

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Hamilton* [2009] QCA 391

PARTIES: **R**  
**v**  
**HAMILTON, Jesse Armstrong**  
(applicant)

FILE NO/S: CA No 170 of 2009  
DC No 2152 of 2008  
DC No 760 of 2009

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 18 December 2009

DELIVERED AT: Brisbane

HEARING DATE: 20 November 2009

JUDGES: McMurdo P, Fraser JA and Fryberg J  
Separate reasons for judgment of each member of the Court,  
McMurdo P and Fraser JA agreeing as to the orders made,  
Fryberg J dissenting

ORDERS: **1. The application for leave to appeal against sentence is granted.**  
**2. The appeal is allowed.**  
**3. The sentence imposed for the offence of grievous bodily harm is set aside and instead a sentence of three years imprisonment is imposed.**  
**4. The sentence imposed for the offence of attempted armed robbery is set aside and instead it is ordered that the applicant is sentenced to two years imprisonment to be served cumulatively upon the sentence imposed for the offence of grievous bodily harm.**  
**5. The date the applicant is eligible for parole is fixed at 10 July 2010.**  
**6. The applicant has been held in custody on the offence of attempted armed robbery between 10 November 2008 and 19 June 2009, a period of 221 days, and this is deemed time already served under the sentence for the offence of attempted armed robbery.**  
**7. The order in respect of the summary offence of evading a taxi fare, namely, the entry of a conviction without further punishment, is confirmed.**

**CATCHWORDS:** CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – the applicant pleaded guilty to one count of doing grievous bodily harm; one count of attempted armed robbery; and a summary charge of evading a taxi fare – the applicant was sentenced to two cumulative sentences, totalling seven years imprisonment suspended at some difficult to determine date – the respondent conceded that the structure of the sentences imposed was problematic and that the applicant would need to be re-sentenced – what is the appropriate sentence

*Penalties and Sentences Act 1992 (Qld)*, s 144

*Neal v The Queen* (1982) 149 CLR 305; [1982] HCA 55, cited

*R v Kinnersen-Smith & Connor; ex parte A-G (Qld)* [2009] QCA 153, cited

*R v Price* [2006] QCA 180, cited

**COUNSEL:** H Fong for the applicant  
B G Campbell for the respondent

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

- [1] **McMURDO P:** The applicant pleaded guilty in the District Court at Brisbane on 19 June 2009 to one count of doing grievous bodily harm on 9 June 2007; one count of attempted armed robbery on 31 October 2008; and a summary charge (related to the attempted armed robbery) of evading a taxi fare on 31 October 2008. For the offence of grievous bodily harm, he was sentenced to four years imprisonment suspended after 16 months with an operational period of five years. For the offence of attempted armed robbery, he was sentenced to three years imprisonment suspended after 12 months with an operational period of five years, to be served cumulatively upon the four year term of imprisonment. The judge convicted him of the summary offence but did not impose any further punishment. His Honour also declared that the time the applicant spent in custody (221 days) was time served under both those sentences. He applies for leave to appeal against his sentences, contending that their total effect (seven years imprisonment suspended at some difficult to determine date, arguably perhaps either after 16 or 28 months) is manifestly excessive.
- [2] Mr B Campbell, who appeared for the respondent in this application, rightly conceded at the outset of the hearing that the structure of the sentences imposed was multifariously problematic. The combined total of the term of imprisonment imposed under the sentences was seven years, but both sentences have been suspended under s 144 *Penalties and Sentences Act 1992 (Qld)* with an operational period of five years, two years less than the total term of imprisonment ordered to be suspended. Further, under s 144(1), a suspended term of imprisonment can only be imposed if the court "sentences an offender to imprisonment for 5 years or less". Here the sentence was seven years imprisonment. In addition, the judge sentenced

the young applicant, who had a troubled background but good prospects of rehabilitation with appropriate guidance and supervision, to a sentence which provided neither guidance nor supervision. Finally, the judge wrongly declared the time served in pre-sentence custody only in respect of the attempted armed robbery and evading a taxi fare offences, as time served under "the sentences", that is also the sentence for the grievous bodily harm offence. For all these reasons, Mr Campbell rightly conceded that the application for leave to appeal should be granted, the appeal allowed, the sentence imposed at first instance set aside, and that this Court should re-sentence the applicant.

