SUPREME COURT OF QUEENSLAND

CITATION:	*R v Gray* [2011] QCA 362
PARTIES:	**R** **v** **GRAY, Nicholas Andrew** (applicant)
FILE NO/S:	CA No 166 of 2011 DC No 475 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	13 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	28 November 2011
JUDGES:	Margaret McMurdo P, Chesterman JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was charged with two counts of assault occasioning bodily harm whilst armed and in company (counts 1 and 2), and one count of child stealing (count 3) – where the applicant pleaded guilty to one count of assault occasioning bodily harm in company – where the applicant pleaded not guilty to counts 2 and 3 – where the applicant was convicted on counts 1 and 2 – where the applicant was found not guilty of the further circumstance of aggravation, that he was armed – where the applicant was sentenced on count 1 to two and a half years' imprisonment with a parole release date of 15 April 2012, requiring the applicant to serve one-third of the head sentence in custody – where the applicant was sentenced on count 2 to 18 months' imprisonment – where the applicant contends that the sentences were manifestly excessive – where the applicant had no prior criminal history and had promising rehabilitative prospects – whether the sentences imposed were manifestly excessive *R v Campbell* [2009] QCA 95, considered *R v Salmon; ex parte Attorney-General of Queensland* [2002] QCA 262, considered

COUNSEL: J McInnes for the applicant
S P Vasta for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Chesterman JA that leave to appeal against sentence must be refused.

[2] The effective sentence, two and a half years imprisonment with parole after 10 months, was unquestionably a heavy penalty for two offences of assault occasioning bodily harm in company committed by a 21 year old with no prior criminal history and with promising rehabilitative prospects. I also note that references tendered on his behalf supported his counsel's contention at sentence that this behaviour was out of character.

[3] But as Chesterman JA explains, general deterrence was an important factor in this case. The community expects disputes over child custody and access to be determined by the courts in the best interests of the child, not settled by fights in public streets. Here the complainant was set upon by three men, including the applicant. Both the male complainant and the completely innocent two year old child were injured. Fortunately, those injuries were not serious but, as the primary judge identified, they could well have been. The violent episode has understandably traumatised the child. The primary judge rejected the defence contention that the other two males involved were passing strangers acting spontaneously. This finding meant that the applicant did not extensively cooperate with the administration of justice despite his plea of guilty prior to trial to assaulting the male complainant in company but without the circumstance of aggravation that he was armed. The primary judge also found the assault on the male complainant involved substantial protracted violence; was premeditated; and the applicant acted in a pack and in a cowardly manner, putting not only the male complainant's wellbeing at risk but also the safety of the toddler.

[4] A substantial penalty was required to deter such conduct and to show the community's and the court's disapprobation of it. Despite the considerable mitigating features, a period of actual custody was warranted. The sentence imposed, though heavy, was not manifestly excessive.

[5] I agree with Chesterman JA's proposed order.

[6] **CHESTERMAN JA:** The applicant was charged on indictment with two counts of assault occasioning bodily harm whilst armed and in company, and one count of child stealing. When arraigned on count 1 he pleaded guilty to assault occasioning bodily harm in company. He pleaded not guilty to counts 2 and 3. After a three day trial in the District Court at Southport, the applicant was, on 16 June 2011, acquitted on the count of child stealing but convicted on counts 1 and 2 of assault occasioning bodily harm in company. He was found not guilty of the further circumstance of aggravation, that he was armed.

[7] He was sentenced on count 1 to two and a half years' imprisonment with a parole release date of 15 April 2012, requiring him to serve 10 months, or one-third of the head sentence, in custody. On count 2 he was sentenced to 18 months' imprisonment.

[8] The applicant has applied for leave to appeal against his sentences on the sole ground that they are manifestly excessive.

[9] The assaults occurred at about 9.00 pm on 26 December 2009. The applicant, the woman with whom he then lived, and two other men waited for and set upon the complainant who was the father of the child the subject of count 3. He was pushing the child in a stroller along the footpath of a suburban street near his home. The child was two years and three months old and living with the complainant who had substantial grounds for thinking that the mother could not provide a suitable home for her. The applicant's partner was the mother. She and the complainant had cohabitated some years earlier.

[10] The mother disputed the complainant's assessment that she could not provide satisfactory living arrangements for their daughter. She wished to regain custody of the child. To that end she went to the complainant's house on Christmas Day and asked to take the child. The complainant refused. The next day the child was forcibly taken from the complainant's possession.

[11] Count 1 was the charge of assaulting the complainant. Count 2 was an indirect assault on the child who was injured in the altercation between the applicant, his co-offenders and the complainant. The acquittal on count 3 appears to have been explained on the basis that the child was taken by her mother and not by the applicant or one of the other men.

