

SUPREME COURT OF QUEENSLAND

CITATION: *R v Dehnen* [2009] QCA 373

PARTIES: **R**
v
DEHNEN, Benjamin James
(applicant)

FILE NO/S: CA No 208 of 2009
DC No 16 of 2009

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Southport

DELIVERED ON: 4 December 2009

DELIVERED AT: Brisbane

HEARING DATE: 4 December 2009

JUDGES: Keane, Holmes JJA and Margaret Wilson J
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDERS: **1. Application for leave to appeal against sentence allowed.**
2. Appeal allowed.
3. Set aside sentence.
4. Substitute a sentence of 3 years imprisonment.
5. Parole release date fixed at 10 August 2010.

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant was sentenced on his plea of guilty to one count of assault occasioning bodily harm whilst armed and in company – where applicant was sentenced to three years imprisonment – where sentencing Judge fixed parole release date which was 17 months from date of sentence – where there was a period of pre-sentence custody of 111 days which could not be declared as time already served under the sentence and a further 22 days which could be so declared – where sentencing Judge took all pre-sentence custody into account in fixing head sentence – whether sentencing Judge failed to give adequate weight to the plea of guilty – whether sentencing Judge drew inferences not open on the evidence – whether sentence manifestly excessive – whether sentencing Judge erred in not explaining why parole release date fixed beyond halfway point of head sentence

COUNSEL: M E Johnson for the applicant
T A Fuller for the respondent

SOLICITORS: Guest Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the
respondent

MARGARET WILSON J: On 6 April 2009, the applicant pleaded guilty to one count of assault occasioning bodily harm whilst armed and in company. On 10 August 2009, he was sentenced to three years' imprisonment.

The sentencing Judge fixed the parole release date as 10 January 2011 which was 17 months from the date of sentence. There was a period of pre-sentence custody of 111 days which could not be declared as time already served under the sentence but which the sentencing Judge said he had taken into account in fixing the head sentence.

There was a further period of 22 days which could have been declared but his Honour opted, in stead, to take it into account in fixing the head sentence and in fixing the parole release date.

The applicant seeks leave to appeal against the sentence. The grounds of the proposed appeal are that the sentencing Judge failed to give adequate weight to the plea of guilty, that he drew inferences not open on the evidence and that he imposed a manifestly excessive sentence.

In written submissions, the applicant's counsel contended that his Honour had erred further in not explaining why he had fixed the parole release date beyond the halfway mark of the sentence.

The offence was committed on 3 November 2007. The applicant was aged 31 at the time of the offence and 33 at sentence. He had a criminal history of a minor drug offence and low level dishonesty offences and traffic offences but no history of violence.

He had been educated to Grade 8 level and subsequently had a good employment record. He was in a stable relationship of about four years' standing and had two children of a former relationship to whom he was a devoted father.

His mother, his de facto and employer spoke well of him. Turning to the offence, the complainant, Holmes, was kidnapped by Scheers and Holland and taken at knifepoint and with his hands taped behind his back, to the rock pools in the Currumbin National Park before sunrise.

On arrival there, he was ordered to walk up a track. Holland slapped his face. Then the applicant arrived in a motor vehicle carrying two others. One of the other men told the complainant to get on his knees but he refused.

The applicant picked up a piece of wood and struck the complainant, knocking him to the ground. The complainant suffered a fractured left cheekbone. Scheers, subsequently inflicted further serious injuries on the complainant, cutting off one ear and part of another and slashing his forehead and cheek.

The men left, leaving the complainant in the bush, tied up. Scheers and the applicant were full members of the Lone Wolf Motor Cycling Club. Holland was a nominee, someone required to do what he was told to do by full members and at risk of punishment by fines or assault if he disobeyed.

The evening before the incident, there had been discussion at the clubhouse that \$40,000 was missing from a drug transaction. It had been decided that the complainant should be confronted to see if he had taken it or what he was going to do to recover it. He was to be given a touch-up.

That evening, the applicant had been drinking heavily. This discussion was not in his hearing but he was told what was intended and agreed to participate. His counsel acknowledged that he went to the rock pools and with punishment in mind, struck the complainant once, causing the fracture of his cheek-bone but other serious injuries, amounting to grievous bodily harm, were inflicted by others.

Although initially charged with other offences, the applicant was facing only the one charge of assault occasioning bodily harm by the time he pleaded guilty.

The sentencing Judge described what the applicant did as a deliberate act with a deliberate purpose. He said alcohol was an explanation but not an excuse for it. He said, "Well, I have concluded that you knew what was going to be done and that you willingly participated in what was done. In fact, you were the prime instigator of the injuries. You were the person who struck Holmes in the face with the piece of wood."

The finding that the applicant was the prime instigator of the injuries was challenged as not open on the evidence. However, I'm satisfied from my review of the transcript of the exchanges between the sentencing Judge and counsel during the hearing his Honour was aware of the chronology.

He could not possibly have meant instigated the whole incident in which violence was inflicted and he fully appreciated that it was Scheers who inflicted the subsequent serious injuries.

What his Honour said should be interpreted as relating only to the complainants being hit with the piece of wood. In sentencing, his Honour said that he used four years as the starting point.

He reduced the head sentence to three years on account of the pre-sentence custody. He said he took the 22 days into account, both in setting the head sentence and in fixing the parole release date.

On any view, taking the 133 days of pre-sentence custody into account, the applicant was going to have to serve about 21 and a half months of actual imprisonment, more than half of the three year term, but his Honour failed to explain adequately why he fixed the parole release date beyond the halfway point of a three year term.

In my view, he erred in failing to do so. The applicant pleaded guilty on the first day of the trial. His Honour considered that the plea could not be regarded as an early one.

He said he took it into account nevertheless but it is not clear to what extent. In my view, he erred in not regarding it as a timely one. The indictment, as presented, charged the

applicant with further offences, grievous bodily harm, the offence to which he pleaded guilty, being charged as an alternative to that and with grievous bodily harm and torture inflicted subsequently.

The first charge of grievous bodily harm was dropped on 2 April 2009, four days before the trial, and the other two charges on the first day of the trial.

One would normally have expected the head sentence to be accompanied by a parole release at about one-third in consequence of a timely plea.

Counsel for the applicant's submissions to this Court were predicated upon four years as a starting point, being within the appropriate range. I agree. In my view, where the sentencing Judge erred was in the way he took account of the pre-sentence custody and the plea.

I would allow the application for leave to appeal, allow the appeal, set aside the sentence and substitute a sentence of three years' imprisonment. I would fix the parole release date as 10 August 2010, being 12 months after the date of the original sentence.

KEANE JA: I agree.

HOLMES JA: I agree.

KEANE JA: The orders of the Court will be as indicated by Justice Wilson.