### **The applicant's antecedents**

- [3] The applicant was 17 at the time of committing the offence of grievous bodily harm; 18 at the time of the remaining offences; and 19 at sentence. He had two entries in his criminal history, both of which occurred after he committed the offence of grievous bodily harm but before he committed the offence of attempted armed robbery. In July 2007, he was sentenced, without conviction, to a \$250 six month good behaviour bond for public nuisance. In June 2008, he sentenced, without conviction, to 18 months probation and ordered to pay restitution and compensation for four counts of wilful destruction; one count of obstructing a police officer; one count of assaulting a police officer; and one count of possession of a knife in a public place or a school. Those offences all occurred on 24 November 2007. He was therefore on probation when he committed the attempted armed robbery.

### **The facts of the present offences and the prosecution's submissions at sentence**

- [4] The circumstances of his present offending were set out in a tendered schedule of facts. The offence of grievous bodily harm occurred in this way. The 58 year old complainant taxi driver picked up the applicant and three women at 2 am at Narangba, on Brisbane's northern outskirts. The applicant was holding a drink which the complainant asked him not to bring into the taxi. The applicant ignored the request. As the taxi moved off, the applicant called the complainant a "fat cunt". After a short time, the complainant stopped the taxi and told the applicant to leave. The applicant got out of the taxi and went around to the driver's side. He threw the bottle he had been carrying in the direction of the complainant. The bottle smashed against the vehicle. Fragments of the broken glass hit the complainant's face. The applicant threw punches at the complainant's head. The complainant retaliated and a struggle ensued. One of the women joined in and the three protagonists ended on the ground with the applicant underneath. The complainant was uncertain whether the woman was attempting to break up the fight or to assist the applicant in attacking the complainant. The complainant experienced pains in his chest and thought he was having a heart attack. He staggered to the back of his taxi and slumped on the ground near the back wheel. The applicant then kicked him to the back and front of his body. The complainant thought he was kicked five or six times but the applicant said he kicked the complainant three times. A woman passer-by stopped her car and assisted the complainant. The applicant and his companions fled.
- [5] The complainant attended the emergency department of the Caboolture Hospital where the following injuries were recorded: a contusion and abrasion to the left eyelid; a linear contusion to the right eyebrow; and soft tissue injuries to both cheeks, the left angle of the mandible, the little and ring fingers of both hands, the

left lower and right lower chest walls and the upper abdomen. The complainant was later examined by his general practitioner who noted the following injuries: a fracture to lumbar vertebrae 4; an L4/5 disc protrusion impinging on the L5 nerve root; an L3/4 disc protrusion; and stress and anxiety. He has suffered a permanent injury to his lower back which requires constant pain medication. He is unable to perform normal daily functions like walking or standing for long periods. His sleep is disturbed. He has given up work and cannot afford to pay his private health insurance. His mental and physical injuries suffered in the attack have placed a considerable strain on his marriage. The complainant emphasised in a victim impact statement the serious detrimental effect of the offence on him: physically, financially and emotionally.

- [6] When interviewed by police, the applicant admitted kicking the complainant when he was on the ground. He said he was angry because the complainant had struck the applicant's aunt, who was only trying to break up the fight and who, the applicant knew, had been a victim of domestic violence. He said: "I've seen flaming red ... I couldn't control my anger."
- [7] The prosecutor at sentence emphasised that this was an unprovoked attack on a 58 year old taxi driver by a much younger and stronger man. The attack continued when the complainant was on the ground. It has resulted in permanent and significant life-changing injuries.
- [8] The remaining offences occurred in this way. On 31 October 2008, at about 10.15 pm, the applicant asked an attendant at a Shell service station at Woody Point to telephone for a taxi. It was Hallowe'en, but it is not suggested anything turns on this. The taxi, driven by a female, arrived shortly after being called. The applicant got into the front passenger seat. The applicant and the driver were automatically photographed within the vehicle when the meter was turned on. The taxi contained a duress button which, when activated, photographed the inside of the vehicle and allowed conversations to be heard at the despatch centre. The applicant told the driver that he did not have the address but he would direct her. After some time, he could not find the place he was looking for and he asked her to take him to Narangba near the train station. The metre was showing about \$50 and the complainant asked the applicant if he had money for the fare. He said he did.
- [9] When they arrived at Narangba, he directed her to drive back towards Burpengary because he remembered that his friend had recently had a baby and would not be there. He again assured the driver that he had the fare. When they returned to the area where the driver had first picked him up, she became concerned and flicked on the duress button. They arrived at a block of flats and the applicant asked her to wait for him. The metre was by now showing \$114. He went to unit 5 before returning. He said that his friend was not at home. He got back into the taxi and asked the driver to take him to a nearby phone booth.
- [10] Another taxi driver, having noted the request for assistance, began following the complainant's taxi. The applicant then produced a large hunting-type knife with a blade about 20 cm long. He pointed it at the driver saying, "I know what you are up to. Lose that taxi behind us." He directed the complainant to drive through a red light and to speed up. The taxi driver who was following lost sight of the complainant's taxi. Whilst the applicant pointed the knife at the complainant, he gave directions to her. After a time, she stopped the taxi and told him to get out.

