SUPREME COURT OF QUEENSLAND

CITATION:	*R v Brown; ex parte A-G (Qld)* [2009] QCA 342
PARTIES:	**R** **v** **BROWN, Denny John** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 191 of 2009 SC No 383 of 2009 SC No 385 of 2009 SC No 388 of 2009 SC No 409 of 2009 SC No 1293 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	19 October 2009
JUDGES:	McMurdo P and Muir and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – the respondent pleaded guilty to a number of charges including three counts of unlawful wounding of a 10 year old child – the respondent injected the complainant child with a needle containing Oxycontin or heroin on three occasions – the complainant child suffered significant psychological harm and attempted suicide on a number of occasions – the respondent pleaded guilty to the wounding offences even though the complainant child could not give evidence – the respondent was sentenced to six years imprisonment with parole eligibility after two years – whether the sentence was manifestly inadequate – whether a serious violence offence declaration should have been made

Criminal Code 1899 (Qld), s 317, s 320, s 323, s 669A
Drugs Misuse Act 1986 (Qld), s 4

GAS v The Queen (2004) 217 CLR 198; [2004] HCA 22, cited
R v Henry & Attorney-General of Queensland [1996] QCA 414, considered
R v KU & Ors; ex parte A-G (Qld) [2008] QCA 154, cited
R v Lacey; ex parte A-G (Qld) [2009] QCA 274, cited
R v McDougall & Collas [2007] 2 Qd R 87; [2006] QCA 365, cited
R v Ottaviano [1997] QCA 338, cited
R v Walsh [2008] QCA 391, cited
R v Watson; ex parte A-G (Qld) [2009] QCA 279, cited

COUNSEL: M R Byrne for the appellant
D R Kent for the respondent

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

[1] **McMURDO P:** The respondent, Denny John Brown, pleaded guilty on 16 July 2009 in the Brisbane Supreme Court to the following charges contained in four separate indictments: burglary and stealing on 20 April 2005; unlawfully supplying the dangerous drug cocaine on 17 April 2007; stealing on 8 July 2007; falsely representing himself to be a police officer with intent to defraud on 8 July 2007; and three counts of unlawfully wounding a 10 year old child on unknown dates between 30 April and 4 July 2007. Brown also pleaded guilty to two summary offences: failing to take reasonable care and precaution in respect of a syringe or needle on 8 July 2007; and possessing a dangerous drug, flunitrazepam, on 8 July 2007. The sentencing judge ordered six years concurrent imprisonment on each count of unlawful wounding and lesser concurrent terms of imprisonment in respect of the remaining offences. The judge declared that time spent in pre-sentence custody (727 days) was time served under the sentence and that parole eligibility be set at 20 July 2009 after he had spent two years in custody.

[2] This Court was informed at the hearing of the appeal that Brown has not yet been released on parole so that he has now spent over two years and three months in custody. Under the sentence imposed, his parole release date remains a matter for the Parole Board.

[3] The appellant, the Attorney-General of Queensland, in an appeal under s 669A *Criminal Code* 1899 (Qld) filed on 13 August 2009, contends that:

> "(a) [the sentences] failed to reflect adequately the gravity of the offences generally and in this case in particular;
> (b) [the sentences] failed to take sufficiently into account the aspect of general deterrence, and;
> (c) the sentencing judge gave too much weight to factors going to mitigation."

[4] The appeal was filed before this Court's decision in *R v Lacey; ex parte A-G (Qld)*[1] which was delivered on 11 September 2009 and in which the principles governing Attorney-General's appeals against sentence under s 669A were redefined. In response to a question from the bench, Mr M R Byrne, who appeared for the appellant, stated that he did not seek to amend the grounds of appeal.

[5] I have ultimately concluded that the appeal should be dismissed. These are my reasons.

[6] The way the prosecution conducted the sentence at first instance is largely relevant to the arguments in, and outcome of, this appeal. It is necessary I refer to those proceedings in some detail. The sentencing court was provided with the following information.