[12] The evidence at the trial showed that the applicant, two other men and a woman, presumably the child's mother, confronted the complainant as he walked his daughter near his home. He retreated from them and they followed. He stopped a passing car and asked the female driver for assistance. She declined to give it but as she drove off observed three men and a woman running towards the complainant. The applicant abused the complainant for not allowing the child to spend part of Christmas Day with her mother. The complainant ran for home. The wheels of the stroller struck a kerb causing the child to be thrown head first on to a concrete driveway, cutting her forehead and grazing her knees. The complainant was then attacked by the three men who pushed him to the ground where they kicked and punched him. His evidence was that two of the attackers (though not the applicant) were armed with batons. It was the circumstance of aggravation, being armed, which the jury rejected. During the attack the child was taken. There is evidence that one of the male assailants took her but also evidence that the woman did. The jury was directed to acquit on count 3 if they found the woman took the child.

[13] The complainant sustained grazes and bruises to his buttocks, back, scalp, shoulder, left shin and forehead. The force needed to cause these injuries was moderate to severe.

[14] The applicant did not give evidence but called the child's mother in his defence. She said that she had spoken to the complainant on Christmas Day and he had agreed that she could have the child the following evening. She said that she and the applicant went to the complainant's home on Boxing Day night. They encountered the complainant who ran away. Two other men, passers by, involved themselves gratuitously in the fight between the applicant and the complainant. The extreme unlikelihood of that sequence was conceded on the appeal.

[15] In addition to calling that improbable evidence the applicant's counsel subjected the complainant to a demeaning cross-examination in which he was bullied, his

previous convictions for dishonesty were brought out, and he was labelled a "smarmy conman". On appeal it was submitted that the jury was not prepared to act on the complainant's uncorroborated testimony.

[16] In passing sentence the learned trial judge said:

> "You ambushed [the complainant] and bashed him. The crime was committed on a suburban street in the evening. … It is clear that you did not like him. He had the care of [the] child and he was not prepared to allow her to have the child overnight at Christmas.
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> I accept [the complainant's] evidence that he was concerned about the environment provided by [the mother] and that [she] had not … shown much interest in her child until this particular day. …
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> I am satisfied that two other men involved were with you … and that they came with you for the purpose of a violent confrontation. There is the flavour of planning and retribution in the offending. The suggestion that there was a spontaneous attack in combination with some passing strangers was ridiculous.
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> [The] baby was hurt in the initial tussle. The jury was satisfied that that was a foreseeable result of your assault … . … Fortunately the injury suffered by [the child] was minimal, but your conduct that night put her at risk of serious harm. …
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> It was apparent … that you intended to violently assault [the complainant]. It was a protracted beating. He was punched and kicked all over his body and his head. For the most part, he was curled up on the ground in an effort to protect his face and internal organs. Some of the injuries he suffered were the result of severe force. … he is still dealing with some residual physical effects. Even worse has been the traumatic impact … for [the complainant] [and] … his little girl.
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> …
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> You say that you are now remorseful. You have written an apology to [the complainant]. I heard no evidence of remorse in an interview that you gave to police in 2009. Further, the conduct of your defence involved a shabby attack upon the character of the complainant. I accept that you are now sorry that the baby was hurt, although you maintained a denial of criminal responsibility for that injury.
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> This was only one episode, but it involved substantial and protracted violence. There is the aspect of premeditation. You acted in a pack and it was cowardly behaviour. You targeted a man who was blameless. You risked the safety of a baby to get him, and the injuries … suffered were substantial. The potential for tragedy for both [the complainant] and his daughter was very real. You created that danger.
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> Your conduct calls for a firm sentence to make it clear that this kind of violence will not be tolerated."

[17] The applicant was 21 years of age at the time of the offences and 22 when sentenced. He had no criminal history and came from a supportive and respectable

family. He was unemployed but had prospects of work. He and his partner had had two young sons. They had separated and the applicant had custody of one of his children. He was said to be remorseful and also appalled that the complainant's child had been hurt. He wrote an apology to the complainant which was given to him in court. He admitted kicking the complainant at least four times. He told the police when interviewed that he had kicked the complainant once. His assertion that the complainant had prevented the child's mother having contact with her was rejected by the trial judge. The indication that he would plead guilty to count 1 was made early.

[18] Counsel for the applicant accepts that the findings made by the trial judge were supported by the evidence. The sentences were said to be excessive on two bases. The first was that the applicant was a young man without prior criminal convictions, remorseful, with the support of a good family and prospects for employment so that there was little likelihood that he would re-offend. A substantial period of incarceration was therefore unnecessary. The second basis was that none of the cases relied upon by prosecution or defence supported imprisonment for as long as two and a half years.