He again pointed the knife at her and said, "Give me your money first." She refused, adding: "This is your opportunity to get out now before anyone comes." He availed himself of that opportunity but as he was leaving, he pointed the knife at the complainant and said, "Don't think of getting anyone to follow me and yes I know I'm on camera." He closed the door and the complainant drove off.

- [11] The applicant was identified from CCTV footage taken from the taxi. The next day, police executed a search warrant at his house and located the clothing he was wearing that day, and a large hunting-type knife with a 22 cm blade in a wooden box in his bedroom. He participated in a record of interview. He said the knife was his brother's and he had taken it from his mother's home. He had been drinking that night. When he got into the taxi he did not know where he wanted to go. He did not have any money. He admitted producing the knife but said he pointed it at the windscreen. He agreed he demanded money from the taxi driver and that he left the scene. He has been in custody on remand since this time.
- [12] The prosecutor at sentence submitted that the aggravating features of these offences were that there was an element of premeditation. The applicant had someone call a taxi for him, knowing he did not have the money to pay the fare, and he was armed with a weapon. The complainant was vulnerable as a female taxi driver working late at night. The offence continued over a significant period of time and in breach of both his bail order for the grievous bodily harm offence and his probation order.
- [13] The prosecutor stated that, although both complainants were cross-examined at committal, the applicant's guilty pleas were timely and he should receive credit for them in the sentence imposed. The sentence imposed for the three offences must be severe enough to provide a deterrent. Whilst cumulative sentences could have been imposed, a global sentence of five years imprisonment was appropriate to both reflect the nature and seriousness of the offending and take into account his youth and plea of guilty.

#### **Defence submissions at sentence**

- [14] Defence counsel at sentence commenced his submissions by tendering a letter from the applicant's mother in which she set out the following. The applicant was the eldest of her four children. He was detrimentally affected by her divorce when he was aged nine, and by finding out, when he was aged 13, that two of his siblings had been sexually abused by their step-grandfather. The applicant blamed himself for the sexual abuse as he considered that, as the eldest, he should have protected them. The mother became severely depressed at this time. Her depression had a detrimental impact on the applicant, who was then a young adolescent. He began drinking alcohol when he was 17, apparently as self-medication for his pain and guilt. Whilst affected by alcohol, he behaved badly and committed offences. Since he has been incarcerated he has completed a computer course and an alcohol and drug course so that he now apprehends that alcohol is not the answer to his problems. He was remorseful, had work available as a roofer, and intended to participate in counselling when released from prison. He was determined to be a sound role model for his younger siblings. He was a hard working, kind and much-loved member of his supportive family.
- [15] Defence counsel then made the following submissions. The cross-examination at the committal of the complainant in the offence of grievous bodily harm was only as

to the extent of his injuries. Once expert medical reports were received confirming their permanent nature, the matter was listed for sentence. The applicant was cooperative and made full and frank admissions against his interest to police, accepting that he kicked the complainant a number of times and that, when he did so, his aunt was not in any particular danger. The cross-examination at the committal of the complainant in the offence of attempted armed robbery was only to establish that the knife was angled towards the roof, not towards the complainant. This was, therefore, not the worst example of such an offence.

- [16] Defence counsel ultimately submitted that the appropriate head sentence for the offence of grievous bodily harm was one of 18 months to two years imprisonment, and for the offence of attempted armed robbery was 12 to 18 months cumulative imprisonment. Taking into account his youth, rehabilitative prospects and cooperation with the administration of justice, an appropriate global head sentence was three years imprisonment for the offence of grievous bodily harm, with a concurrent term of imprisonment of 18 months for the offence of attempted armed robbery and a parole release date fixed on 9 November 2009. By that time, the applicant will have spent 12 months in custody. He would then have the benefit of two years parole to support him in his rehabilitation.