Brown's antecedents

[7] Brown was 24 at the time of the burglary offence and 26 at the time of the remaining offences. He was 28 at sentence. He had some relatively minor criminal history. In December 2001, he was fined in New South Wales for two counts of obtaining money by deception and one count of "goods in personal custody suspected being stolen". His Queensland criminal history was as follows. On 9 July 2007 (immediately after his arrest on the last of the present offences) he was fined for failing to appear in accordance with his bail undertaking. In September 2007, he was fined for one count of stealing and one count of uttering committed on 9 March 2007. He therefore had no prior convictions for offences involving violence or drugs. He had not had the benefit of a supervised community based order like probation. He had never before been sent to prison. He has been in custody since 8 July 2007 when he was his arrested on the last of the offences the subject of this appeal.

The schedule of facts

[8] The prosecutor at sentence tendered a schedule of facts relating to Brown's offending which included the following information.

[9] In April 2005, Brown was living with a couple in an Ashgrove unit. On 20 April 2005, the couple left for work. When they returned, the front door was closed but unlocked, the balcony door was open, their unit had been ransacked and electrical equipment valued at $1,185 had been stolen. Brown's bedroom was undisturbed and he never returned to the unit. The couple complained to police. When Brown was detained in respect of subsequent offences, he told police that he and three male acquaintances from the drug scene stole the property. When they were unable to sell the property, they took it back to the house of one of his co-offenders. These facts constituted the burglary and stealing offences.

[10] At about midnight on 17 April 2007, security staff at Paddy Shenanigan's Bar, Airlie Beach, found two men in a single cubicle in the male toilet. They suspected the men were involved in the illegal drug scene, asked them to leave and notified police. Brown was one of these men. Police followed him and saw him throw something away. They recovered the package he discarded and intercepted him. He gave police the following information. The package contained glucose. He was

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1 [2009] QCA 274.

"just trying to make some extra cash". He was selling the glucose as cocaine at $250 per gram. When the substance was analysed, no drugs were detected. Brown took part in a record of interview with police and provided further information. He had been drinking and taken morphine that evening. He offered to sell a gram of the white substance, claiming it was cocaine, for $250 to a person he met at the bar. He did not finalise the transaction before he was evicted by the security officers. He needed money. These facts constitute the offence of supplying cocaine. (Under s 4 *Drugs Misuse Act* 1986 (Qld) "supply" includes offering to sell.) He also admitted to the burglary and stealing offences discussed in the preceding paragraph. He was released on bail so that the remaining offences were committed whilst he was subject to that bail order.

[11] On 8 July 2007, Brown struck up a conversation with a 40 year old man who was waiting for his wife at a shopping centre. Brown offered to sell him a PlayStation 3 console. He said he could get it at the reduced price of $400, because he worked in retail and had access to slightly damaged imported goods. The complainant expressed interest and wrote down Brown's mobile phone number. The complainant contacted Brown and arranged to meet him on 8 July 2007 to purchase three consoles for friends and family. The complainant met Brown as arranged. They drove to premises at Forest Lake where Brown told the complainant to wait for the goods.

[12] A small car driven by a woman with a man in the passenger seat, suddenly pulled up in front of the complainant's car. The man rushed to the front of the complainant's car and said to Brown, "We've got warrants on you. We're from the Inala CIB." The man flashed something that appeared to be a black wallet about the size of a police identification badge. The complainant believed the man was a police officer even though he was not in uniform. Brown blamed the complainant for his "apprehension". The "police officer" accused the complainant of involvement in the purchase of drugs or stolen property. He directed the complainant to get out of the car and to produce his identification. He took Brown over to the other car, pushed him into the back seat, and advised the complainant that he would be conducting a search of his car. The "police officer" searched the complainant's car and asked, "Where's the money?" He found the $1,200 cash the complainant had for the PlayStations. He again asked the complainant for identification. This time when the complainant produced his wallet, the "police officer" took the cash in it (about $300), claiming that it was evidence. The "police officer" returned to his car and appeared to make a phone call in which he said, "We've got them both here now. Can you send a car to come and pick them up?"

[13] The complainant followed the "police officer" to his car and asked for his name and badge number. The "police officer" responded, "Fuck off you little piece of shit. I don't have to give it to you." The complainant reached through the car window and grabbed his shirt. The "police officer" produced what appeared to be a gun which he pointed at the complainant's stomach, adding, "Fuck off." The complainant wisely retreated and the car sped off. Later that day, after discussing the events with family and friends, the complainant reported the matter to police. Witnesses in the street had noted the registration details of the cars. The car in which the "police officer" and the female were travelling was registered to H, Brown's de facto partner.

