 applied

COUNSEL:	The applicant appeared on his own behalf R G Martin SC for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

[1] **JERRARD JA:** I have read the reasons for judgment of Justice Douglas and respectfully agree with those reasons and the order proposed by His Honour.

[2] **ATKINSON J:** I agree with the reasons for judgment of Douglas J and the orders proposed.

[3] **DOUGLAS J:** The applicant pleaded guilty to an offence of unlawfully doing grievous bodily harm and to two offences of performing negligent acts causing harm, as well as to a summary offence of drink driving. The offences occurred on two separate occasions, 9 April 2005 and on 4 June 2005. He was convicted on 1 June 2006 and sentenced to three years imprisonment suspended after 12 months on the count of unlawfully doing grievous bodily harm, to 21 months suspended after 12 months on each count of performing negligent acts causing harm and to three years probation in respect of a dangerous driving charge. The sentences were to be served concurrently. He had previously been convicted for two assaults occasioning bodily harm in 2003 and, after the present offences and while on bail for them, was convicted for a common assault in December 2005.

[4] His submission is that the period of imprisonment for his offences should have been six months.

[5] In summary the circumstances of the offences were that on 9 April 2005 a man named Mr Toombs was initially assaulted by the applicant's co-offender, named Tyson Foord. Mr Toombs had a congenital medical condition, so a soldier called Joel Juratowitch who knew of Mr Toombs' condition intervened, trying to separate Mr Foord and Mr Toombs. In the event, Mr Juratowitch pushed Mr Foord to the ground and pinned him to stop any further assault on Mr Toombs.

[6] At this point, the applicant intervened on behalf of Mr Foord, with a kick to the back, which caused Mr Juratowitch to let go of Mr Foord, and punches to the head and shoulder. Mr Foord joined in with at least one kick to Mr Juratowitch's lip. The applicant then pushed Mr Juratowitch to the ground and, as he tried to rise, the applicant punched him. Eyewitness accounts described Mr Juratowitch being kicked and stomped to the head, back and ribs while he was on the ground. There were punches as well. On these accounts there were three people involved in this including Mr Foord and the applicant. The applicant was sentenced on the basis of Mr Foord's account that he (Foord) was responsible for all the kicking. The applicant was also taunting Mr Juratowitch and screaming at him that he was going to kill him.

[7] Mr Juratowitch suffered a significant injury to his spleen. He received blood transfusions. He was hospitalised for 5 weeks. He was a soldier, and the injuries jeopardised his career, although he recovered sufficiently to be able to continue to serve in East Timor.

[8] His Honour summarised the evidence about the count of assault occasioning grievous bodily harm in detail at R. 55-57 as follows:

> "Whilst the complainant was facing forward he received a very sharp and serious blow in his left-hand lower lumbar area, such being significant as far as subsequent medical evidence was concerned. The complainant at different stages was on the ground or standing up. There were three people who persistently kicked and punched him. He received for instance, a kick to the lip in addition to punches around the face and the body and being on the ground and as I said, serious kicks of some persistence.
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> Crown counsel very fairly informed the Court that this is not one of the usual situations in which everyone in a vicious attack involving kicking says he was not the kicker. He informed the Court that your co-accused Foord said that he was a regular kicker and that you did not kick at all. Nevertheless you were a very important and willing party to this vicious assault with the strength of numbers, as I said, three on one. The reasonable conclusion is you were fully aware that Foord and possibly the third person were kicking the complainant in the circumstances outlined and you willingly continued to punch and apply force at the same time before, during and after.
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> The complainant stated inter alia that at one stage you said you were going to kill him or something like that. He feared for the safety of his girlfriend nearby. The complainant suffered an injury which at the time it was suffered, without medical treatment, would have been life-threatening.
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> The doctor describes the injuries including a grade 4 splenic injury with a significant amount of haematoma surrounding the injured spleen. The complainant was in hospital for nine days after his admission. The doctors advised him to avoid contact sports for six months as well as any other activity in which he may be susceptible to sustaining a significant blow to the abdominal region. That had a special and particular effect on the complainant as he was a career soldier.
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> As he states in Exhibit 6:
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> > 'I was viciously attacked by a group…I was punched, stomped on and kicked. When I was repeatedly punched, stomped and kicked I felt intense and searing pain in my face and all, over my body. I could feel blood in my mouth and felt it on my body and I was desperately trying to protect myself but felt disorientation and was sure that I was going to be killed as the punching, kicking and stomping continued unabated for what seemed an eternally long time and the pain was all over my body as it never seemed to end. Mentally I was afraid for my life and felt humiliated and helpless as Dobinson' (that is yourself) 'taunted me and he was screaming in a very aggressive manner that he