### **The submissions in this appeal**

- [17] Counsel for the applicant, Mr Fong, now takes a more realistic approach than defence counsel at sentence, appropriately recognising the seriousness of the offences. He contends that a sentence of three to three and a half years imprisonment should be imposed in respect of the count of grievous bodily harm and a cumulative sentence of between 18 months to two years imprisonment on the offence of attempted armed robbery. The many mitigating features, particularly the applicant's youth; his troubled background; his promising prospects of rehabilitation; his cooperation with the authorities; and his guilty plea warrant suspension or parole eligibility after one third of each sentence. He emphasises as comparable and as supporting his submission *R v Price*<sup>1</sup> and *R v Kinnersen-Smith & Connor; ex parte A-G (Qld)*.<sup>2</sup> Mr Fong clearly did not consider that such a sentence would be heavier than that imposed at first instance so as to warrant the withdrawal of Hamilton's application for leave to appeal against sentence prior to the determination of the appeal: cf *Neal v The Queen*.<sup>3</sup>
- [18] Mr Campbell for the respondent contends that the prosecutor at first instance was wrong in asking for a global sentence of a mere five years imprisonment to reflect the applicant's culpability on these gravely serious offences. Although the effective seven year sentence imposed by the primary judge was wrongly structured, Mr Campbell submits seven years is the correct sentence. He contends that four years imprisonment for the offence of grievous bodily harm and three years cumulative imprisonment for the offence of attempted armed robbery should be imposed. A recommendation for parole eligibility after two years and three months (about one-third of the seven year sentence) appropriately recognised the mitigating features.
- [19] Neither party contends that anything other than a nominal sentence should be imposed in relation to the offence of evading a taxi fare.

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<sup>1</sup> [2006] QCA 180.

<sup>2</sup> [2009] QCA 153.

<sup>3</sup> (1982) 149 CLR 305.

## Conclusion

- [20] Unquestionably, there are very serious aspects to both the offence of grievous bodily harm and the offence of attempted armed robbery. They were committed upon taxi drivers, merely doing their not especially well-paid job. Taxi drivers provide a valuable community service, particularly late at night and often in situations which leave them vulnerable to attacks like this. Courts must ordinarily impose heavy deterrent penalties on those who gratuitously assault taxi drivers. There were other serious aspects to the offence of grievous bodily harm. The applicant was in the company of three others. Although there was no suggestion that they were involved in the attack on the complainant or acting in concert with the applicant, their presence must have made the complainant feel at considerable risk. The applicant was a young man whilst the complainant was 58 years old. When the complainant lay down because he thought he was having a heart attack, the applicant continued to assault him, kicking him three times. As a result of the offence, the complainant has suffered serious life-changing physical injuries which have impacted detrimentally upon his emotional and financial well-being. There are also very serious aspects to the offence of attempted armed robbery. It was committed whilst the applicant was on bail for the serious offence of grievous bodily harm and on probation for other offences. The female taxi driver must have been terrified when the applicant produced a hunting-type knife and demanded money from her. These dreadful offences demand significant deterrent penalties.
- [21] The offences occurred in two quite separate time periods. In such circumstances, a global penalty is often and may properly be imposed on the most serious offence of grievous bodily harm, with concurrent sentences on the remaining offences. But, like the primary judge, I consider that the better approach in this case is to impose cumulative sentences on both these serious offences. But, applying the totality principle requires that, to ensure the overall effect of the cumulative sentence is not crushing, the sentence must be appropriately moderated.
- [22] There are mitigating factors and modest cause for optimism as to the applicant's prospects of rehabilitation. Although he has had a troubled background and some prior criminal history, his mother identified in her letter to the primary judge his positive character traits. Since he has been in custody he has undertaken an alcohol and drug course, is remorseful and insightful and keen to participate in alcohol counselling when released from prison. He also has a job available and the support of a loving family. It is both in the community's and the applicant's interest that he have structured support for a significant period when he is released from prison.
- [23] Were I sentencing the applicant only for the offence of grievous bodily harm, because he was then a 17 year old first offender, I would have imposed a sentence of about three years imprisonment with a parole release date fixed at about one-third of that term. He has committed a number of subsequent offences all of which appear to be associated with his alcohol abuse. When he committed the attempted armed robbery, he was not only on bail for the offence of grievous bodily harm, but he was on probation for other criminal offences. Were I sentencing him only for the offence of attempted armed robbery, but taking into account his prior criminal history as well as the mitigating factors, I would have sentenced him to three years imprisonment. I would have fixed a parole release date after about one-third to reflect his good rehabilitative prospects and his guilty plea.
- [24] When imposing sentences cumulatively, courts must take care to ensure that the overall effect of the cumulative sentence is not crushing, whilst still reflecting the