[14] At about this time, police were notified of a disturbance involving this car and it was intercepted with Brown and H in it. Police took them into custody and shortly

afterwards apprehended Brett Beard, who impersonated the police officer in the earlier incident. H had $450 cash in her possession. H and Brown participated in a record of interview with police. They admitted the offences. Beard received $700, Brown $360 and H the balance. Brown and Beard pooled their proceeds to buy heroin, which they immediately consumed. Brown said that H's two children, aged 10 and 11, were in the back seat of the car at the time of the stealing and personation offences. He did not have possession of a gun but he knew that Beard had a gun. These facts were relied on to establish the counts of stealing and falsely representing to be a police officer with intent to defraud.

[15] At the police station, police noticed Brown had something in his mouth and directed him to spit it out. It was a piece of plastic containing six green-coloured tablets which Brown said were Rohypnol. He said he had consumed about 10 tablets and he intended to use those in his mouth to commit suicide. This constituted the summary offence of possession of flunitrazepam.

[16] During the resulting police investigation, the three counts of unlawful wounding came to light. H and Brown had been in a de facto relationship for about 10 months prior to their apprehension. Brown assumed the position of father-figure to the 10 year old complainant and his slightly older sister. When these offences occurred between May and early July 2007, Brown was addicted to, and was a frequent intravenous user of, heroin. If he could not obtain heroin, he used H's morphine-based pain medication which was legitimately prescribed for her back pain. The family unit lived with various other adults at about seven different addresses during this period. The complainant child said that Brown deliberately, and without his consent, injected him with a morphine-based substance using a needle and syringe on three different occasions. After H's arrest, the child told adults in the household that Brown was the cause of his mother's predicament, stating, "he even sticks needles into my arm." He rolled up his sleeve to show the needle marks. He said that Brown injected him with heroin and that it made him "itch and scratch and feel funny. I don't know why they like it. When he gives it to me my head just goes down and I thought I was going to die." He directed the adults to a bag in the premises that contained needles, spoons and slimy substances. They drove the children to their maternal grandparents. The child gave a similar account to his grandparents. They immediately took him to a doctor who reported the matter to police the following day.

[17] The first count of unlawful wounding occurred when the family was living in a hostel. After Brown injected the complainant, his arm went "really big". The second count occurred when the family was living in a house and the complainant was sharing a room with Brown and H. When H was in the car listening to music, Brown asked him if he wanted "some" and the child responded, "No". Brown nevertheless injected him with what the boy thought was heroin because "there were little blue balls in the syringe" and heroin was "blue when mixed up". The third count occurred the Monday before the child was interviewed.[2] Brown grabbed the child and injected him. When asked to describe his reaction to the injection, the boy said, "makes you scratch a lot and my little beat, my little heart stopped." He thought the substance he was injected with was "Oxie or heroin; white balls in the syringe – stuff to make [the child] feel drowsy." He vomited and felt nauseous and sleepy. No one else was home at the time. He slept for three days after this injection.

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[2] The child was interviewed on 10 July 2007.

[18] A number of Crown witnesses saw marks on the child's arms on 9 and 10 July 2007, a day or so after Brown's apprehension. These marks were consistent with needle marks. The child was photographed. He was examined by a doctor on 9 July 2007. The doctor noted scarring consistent with needle trauma over the course of his veins in his left cubital fossa. The marks were not made within 24 hours prior to examination, but the doctor could not otherwise date them. The doctor noted two markings to his arms which she described as "noticeable and consistent with penetration of the vein". A paediatrician examined the child on 12 July 2007 and confirmed those findings. The residual lumps at the injection site were not consistent with the ordinary markings left from pathology collection (the child had a kidney disorder apparently requiring regular testing) "but rather appeared to be from someone not particularly competent and [something] not particularly sterile". These facts established the three counts of unlawful wounding.

[19] Police later found a duffle bag in Brown's home which H said belonged to Brown. It contained unsecured used syringes and drug paraphernalia. This was relied on to establish the summary charge of failing to take reasonable care and precaution in respect of a syringe or needle.

