SUPREME COURT OF QUEENSLAND

CITATION:	*R v Edwards* [2012] QCA 117
PARTIES:	**R** **v** **EDWARDS, Michael John** (applicant)
FILE NO/S:	CA No 281 of 2011 DC No 1054 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	4 May 2012
DELIVERED AT:	Brisbane
HEARING DATE:	5 April 2012
JUDGES:	Holmes JA, Mullins and A Lyons JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal against sentence allowed.** **2. Appeal against sentence allowed.** **3. Sentence varied by reducing the term of imprisonment imposed to five and a half years.** **4. Sentence imposed at first instance otherwise confirmed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was 26 at the time of the offence and had no prior convictions for violence – where the applicant had pleaded guilty at the earliest opportunity – where the applicant was sentenced to seven years imprisonment with a serious violent offence declaration for the offence of unlawful wounding with intent to do grievous bodily harm – whether the sentence was manifestly excessive *Criminal Code* 1899 (Qld) *Penalties and Sentences Act* 1992 (Qld)

R v Bryan; ex parte A-G (Qld) (2003) 137 A Crim R 489; [2003] QCA 18, cited
R v Holland [2008] QCA 200, cited
R v Lowe [2001] QCA 270, cited
R v Marks; ex parte Attorney-General of Queensland [2002] QCA 34, cited
R v Mitchell [2006] QCA 240, cited
R v Thomason; ex parte A-G (Qld) [2011] QCA 9, cited

COUNSEL: M J Copley SC 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] **HOLMES JA**: The applicant seeks leave to appeal against the sentence imposed on him on his plea of guilty to one count of unlawful wounding with intent to do grievous bodily harm. He was sentenced to seven years imprisonment with a declaration that he was convicted of a serious violent offence, with the result that he is required to serve 80 per cent of that sentence before being eligible for parole. The period of 448 days which the applicant had spent in custody before the sentencing date was declared as imprisonment already served under the sentence pursuant to s 159A(3) of the *Penalties and Sentences Act* 1992.

The offence

[2] The applicant was 26 years old when he stabbed the 23 year old male complainant. The events which led up to the stabbing took place on 11 July 2010 at a railway station. The applicant, his de facto wife, her brother and a female friend had been on a fishing trip. On their journey home, their unruly behaviour led to their ejection from the train on which they were travelling. The applicant was, the Crown accepted, intoxicated. As he and his friends left the train, they perceived that a young man on the station platform was laughing at them, and there was some exchange of words between him and them. The man on the platform was sufficiently concerned by their demeanour to ring some friends who had dropped him off at the station to come back and keep him company while he waited for his train. They returned, making, with him, a group of five. The applicant and his friends concluded, apparently for no better reason than that the man had been joined by others, that this meant there would now be a fight.

[3] The applicant's male companion, a man named Steimel, broke a piece of branch from a tree and brandished it. The applicant took a filleting knife from his fishing gear, vaulted the platform fence and followed Steimel in approaching the group. His counsel said, by way of explanation, that he had felt obliged to support Steimel. There was some pushing and shoving between Steimel and the applicant, on the one hand, and the group of men, on the other; in the course of the altercation the applicant used his filleting knife to stab one of the men in the other group twice in the upper chest and neck. After doing so, he threw the knife over a fence and returned to the platform, where he and his companions got onto a train. The victim did not immediately realise he had been stabbed, walking away with his friends.

[4] The medical report tendered by the Crown described the two wounds inflicted. The more serious was a 15 millimetre wide incision above the collar bone, which had penetrated the chest wall and caused a 10 per cent pneumothorax. The other wound was a seven millimetre wide, superficial incision in the chest. The pneumothorax was treated with a chest drain. The Crown accepted that although the injury, if left untreated, had the potential to become very serious, it was not likely to amount to a permanent injury to health. No victim impact statement was tendered, and there was no evidence of any longer-term effects of the wounding on the victim.