gravity of the offending. The totality principle has special relevance when there is a good prospect of successfully rehabilitating a youthful offender. This applicant was 17 at the time of the grievous bodily harm offence, 18 at the time of the attempted armed robbery offence, and is now 19 years old. The combined sentences I would have notionally imposed if sentencing for them individually is six years imprisonment. Following the totality principle, I would moderate that notional six year sentence by 12 months to five years imprisonment. Interestingly, this is the penalty sought by the prosecutor at first instance. The totality principle should also be applied to his parole eligibility date. I consider that the applicant ought to be released from custody after serving about one third of his total five year sentence, namely 20 months. But unlike the primary judge, I consider that the applicant should be subject to the supervision and support available under a lengthy parole order. I would therefore order that he be eligible for parole after serving 20 months of his sentence. Taking into account his pre-sentence custody, this will be on 10 July 2010.

**ORDERS:**

1. The application for leave to appeal against sentence is granted.
2. The appeal is allowed.
3. The sentence imposed for the offence of grievous bodily harm is set aside and instead a sentence of three years imprisonment is imposed.
4. The sentence imposed for the offence of attempted armed robbery is set aside and instead it is ordered that the applicant is sentenced to two years imprisonment to be served cumulatively upon the sentence imposed for the offence of grievous bodily harm.
5. The date the applicant is eligible for parole is fixed at 10 July 2010.
6. The applicant has been held in custody on the offence of attempted armed robbery between 10 November 2008 and 19 June 2009, a period of 221 days, and this is deemed time already served under the sentence for the offence of attempted armed robbery.
7. The order in respect of the summary offence of evading a taxi fare, namely, the entry of a conviction without further punishment, is confirmed.

[25] **FRASER JA:** I have had the advantage of reading the reasons of the President and of Fryberg J. This Court must re-sentence the applicant afresh for the reasons given by the President, as was properly conceded by the respondent. I agree with the President's reasons, subject to one caveat: I consider that a sentence of greater severity than that proposed by her Honour might be imposed. However I am unable to agree that the sentence should be as severe as that proposed by Fryberg J. In these circumstances, and noting that the total period of imprisonment proposed by the President is that which the prosecutor submitted at the sentencing hearing was appropriate, I agree with the orders proposed by the President.

[26] **FRYBERG J:** The relevant facts are set out in the reasons for judgment of the President. So are the submissions of the parties. Her Honour has recorded the respondent's concession that this Court must re-exercise the sentencing discretion.



In my judgment that concession was rightly made. Whether or not in theory it is lawfully possible to impose multiple partially suspended terms of imprisonment, in this case it was inappropriate to do so. We must resentence.

- [27] I agree with her Honour's view that this is a case where cumulative sentences are appropriate. I agree with her Honour's view that this is an appropriate case for release on parole rather than suspended sentences. I agree with her Honour's assessment of the seriousness of the applicant's offending. Unfortunately, I disagree with her Honour's assessment of the punishment which that offending should attract.
- [28] Were the applicant being sentenced only for the offence of grievous bodily harm, the sentencing range would be 4 - 6 years imprisonment. Were he being sentenced only for the attempted armed robbery the range would be 3 - 5 years imprisonment. Considerations of totality would come into play were he sentenced to cumulative terms at the top of each range. That complication can be avoided by imposing terms at the bottom of the range. A total period of seven years imprisonment with parole eligibility after two years and four months cannot in my judgment be described as crushing.
- [29] I would make the same orders as those proposed by the President, except that in para 3, I would impose a sentence of four years imprisonment; in para 4, I would impose a sentence of three years imprisonment and in para 5, I would fix the date at 10 March 2011.