[20] Brown agreed to an interview with police about the wounding counts in which he claimed the following. Brown admitted that he was a heroin addict but he denied responsibility for injecting the child. The child had been injecting himself with drugs using Brown's paraphernalia. The child used drugs two or three times a day and had admitted to "shooting up Oxycontin". Brown had noticed the child under the influence of drugs. He had seen the child injecting himself, and falling asleep and vomiting because of drug consumption, but had not called an ambulance.

The prosecutor's submissions at sentence

[21] The prosecutor at sentence made the following submissions.

[22] H, who was 31 years old when sentenced for personation of a police officer and stealing, received six months imprisonment wholly suspended with a two year operational period. Beard, who was 36 years old when sentenced for these offences, had a worse criminal history than Brown for offences including violence, dishonesty and drug use. For the offences of personation of a police officer and stealing, Beard was sentenced to 18 months imprisonment with immediate parole.

[23] Brown told Corrective Services officers at the time of his admission on remand that he had hepatitis C. As at 21 September 2006, the child complainant did not have hepatitis C. In July 2007, when the offences first came to light, the child tested positive for hepatitis C. When tested in November 2007, hepatitis C was no longer detected. It seems that the child may have seroconverted and become immune, but his condition will have to be monitored. The judge could infer that Brown's offending had infected the child with hepatitis C but the child had subsequently developed an immunity which may or may not remain. The only explanation for Brown's conduct towards the child came from H, who described the child as "excitable" and "hyperaroused".

[24] Brown's offending left a serious and detrimental psychological effect on the child. Between October and December 2008, he made repeated and apparently genuine attempts at suicide. He was hospitalised involuntarily from December 2008 until January 2009 and then placed in a supported residential program affiliated with the

Child and Youth Mental Health Service. At the time of Brown's sentence, he remained part of that live-in program and continued to receive psychological and psychiatric assistance. His mother and grandmother maintained close links with him, but he has very special needs. He was suffering from a post-traumatic stress disorder which is at least in part as a result of Brown's conduct. He was considered too young and too vulnerable to provide a victim impact statement. He was frightened of Brown and worried about what would happen when Brown was released.

[25] Brown wrote to H from prison requesting that she have the child discontinue the charges so that he could be released from custody.

[26] On all but the unlawful wounding counts, the prosecution of these matters proceeded by way of a full hand-up committal. In respect of the wounding counts, the mother, grandmother and medical witnesses were cross-examined at committal about the markings on the child's arms. The prosecution considered that the child was unable to give reliable evidence at trial. There was some delay by the prosecution in progressing the matter because it hoped that, in time, the child's condition would improve; but it did not. Despite the prosecution's assessment of the child's reliability, Brown indicated an intention to plead guilty and should be given credit for that in determining the appropriate sentence.

[27] An effective global penalty of six years imprisonment was within range, with parole eligibility after one-third. This would effectively mean that Brown could apply for parole forthwith. Brown clearly needed the ongoing, structured community supervision and strict monitoring offered by the parole system.

Defence counsel's submissions at sentence

[28] Defence counsel commenced his submissions by contending that a global head sentence of five years imprisonment should be imposed. The judge immediately stated:

> "I'm just restraining myself from saying to the Crown: are you sure that that is the sentence I should impose because I would have thought any sentence lower than that would – would outrage me let alone the community."

[29] Defence counsel first tendered a letter from a doctor in the prison mental health service stating that Brown had schizophrenia in the context of substance abuse and was responding well to medication.

[30] Defence counsel next tendered a letter from the managing director of a transport business who had known Brown since 1982. Brown was one of five boys who were all recognised sportsmen in the Grafton area. Whilst still young, he was diagnosed with a mental disorder. He was easily misled when in bad company. Brown now wanted to make something of his life. The author offered to employ Brown and to be his mentor and carer, giving him the "employment, guidance and unconditional love" that he would need to succeed in his rehabilitation.

[31] Defence counsel then tendered a certificate indicating that Brown had participated in the drug offender intervention and treatment program whilst in custody. Drug screening certificates relating to samples provided on 15 December 2008 and 1 January 2009, which he also tendered, recorded negative findings.

[32] Defence counsel's final tendered exhibit was a letter from Brown. Brown apologised to his victims and identified his need for short and long term rehabilitation to address his problems and to ensure he did not return to jail. Brown did not make specific reference to the child victim. Defence counsel then made the following submissions.