[19] The case principally relied upon was *R v Salmon; ex parte Attorney-General of Queensland* [2002] QCA 262 in which at first instance an intensive correction order of 12 months was imposed for a serious case of home invasion involving one count of burglary with violence whilst armed and in company, two counts of assault occasioning bodily harm whilst armed and in company and one count of child stealing. Four or five people went to a home in which a child of one of the offenders had been put in foster care. The object of the home invasion was to recover possession of the child for its mother and to assault the foster father against whom Salmon had a grudge. The criminals broke open the door to the home unit, the foster father was punched in the face and hit with a club. The foster mother was assaulted in order to secure possession of the child. Salmon was 24 and had prior criminal convictions for house breaking, dishonesty and drug offences.

[20] On appeal a sentence of 18 months' imprisonment suspended after six was imposed. The case was decided at a time when appeals by the Attorney-General were "approached with caution" and any successful appeal resulted in a moderate sentence. But for that constraint the sentence would have been "at least two years imprisonment without any suspension".

[21] The other case, *R v Campbell* [2009] QCA 95 was also one of assault occasioning bodily harm in company committed in the context of disputed custody of children. Campbell had been sentenced to 12 months' imprisonment to be released on parole after three months.

[22] The dispute was between Campbell's daughter, the children's mother, and their father. Campbell, his daughter and another family member attempted to take one of the children by force from the father who had possession by agreement with the mother. He had declined to return them to her when she changed her mind about where they should live. A complaint to the police was ineffectual because they ascertained that the children were being properly cared for. The applicant was warned not to take the law into his own hands.

[23] Undeterred, Campbell, his daughter and a son-in-law went to a shopping centre where, when the complainant emerged from the shops with one of his children, they

confronted him and attempted to take the child. Campbell held the father in a headlock while the others held his arms and tried to pull him away from the child. Campbell disengaged himself from the wrestling, stepped back and kicked the father with sufficient force to cause him to fall to the ground. The mother then took the child. The father suffered minor soft tissue injuries without lasting complications. Campbell was a mature man without criminal history who acted to assist his daughter.

[24] In refusing leave to appeal against sentence the President, speaking for the Court, said (at [17]):

> "… The primary judge's concern to impose a sentence that discouraged vigilantism and encouraged citizens to follow lawful means to enforce their rights was also sound. The complainant was entitled to the protection of the rule of law. A wrestling match over a toddler in a shopping centre car park amounting to an assault occasioning bodily harm in company is not the way a civilised society settles custody disputes. The applicant's behaviour could not have been in the best interests of [the child]. The applicant's offending created a real risk that innocent members of the public witnessing the affray and understandably concerned for the welfare of [the child] could become involved and subsequently harmed in the fracas."

[25] Those remarks apply with equal force to this case which is much more serious. The complainant was ambushed by the applicant and three others. He was pursued and knocked to the ground where he suffered a protracted beating which left him with some residual injuries. The offence was committed at night where the chance of intervention from bystanders or detection by witnesses was less likely than in Campbell's case where the offence occurred in daylight in a crowded carpark. An additional feature which makes this case more serious than *Campbell* is the circumstance that the child was injured and may well have been seriously hurt in the fight.

[26] There is a distinct need, as the trial judge recognised, to impose a sentence that expresses the Court's, and the community's, intolerance for resort to violence to settle disputes, particularly those involving the welfare of children. The factors of mitigation personal to the applicant, though important, do not outweigh the objective seriousness of the offence and the need to protect and insist upon the lawful and peaceful settling of disputes.

[27] The factors in support of leniency are reduced in potency by the consideration that the applicant's remorse appears to have come late and to have been incomplete. There was reluctance to accept responsibility for the injury to the child, a tendency to blame the complainant and disparage him publicly, a lack of frankness in his police interview and lack of cooperation in refusing to identify his co-offenders.

[28] *Salmon* shows that something more than two years' imprisonment would have been an appropriate sentence for the offending in that case had the sentencing discretion been properly exercised at first instance. It did not decide that anything more than two years would have been excessive. *Campbell* involved much less violence without the elements of attempted concealment and the involvement of unknown assailants, recruited for the purpose of, attacking the complainant. *Campbell* was a confrontation between members of the family in broad daylight where the potential for serious harm was slight.

[29] These factors and the cases indicate that the sentences imposed were not beyond the permitted range. The trial judge was confronted with the common dilemma of balancing the need to punish and deter violent behaviour while encouraging the applicant's prospects of rehabilitation. Her Honour chose to emphasise the need to denounce violent anti-social behaviour and to protect citizens and their children. The balance struck by the trial judge was within the permitted range of responses to the offences.

[30] The application for leave to appeal should therefore be refused.

[31] **MULLINS J:** I agree with Chesterman JA.