> was going to kill me and/or cause as much damage to me as he could. While the attack was happening I could hear my girlfriend screaming and crying and I felt intensely afraid for her safety and felt helpless and humiliated that I could not protect her or myself.'
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> He refers to the not insubstantial effects on his army career; he financial loss that it involved. In referring to the injury he said:
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> 'I suffered a grade 4 tear to my spleen this resulted in the very real possibility of losing my spleen which could forever affect my career with the army. The spleen healed at the tear but created scar tissue/scabs which means that for the rest of my life I live with the possibility of the spleen rupturing, which mean that I would bleed internally and can result in that I would die from this injury. The rupture can result from a sudden jolt…due to the spleen injury I have not been able to properly fulfil my duties as a member of the army. It brought my career to almost a standstill…during the attack I suffered broken ribs which caused enormous pains for months after the attack. My lips were badly split during the attack and I suffered severe bruising all over my body including the imprint of a shoe over my kidney. While in hospital I also suffered a partial collapse of my lungs.'
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> As happens with spleen type injuries a person can make the recovery, except for risk of future rupturing that the complainant referred to and, fortunately, for all concerned he has recovered to such an extent that he is now serving his country in East Timor in his capacity as a soldier."

[9] While he was on bail for that offence, the applicant committed the further offences with which he was charged. On 3 June 2005 the applicant went to a hotel with his girlfriend, Ms Jade Carter. While there, he became upset over the fact that his girlfriend, during a period when their relationship was temporarily and briefly not on foot, had taken up with a man named James Harding. The evening ended badly. There was an argument between the applicant and Ms Carter. At about 2.00 am they left together in a taxi. During the taxi trip, the applicant had a phone conversation with Mr Harding, threatening to kill him.

[10] When the taxi trip finished, Ms Carter said she was not going to stay with him, and then saw the applicant drive towards Townsville City. She caught a taxi back to the city (to the hotel she had just left) and saw the applicant and Mr Harding surrounded by a crowd, obviously having fought. Ms Carter moved away from the hotel a short distance but then heard the applicant's vehicle "going out of control". She heard screeching tyres and an engine revving. When she came back to the Strand, she saw a group of her associates on the footpath. When she got to about 5 metres from them, she saw the applicant's car skid past her towards the group on the footpath.

[11] The members of the group, with two exceptions, successfully avoided being hit by the car. Other descriptions of the applicant's driving have him reaching a speed of 65-75 kph (in a 40 kph zone), and becoming airborne as he crossed a traffic island, while driving at people. One woman was hit from behind. She sustained bruising

and a gravel rash to her hip. Another man suffered relatively minor foot injuries. The details are a little difficult to follow, but it is clear that there was a degree of persistence about the driving. It was accepted that the applicant was not deliberately trying to hit people; rather he was trying to scare them, intending to pull up marginally short of them. Later the applicant surrendered himself at a police station. His blood alcohol was 0.074 per cent.

[12] The learned sentencing judge identified that the applicant had an obvious anger management problem, noted that it was sufficiently pronounced that it could not be passed off as a one-off or out of character action and said that the driving could not be said to be split second or spur of the moment. He said that he had thought at one stage that the applicant should serve 18 months imprisonment to be followed by structured supervision on parole but considered that that provided too cumbersome and uncertain an outcome. Instead of that he combined a suspended sentence with probation taking the view that the result was "a bit on the light side".

[13] The respondent, who appeared in person, submitted that his co-accused on the first count of assault occasioning grievous bodily harm was sentenced in a different court at a different time and received a lighter penalty even though he admitted to being the one who kicked the complainant. The applicant also submitted that his prospects for rehabilitation were not taken into account in relation to a possible employment offer, that his age was not taken into account and that his full cooperation with police in respect of that count and in respect of the charges of negligent acts causing harm was not given proper credit. He further submitted that his character references were not given sufficient weight, nor was his remorse. He submitted that the sentence which should have been imposed was one of six months imprisonment with three years probation on his release for all charges.