[33] Brown grew up in northern New South Wales. He moved to Sydney where he worked for the Sutherland Shire Council and played football with Cronulla in the under 19 team. He spent too much time partying and lost his job. He became involved with drugs including injecting heroin. He was assisted to rehabilitate by former rugby league footballer and now professional boxer, Anthony Mundine, but when he left the Mundine household he reverted to drug use. He had attempted rehabilitation in the past with only short term success. He had been a heroin user since he was 19. Upon his release from prison to he hoped participate in a rehabilitation program. He did not intend to resume his relationship with H.

[34] Defence counsel emphasised Brown's plea of guilty which he entered despite being informed that the child complainant was unable to give reliable evidence. This demonstrated some genuine remorse and insight. Brown did not wish to put H's children through the ordeal of giving evidence, and neither child was required to give evidence at any stage. Brown's father, a brother and a family friend were present in court and were keen to assist Brown on his path to rehabilitation.

[35] It is common ground in this appeal that defence counsel intended to submit that, for the most serious counts, a global sentence of four to five years imprisonment with suspension should be imposed, and that this should be combined with a lengthy probation order on the less serious counts to ensure community supervision. But the judge interrupted defence counsel's submission at this point to express her concern that, although she accepted a global sentence was probably appropriate, she could not accept a head sentence of four to five years in light of Brown's depraved behaviour towards the child. Her Honour noted that defence counsel was "talking [the judge] into accepting the Crown's submission on sentence. In other words, not because you're upping the anti (sic), but you're making me more comfortable with the Crown submission."

The prosecutor's submission in reply

[36] The judge then stated to the prosecutor:

> "… I'm not completely satisfied that the sentence that you proposed is sufficient for the criminality involved here, notwithstanding [defence counsel's] very helpful submissions about … his personal circumstances."

[37] The judge asked the prosecutor to find comparable cases involving the wounding of a child by an adult, even if there were none involving an adult injecting a child with drugs. The judge invited the prosecutor to demonstrate that a sentence of four to five years imprisonment was appropriate for the wounding offences and that, taking into account the remaining offending, a global sentence of only six years imprisonment should be imposed. The prosecutor stated that she had consulted "with a senior member of the office". The judge added that she was "concerned that the behaviour is punished appropriately", explaining that cases of unlawful wounding were normally dealt with in the District Court. The judge expressed her desire to be sure that, when she exercised her sentencing discretion, she did so in an informed way. She stood the matter down to allow counsel to find helpful cases.

[38] When the court resumed, the prosecutor referred to some cases which she accepted were not comparable and which related to the offence of aggravated supply (an adult supplying a dangerous drug to a minor) where the maximum penalty was 25 years imprisonment.[3] The prosecutor submitted that in setting the sentence in this case, the judge should have regard to the general range of offences of unlawful wounding. Those involving "pub glassings" were from 18 months to up to three years imprisonment. Sentences of up to four years were imposed where the injuries sustained were both serious and involved a knife. In *R v Henry & Attorney-General of Queensland*,[4] the Attorney-General unsuccessfully appealed against a three and a half year term of imprisonment imposed on the 39 year old Henry. He both assaulted causing bodily harm to and wounded an eight month old baby in his care after he had been drinking throughout the day. Henry punched the baby to the face causing him to fall to the floor. That conduct constituted the assault occasioning bodily harm. He then pulled and prodded the hair of the baby until another person present intervened and struck Henry. The baby went to sleep but woke up crying. Henry smashed a beer bottle on the floor and used a piece of broken bottle to slash at the baby's face. The baby suffered a laceration to the eyelid and cheek. There did not seem to be any permanent harm to the baby although there was a chance of some scarring. Henry had a lengthy criminal history but this offence was out of character. This Court noted that, in the absence of mitigating factors, a five year sentence would have been appropriate. The three and a half year sentence, although at the lower end of the scale for such an abhorrent crime, was within range.

The judge's sentencing remarks

[39] In sentencing Brown, the judge made the following observations.