[5] The applicant was extradited from New South Wales, where he had gone to live with his father, a fortnight after the offence and remained in custody thereafter. When he was questioned by police, he asserted that he had been knocked out in the incident, in which, he claimed, the opposing group had numbered ten, and that he did not remember anything. There was a committal hearing, although at that stage the applicant was facing a charge of attempted murder; the indictment ultimately presented was for the unlawful wounding, to which the applicant intimated a plea of guilty on the first mention in the District Court.

The applicant's antecedents

[6] The applicant's criminal history consisted of some eight offences, over the years between 2003 and 2009. All were dealt with summarily, in each case by way of fine; they were matters such as possessing dangerous drugs, committing public nuisance and wilful damage. Of some concern though, were three charges of possessing a knife in a public place. The first two of those offences occurred in 2003 and resulted in fines but no convictions; on the third occasion, in 2007, the applicant was convicted and fined.

[7] At the time of the unlawful wounding offence, the applicant had been for some years in a de facto relationship and was the father of a three month old baby. A psychologist's report tendered on his behalf set out his history. The applicant had had a difficult childhood, with his parents separated and an unhappy relationship with a step-father. He left school before completing year 9 but had worked as a welder subsequently, and had completed three years of an apprenticeship as a boiler-maker. He had used cannabis and amphetamines, but had managed to overcome his dependence on the latter. When he lost his job in early 2010, he began to drink excessively and became dependent on alcohol. The psychologist's assessment did not reveal any personality disorder. The applicant's alcohol consumption on the day that he committed the offence had, in the psychologist's view, substantially contributed to his impulsive actions. The likelihood of his re-offending in a similar way was significantly reduced if he refrained from excessive alcohol use; counselling would assist him with his alcohol and drug use problems.

[8] A reference was tendered on the applicant's behalf from a former employer who spoke highly of him, describing him as reliable, not given to aggression and devoted to his family. His de facto wife, her mother and his own father provided letters in support of him. The applicant himself wrote a letter to the Court expressing his remorse. While in custody he had completed a number of first aid courses. His behaviour was the subject of favourable comment from a number of Corrective Services officers who had supervised him.

The sentencing remarks

[9] The learned sentencing judge noted that the applicant had shown no compassion to the complainant after he had stabbed him and, although presently expressing remorse, had not shown any similar contrition when interviewed by the police. His Honour noted the applicant's antecedents, the fact that he was well spoken of by prison officers and that it appeared that he was heavily affected by alcohol on the day of the offence. While he accepted that there might be good prospects of rehabilitation in the applicant's case, the offence was, his Honour observed, a very serious one, occurring in a public place where there were other people in the vicinity. It was unprovoked, and the applicant's arming of himself with a knife and taking it into the fight were completely unnecessary. His actions could have led to the complainant's death. The learned judge referred initially in his sentencing remarks to the applicant's having caused grievous bodily harm to the complainant, but when it was brought to his attention, confirmed that the reference was a slip of the tongue.

Comparable decisions

[10] At sentence, the Crown relied on two decisions of this Court: *R v Bryan; ex parte A-G (Qld)*[1] and *R v Thomason; ex parte A-G (Qld)*,[2] each involving an Attorney-General's appeal against a sentence imposed for grievous bodily harm.[3] The applicant also referred to those decisions here. In *Bryan*, the respondent, who was in company with a group of other young men, had abused and harassed the complainant and his girlfriend. The latter were returning home from a function in the early hours of New Year's Day, walking towards the Queen Street mall. The respondent started a physical fight with the complainant. Initially, they exchanged kicks and punches, but the respondent, who was losing the fight, produced and opened a pocket-knife which he used to stab the complainant. He inflicted three wounds, one to the complainant's chest and two to his left arm. The chest wound was a very extensive and dangerous one. The complainant recovered, but was left with areas of numbness in his left lower arm and back.