[14] The effect of the submissions for the respondent is that the appropriate sentence should have been from three to five years imprisonment but that the sentence imposed by his Honour was "generously distorted so that it came within the confines of granting him both the certainty of a suspended sentence and the supervision of parole." If anything, the respondent submitted, the sentence was too low. There is no appeal, however, by the Attorney-General against the sentence.

[15] The proper approach in cases of this nature was recently discussed in this Court by White J in *R v Price* [2006] QCA 180. Her Honour, giving the primary judgment, said:

> "[21] In *R v Bryan; ex parte A-G(Qld)* [2003] QCA 18, Williams JA said at [32] of the offence of grievous bodily harm that it is difficult, if not impossible 'to speak meaningfully of a 'range' when considering penalty' because of the great variety of acts which may result in the commission of the offence. The same might well be observed of unlawful wounding. The circumstances and the nature of the injury as well as the permanent consequences thereof will vary greatly and have impact on the appropriate sentence. As Pincus JA commented in *Amituanai* [1995] 78 A Crim R 588 at 589
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> > '... for reasons that are evident enough, the offender will find that his punishment may depend on the extent of the damage the victim happens to sustain. That is, the risk that a blow which might by good luck have caused little damage in fact has catastrophic results, as it had here, is one which is shared by the

> victim and the offender ... The applicant may well, having served a period of imprisonment, leave the whole affair largely behind him; the victim can never do so and his prospects of a happy and useful life are greatly and permanently impaired.'

[22] Thomas J (as his Honour then was) and I agreed with those comments and added at 596-7

> 'It must also bear in mind that vindication is one of the many functions of the sentencing process, and it is an evident matter in the present case. Unless courts are seen to inflict real punishment, victims and their families may be tempted to exact their own form of revenge. That is not to say that cases may not arise in which this factor will be outweighed by the benefits of rehabilitation.'

[23] Deterrence, as well as vindicating the victims of violence, particularly in the case of street violence by gangs of adolescents and young men is of great importance and is enshrined in the sentencing guidelines in the *Penalties and Sentences Act 1992* (Qld), s 9(1)(c). Street violence which was once regarded as an isolated occurrence is now reported as happening with alarming frequency in our cities and suburbs. No community can contemplate without unease the kind of activity which the facts of these two incidents reveal. This Court has consistently denounced street violence. In *Amituanai* the offender was sentenced to three years imprisonment with a recommendation for early release after serving nine months which, although described as 'not light' was not interfered with on appeal. The offender was a 26-year-old young man who was celebrating his successful final university results and kicked his victim in the head which caused him to fall and sustain severe head injuries after an altercation at a taxi rank in the suburbs late at night. This occurred after the offender had himself sustained an unprovoked severe blow from a member of the complainant's group which fractured his jaw.

[24] The offender in *R v Hoogsaad* [2001] QCA 27 was aged 19 when he struck the complainant, a bystander outside a hotel in Ayr at night, with an iron bar around the arms and legs and then inflicted two blows to his head which left him with some serious deficits. There had been an earlier altercation which did not involve the complainant and there was no explanation for the attack. The five year sentence for inflicting grievous bodily harm was not disturbed after a plea of guilty.

[25] In *Bryan* a knife was used in an unprovoked attack in Brisbane on New Year's Eve with life-threatening consequences for the victim. This Court on an Attorney-General's appeal increased the sentence of four years suspended after 12 months with an operational period of five years after a plea of guilty to one of six years. Both the Chief Justice and Williams JA commented that a serious violent offence declaration may well, if sought, have been appropriately made.

[26] *R v Tupou; ex parte A-G(Qld)* [2005] QCA 179 was an Attorney-General's appeal where a sentence of three years suspended after nine months with an operational period of three years was increased to the extent of ordering suspension after serving 15

months. The offender, aged 18 years, pleaded guilty to doing grievous bodily harm to a much smaller mildly disabled young man at a taxi rank by punching him in the head and causing him to fall to the ground. The complainant's jaw was broken and he had ongoing problems. The offender subsequently sought to avoid detection and was on a good behaviour bond when he offended. The Chief Justice commented at p 10

> 'In a number of recent decisions, the Court of Appeal has emphasised the strength of the importance of deterrence in sentencing for violent offending of this general character. The public rightly expects the Courts by their sentences to achieve so much as can be achieved to help ensure the cities of this State are safe places for those who venture out during the night.'