[40] The case was an example of the dreadful effects of illegal drugs on individuals and the community. The offences were all serious but the most serious were the unspeakable offences committed against the child to whom Brown was in a position of trust. He described himself as hepatitis C positive. After Brown's offending was revealed, the child tested positive for hepatitis C, although he has since developed antibodies to it. Brown had attempted to have the child discontinue the charges. He initially gave an exculpatory account. His plea of guilty, however, was entered despite the Crown's concern that the child could not give reliable evidence. It was a mitigating feature.

[41] The child had suffered dreadful psychological effects, at least in part because of these offences. Brown was 28 years old and had a minor criminal history. He came from a fine family and had their support. Brown's offending had caused great suffering to his own family. He had been using illegal drugs since the age of 18 and heroin since he was 19. His past efforts at rehabilitation had failed. He had been diagnosed with schizophrenia. He had two drug screens in prison which showed him to be drug free. Fixing a correct sentence was difficult. There were no comparable sentences for the wounding offences and the least possible sentence which could be imposed for them alone was, as suggested by the prosecution, four to five years imprisonment. The sentence imposed must punish, deter and denounce; but it should also rehabilitate.

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3 *Drugs Misuse Act* 1986 (Qld), s 6.

4 [1996] QCA 414.

[42] The judge ultimately determined to impose a global sentence which took into account the seriousness of the totality of the criminal behaviour to which Brown had pleaded guilty, and to impose that sentence on the wounding counts, with lesser concurrent sentences on the remaining counts. Had it not been for the submissions made by Brown's counsel, the judge would have seriously considered imposing a higher sentence than that proposed by the prosecution. Her Honour sentenced Brown to six years imprisonment on each of the wounding counts with lesser concurrent sentences on the remaining counts. Parole eligibility was fixed after two years (or one-third of the global sentence).

The appellant's contentions in this appeal

[43] Mr Byrne's submissions on behalf of the appellant are as follows.

[44] The extraordinary nature of the offences of unlawful wounding means that there are no comparable cases. To expose a vulnerable young child to whom Brown was a father-figure to the dangers of drug use, and to abuse and injure the child by administering substances intravenously, is a most serious example of the offence. A single instance would warrant a sentence towards the maximum penalty of seven years imprisonment. The commission of three such offences justifies a declaration that Brown serve 80 per cent of the sentence and a declaration that the offences are serious violent offences: *R v McDougall and Collas*.[5] The wounding offences were committed whilst on bail and so could be imposed cumulatively upon other sentences. But, to reflect the plea of guilty and matters of mitigation, a concurrent sentence may be appropriate.

[45] Mr Byrne frankly acknowledged that his biggest obstacle to success in his appeal was that the judge imposed the very sentence asked for by the prosecutor. He contended, however, that the judge was not bound by the prosecutor's submissions: *R v Walsh*.[6] The judge was not constrained in exercising her unfettered discretion if she was in substantial disagreement with the sentence suggested by the prosecutor: *R v KU & Ors; ex parte A-G (Qld)*;[7] *Lacey*. Even though the prosecutor did not suggest the sentence Mr Byrne now urged this Court to impose, the judge should have declared the offences of unlawful wounding to be serious violent offences. A declaration was warranted because of the following factors. The victim was very young and Brown was in a position of trust and had authority over the child. The offences involved the use of a dirty needle to intravenously inject an unwilling child with a dangerous drug. Brown's conduct seems to have infected the child with hepatitis C. The child remained fearful of Brown. Although Brown pleaded guilty in circumstances where the child's evidence was considered unreliable by the prosecution, he earlier tried, through H, to have the child drop the charges. Brown's letter to the judge tendered at sentence did not show deep insight into the seriousness of these offences.

[46] As the High Court in *GAS v The Queen*[8] and this Court in *KU*[9] recognised, the prosecutor cannot shift the burden of responsibility for imposing a proper sentence from the sentencing judge if the sentence requested by the prosecutor would amount to a judicial failure to appreciate and give sufficient weight to the offending

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5 [2007] 2 Qd R 87.
6 [2008] QCA 391.
7 [2008] QCA 154.
8 (2004) 217 CLR 198 at [40].
9 [2008] QCA 154 at [96]-[100].

conduct. Despite the submission of the prosecutor at first instance, this Court should reflect the seriousness of Brown's multiple offending by substituting a sentence of seven years concurrent imprisonment on each count of unlawful wounding, and each of those counts should be declared to be a serious violent offence.