[11] The respondent told his girlfriend what he had done and pressured her to give him a false alibi; indeed, he made threats of harming anyone who gave evidence against him. She eventually told the police what she knew, and the respondent subsequently pleaded guilty to the offence. It was put to the sentencing judge that he had been intoxicated by alcohol, cannabis and heroin. He had no previous criminal history for violence, although he had minor convictions for property offences. Williams JA, with whom the other members of the court agreed, observed that the circumstances of the case made it one of the worst examples of doing grievous bodily harm to be found. It was:

> "an unprovoked, vicious and cowardly attack upon an innocent passer-by in a public street [involving] the use of a knife in such a way as to seriously threaten life."[4]

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1 (2003) 137 A Crim R 489; [2003] QCA 18.

2 [2011] QCA 9.

3 It is to be noted that the maximum penalty for the offence of doing grievous bodily harm simpliciter is 14 years imprisonment (*Criminal Code* 1899, s 320), whereas offences involving an intent to do grievous bodily harm, including wounding and doing grievous bodily harm carry a maximum sentence of life imprisonment (*Criminal Code* 1899, s 317).

4 [2003] QCA 18 at [35].

The offence amounted to gratuitous street violence in the centre of Brisbane at a time when it could be expected that people would be congregating. Deterrence was a major factor: the community had to be protected from such offences. Given those factors, a sentence in the range of six to seven years was the minimum which could be considered as the head sentence. Such circumstances would often justify the making of a serious violence offence declaration, but none had been asked for. The respondent lacked any remorse; there were some indications of rehabilitation, but that was not a significant consideration. The only mitigating factor was the plea of guilty.

[12] In *Thomason*, the respondent stabbed a 21 year old complainant from behind with a steak knife, for no reason other than that the latter had not returned the respondent's "high five" gesture. After the attack, he followed the complainant (who had managed to fight him off and disarm him) and his friends for a short period, shouting at them. The complainant had suffered a wound to the neck and another to the heart which required surgery. He was left with scarring from the stab wounds and the surgery; there was some indication that scar tissue of the heart might cause future problems. The respondent was identified from CCTV footage. He was intoxicated at the time of the offence and disclaimed any knowledge of it. After a full committal, he pleaded guilty a fortnight before his trial was due to commence. He had two previous convictions which had attracted fines, but subsequent to his arrest had breached a community service order and, later, the sentence of imprisonment imposed in respect of that breach. While on bail for the grievous bodily harm offence, he was also sentenced in respect of motor vehicle, wilful damage and domestic violence offences.

[13] In the leading judgment, de Jersey CJ identified a number of features which made the offence a serious example of grievous bodily harm: the respondent was carrying a knife and used it; he had caused injuries which threatened the complainant's life in an attack which was from behind and was entirely unprovoked; he had continued to harass the complainant after the stabbing and left the scene knowing what he had done, and knowing that the complainant would require urgent medical attention; the incident had occurred in a public place; and although the physical effects on the complainant were limited in the main to the scarring to his chest, he was also emotionally harmed. The Chief Justice considered the case to be closely comparable to *Bryan* and concluded that the respondent should be sentenced to six years imprisonment, with a declaration that he had been convicted of a serious violence offence.

[14] In this Court, the applicant referred to a third case involving an Attorney-General's appeal, *R v Marks; ex parte A-G (Qld)*.[5] In *Marks*, the respondent was sentenced at first instance to five years imprisonment on a conviction of unlawful wounding with intent to do grievous bodily harm. He and his brother had gone to the home of the complainant, who had engaged in a sexual relationship with the respondent's girlfriend. The front door was smashed, although it was contentious as to how that had occurred. The complainant was shot twice in the back by bullets fired from a sawn-off semi-automatic .22 calibre rifle; five other shots were also fired. He was treated for gunshot wound injuries to his chest and back and sustained a pneumothorax and haemothorax. He was admitted to an intensive care ward and underwent surgery. The respondent was 30 years old and had previous convictions for robbery and recklessly causing serious injury, for which he had been

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5 [2002] QCA 34.

sentenced to two years imprisonment. The leading judgment was given by Margaret McMurdo P, who observed that it was only good fortune which had saved the complainant from death; that the respondent had shown no remorse and had been convicted after a trial; and that such conduct demanded salutary deterrence. The sentence imposed at first instance was manifestly inadequate; a sentence of seven years imprisonment was substituted, without any declaration.