He quoted with approval the observations of Williams JA in *Bryan* at para 30

> 'Deterrence must be the major factor influencing sentencing (in these cases). Ordinary citizens must be able to make use of areas such as the Mall, even at night, sure in the knowledge that they will not be savagely attacked. The only way Courts can preserve the rights of citizens to use public areas in going about their own affairs is by imposing severe punishment on those who perpetrate crimes such as this.'

[27] The amendments to the *Penalties and Sentences Act 1992* (Qld) made by the *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld) provided in s 9(3) that the principle in s 9(2) that imprisonment should be regarded as a last resort did not apply to the sentencing of an offender for an offence that involves violence. The effect of those amendments on the sentencing of youthful offenders, long regarded by sentencing courts as calling for special leniency, was commented on in *R v Lovell* [1999] 2 Qd R 79. Each of the members of the Court, Davies and Pincus JJA and Byrne J commented that the amendments had the consequence that the youth of an offender, while still relevant, does not have the weight which it had, especially where violence is used or physical harm caused to another person. It is true that the comments were made in the context of considering whether a term of actual imprisonment should be served by that offender and as Byrne J added at 83

> 'Nonetheless youth remains a material consideration; for the rehabilitation of youthful, even violent, offenders, especially those without prior, relevant convictions, also serves to protect the community.'

[28] Whilst the rehabilitation of youthful offenders is important it is also important to keep firmly in mind that the court was here sentencing the applicant for two distinct and serious acts of street violence separated only by one month. The applicant has blighted the hopes and aspirations of one young man and devastated the life of the other and brought consequential suffering on their families, particularly in the case of the second complainant. In his

> case, as was noted by the learned sentencing judge, he himself was part of a gang engaged in street violence.
> [29] Whilst the learned sentencing judge might have acknowledged the factors in favour of the applicant by an early recommendation or suspension, not to have done so can not, in my view, be described as being beyond the exercise of a sound sentencing discretion and therefore manifestly excessive."

[16] Before his Honour in this case the prosecution had submitted that the offences charged on the second indictment should attract a sentence cumulative to the sentence for the charge of assault occasioning grievous bodily harm on the first indictment leading to an overall sentence of six years imprisonment taking into account the apparent lack of remorse evidenced by the accused's failure to apologise to the complainant in the first indictment and because the subsequent offences were committed while he was on bail for that first offence. For the applicant it was submitted that he cooperated with police and entered early pleas of guilty. He was also prevented by his bail conditions from contacting Mr Juratowitch but, through his counsel, expressed a willingness to write a letter of apology.

[17] His Honour took his cooperation into account as well as the applicant's youth; see R64 ll35-45. He was 19 at the time of the offences and 20 when sentenced. He was particularly concerned to structure the sentence so that the applicant spent some time in jail but then was released to a "structured supervised existence when you get out of jail".

[18] In my view that was an appropriate use of the sentencing discretion in the case of a young man clearly subject to problems with controlling his anger, such as the applicant, and one which betrays no error of principle. The sentence for the charge of assault occasioning grievous bodily harm, taking into account the mitigating features on behalf of the applicant, and considering the statements of principle and the range of sentences referred to by White J in *R v Price*, was appropriate and certainly not manifestly excessive. Particularly when one considers the subsequent behaviour charged in the second indictment, the overall result may well have been temperate, as it was described by the respondent.

[19] It was encouraging to hear from the applicant during the appeal that he has already progressed to an open classification in prison, but that does not affect the propriety of the original sentence and may serve to confirm the learned sentencing judge's approach as a means of addressing the applicant's anger problem.

[20] That Mr Foord, the co-accused in respect of the first indictment, received a different penalty is not persuasive. He was sentenced to two years imprisonment suspended after four months. The judge who sentenced him took care to distinguish his situation from that of the applicant. He was two years younger, 17 at the time of the offence, had no previous criminal convictions, had pleaded guilty without a committal hearing and showed "every sign of rehabilitation", unlike the applicant who re-offended very seriously within less than two months.

[21] Although it is desirable that co-accused be sentenced by the same sentencing judge and preferably at the same time, nothing said in respect of the co-accused takes away from the fact that this sentence was clearly appropriate for the serious criminal conduct committed by the applicant. I would dismiss the application.