[47] The Attorney-General's appeal in this case was exercised consistently with this Court's direction in *Lacey*:[10] "sparingly … and not merely for the purpose of having a 'second bite at the cherry'". The fact that the prosecutor at sentence asked for the very sentence imposed by the primary judge is a consideration which is outweighed by the need in this case for condign punishment for the dreadful offending.

The contentions on behalf of Brown in this appeal

[48] Brown's counsel in this appeal, Mr D R Kent, emphasises the following matters.

[49] The wounding offences were dreadful in their nature and have contributed adversely to the child's mental health. But as the prosecutor conceded at first instance, the child was very much immersed in the lifestyle of his mother, so that Brown's conduct was not the only contributing factor. Brown was still a young man aged between 24 and 26 at the time of his offending. His criminal history was relatively minor. He has significant health problems, including schizophrenia. He has a supportive family who will assist him in his rehabilitation and he has an offer of employment. Since his arrest, he has attempted rehabilitation which was supported by two clear drug screens. He pleaded guilty to all counts, including the wounding counts, on which the child was unable to give reliable evidence. Brown expressed remorse for his conduct. He has now served well over two years pre-sentence custody.

[50] The Attorney-General should exercise the right of appeal conferred by s 669A *Criminal Code* sparingly: *Lacey*.[11] Ordinarily, if the prosecution does not make a submission as to sentence at first instance, the Attorney-General should not advance that contention on appeal.[12] The prosecutor at sentence submitted that an appropriate global sentence of six years imprisonment with parole eligibility after two years should be imposed. The prosecutor did not submit that the unlawful wounding offences should be declared serious violent offences. The appellant's submission, to now increase the time of Brown's parole eligibility from two years to 5.6 years (a 280 per cent increase), is the "second bite at the cherry" eschewed by this Court in *Lacey*.[13]

[51] Brown's conduct was serious and contributed to the child's present dreadful psychological problems, but it did not result in any significant physical or permanent health effects. The maximum penalty for unlawful wounding, seven years imprisonment, was not appropriate in this case, even concurrently for the three offences. A declaration that the offences were serious violent offences was not appropriate. The sentence imposed at first instance balanced the competing considerations. The appeal should be dismissed.

Conclusion

[52] As the primary judge noted at the commencement of her sentencing remarks, this case illustrates the deleterious and sinister effect of heroin on addicts like Brown,

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10 [2009] QCA 274 at [148].
11 [2009] QCA 274 at [148].
12 [2009] QCA 274 at [155].
13 [2009] QCA 274 at [148].

those close to them, and the broader community. Heroin addiction has ruined Brown's young life to date. He has committed dreadful offences, detrimentally affecting the lives of his victims, including an innocent and vulnerable 10 year old boy who must have looked to Brown as a father-figure. He has caused heartbreak and distress to his own family. The cost to the community of dealing with his addiction and the consequences of his offending on the victims is an enormous ongoing burden.

[53] Brown's background and previous offending suggest that the most serious offences, those of unlawful wounding, were out of character. They can only be understood in the context of his long term heroin addiction. That helps explain the otherwise inexplicable, but it does not excuse his shocking and unforgivable abuse of trust towards the 10 year old son of his partner by injecting him with dangerous drugs using dirty needles. In doing so, he probably gave boy the serious illness, hepatitis C, but fortunately the child appears to have developed an immunity to it. Brown's offending certainly contributed to the child's ongoing psychological problems. It is an additional aggravating feature that he committed many of these offences whilst on bail.

[54] As the primary judge recognised, Brown must be sentenced only for the offences to which he pleaded guilty and not for more serious, uncharged conduct. The sentencing court must not be overwhelmed by the nightmarish aspects of the case but must sentence him only for the conduct of which he has been convicted. He was not convicted of aggravated supply of a dangerous drug to a minor, which carries a maximum penalty of 25 years imprisonment.[14] He was not convicted of intentionally doing grievous bodily harm to the child, which carries a maximum penalty of life imprisonment.[15] He was not convicted of unlawfully wounding the child with intent to transmit a serious disease, which has a maximum penalty of life imprisonment.[16] He was not convicted of doing grievous bodily harm simpliciter, which has a maximum penalty of 14 years imprisonment.[17] He was convicted of three counts of unlawful wounding, each of which has a maximum penalty of seven years imprisonment.[18] The wounding offences do not involve the element of intention to wound; nor do they involve the element of permanent or life-threatening injury to the victim; and the sentences imposed give effect to that: see *Henry*.

[55] There were weighty mitigating factors. Although Brown investigated a possible defence to the wounding offences at committal, he did so in a way that did not involve any cross-examination of H's children. To his very great credit, he pleaded guilty to those offences knowing that the prosecution considered the complainant child was unable to give reliable evidence. But for his guilty plea, the prosecution may not have secured any convictions on the wounding offences. Some of his admissions in respect to other offences resulted in charges being brought against him which could not otherwise have been brought. Since his incarceration, he has commenced rehabilitation. He has completed a drug treatment program and drug-free screening tests were tendered. He has the strong support of family and a job available when released. He has now spent over two years and three months in prison. There is reason to hope that, when the authorities release him on parole, he will have spent long enough in custody to break the drug cycle.

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14 *Drug Misuse Act* 1986 (Qld), s 6.
15 *Criminal Code* 1899 (Qld), s 317.
16 *Criminal Code* 1899 (Qld), s 317(2).
17 *Criminal Code* 1899 (Qld), s 320.
18 *Criminal Code* 1899 (Qld), s 323.

[56] Had Brown not pleaded guilty to the offences of unlawful wounding, had he prior convictions for violence and had he not promising prospects of rehabilitation, like the primary judge I would consider that the sentence asked for by the prosecution at first instance may have been inadequate. But as I have noted, the mitigating features in this case are of real significance. It is highly relevant that the sentence imposed at first instance was precisely that asked for by the prosecution. Unlike in *KU*, the prosecutor's submissions were thoroughly prepared after considerable thought and discussion with "a senior member of the office". The judge even adjourned the hearing to ensure that all relevant cases were before the court. In those circumstances, this Court should only accede to the appellant's contentions if the sentence imposed at first instance "was so inadequate as to warrant the court's intervention, notwithstanding its not substantial disconformity with the position advanced by the prosecutor before the sentencing Judge": *R v Watson; ex parte A-G (Qld)*[19] and *GAS*.[20]

[57] Although there were three separate offences of unlawful wounding, the context in which they were committed warranted a concurrent sentence on each wounding offence. The judge was entitled to impose a global sentence on the most serious offences, the wounding offences, to reflect the criminality involved in all offences. When Brown's other offending, some of it whilst on bail, is also taken into account, that global sentence should have been at or near the maximum for the unlawful wounding offences: six to seven years imprisonment. This conclusion is supported in a general way by the sentences imposed in *R v Ottaviano*[21] and *Henry*.[22] Adopting the approach taken by this Court in *McDougall and Collas*,[23] tends to support the making of declarations that the wounding offences were serious violent offences. But other relevant considerations discussed in *McDougall and Collas* do not support the making of declarations. Despite the stomach-churning and heartbreaking nature of the three wounding offences, Brown had no prior convictions for violence. He pleaded guilty in circumstances where the prosecution would have had difficulty in otherwise obtaining convictions as it considered the child was an unreliable witness. He suffered from schizophrenia and heroin addiction but had promising rehabilitative prospects. His troubled background suggested a need for an extensive period of community support and control under a lengthy parole order, rather than the much shorter period of parole available to him if the offences were declared to be serious violent offences.[24] In those circumstances, the decision not to declare the wounding offences serious violent offences was an unexceptional exercise of discretion. Weighing the competing considerations to which I have referred, I am not persuaded that the global sentence of six years imprisonment with parole eligibility after one-third, imposed in conformity with the prosecutor's request, was so inadequate to warrant this Court's intervention.

[58] It follows I would dismiss the appeal.

ORDER:

Appeal dismissed.

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19 [2009] QCA 279 at [30].
20 (2004) 217 CLR 198 at [40].
21 [1997] QCA 338.
22 [1996] QCA 349.
23 [2007] 2 Qd R 87 at 94-98.
24 See *Corrective Services Act* 2006 (Qld), s 182.

[59] **MUIR JA:** I agree that the appeal should be dismissed for the reasons given by the President.

[60] **FRASER JA:** I agree with the reasons of the President and the order proposed by her Honour.