[15] The applicant also relied on two other decisions of this court: *R v Lowe*[6] and *R v Holland*.[7] Both involved convictions after trial for the offence of grievous bodily harm with intent to do grievous bodily harm. In neither was a declaration of a serious violent offence made. The appellant in *Lowe* was 30 years old and had a number of criminal convictions, although none were for offences of violence. He and a friend, Jacobs, had attacked the complainant. Jacobs kicked him in the upper body while the appellant struck him with a length of wood, described as a "piece of four by two". The complainant sustained a number of injuries: fractures to both legs; fractures to several ribs with a pneumothorax and bruising of the lung; a fracture of the right cheekbone; and a subdural haemorrhage. Without medical attention he could have died. The point was made and accepted on appeal however, that the broken ribs more probably the result of kicking by Jacobs; it was for the injuries to the lower part of the complainant's body that the appellant should have been sentenced. The sentence imposed at first instance, of eight years imprisonment, was reduced to six years.

[16] In *Holland*, the appellant was sentenced to five years imprisonment, cumulative on an earlier sentence (previously suspended) of 12 months imprisonment for assault occasioning bodily harm. The appellant had been staying with a female friend at the house occupied by the complainant and some other men. He accused the complainant of being a "pervert", apparently because he thought the complainant was watching him and his female friend as they embraced in a state of undress. He punched the complainant several times and then kicked him in the face with a heavy boot three or four times. The appellant was 43 years of age; the complainant was smaller and older. His jaw was broken in a number of places and required surgery. The sentencing judge accepted that the assault had been provoked by the complainant, but regarded the appellant's response, unsurprisingly, as grossly excessive. He noted that the appellant had shown no remorse.

[17] Keane JA (with whose reasons Fryberg J agreed) observed that according to this Court's decisions in *Lowe* and *R v Mitchell*[8] (which is discussed below), the sentence which might be imposed "where grievous bodily harm has been deliberately inflicted by the use of a weapon by a mature offender with a record of personal violence"[9] lay between four and seven years. He regarded the appellant's use of his boot in kicking the complainant as amounting to use of a weapon. Keane JA noted that the judge at first instance could have imposed a sentence at the lower end of the range, given that it would be cumulative; but it was, he said, open to the sentencing judge to pose a more severe punishment in light of the appellant's "apparently escalating tendency to violent offending."[10] Margaret McMurdo P regarded the sentence of five years imprisonment cumulative upon the 12 months

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6 [2001] QCA 270.
7 [2008] QCA 200.
8 [2006] QCA 240.
9 [2008] QCA 200 at [63].
10 At [64].

suspended sentence as at the high end of the appropriate sentencing range, taking into account the nature of the injuries suffered by the victim, the absence of any weapon and the fact that there had been some provocation. On the other hand, the appellant had shown no sign of remorse and it was fortunate that the complainant was not even more seriously injured. Fryberg J agreed with those observations.

[18] Counsel for the respondent relied on *Mitchell*, in which the applicant unsuccessfully sought leave to appeal against a sentence of seven years imprisonment with a serious violent offence declaration, imposed on a guilty plea to a count of grievous bodily harm with intent. That applicant was also sentenced to a concurrent period of 12 months imprisonment in respect of an associated count of deprivation of liberty. The complainant, a 45 year old woman, had been drinking over an extended period with the applicant and one of his friends at various locations, ending up at the applicant's unit. The account which the sentencing judge accepted was that the complainant had rejected sexual overtures by the applicant, who threatened to kill her. He used an iron bar to hit her on her head, shoulders and arm as well as hitting, kicking and punching her. The complainant escaped by jumping from the first floor balcony of the unit to the ground below. She sustained a laceration and compound fracture to the left elbow, lacerations to her scalp and shins, bruising around her left eye and right shoulder and a dislocation of a toe joint. She was left with some lack of balance as a result of the toe injury, pain associated with the injuries to her left elbow and right shoulder and psychological consequences in the form of anxiety attacks and nightmares. The fracture of the left elbow constituted the grievous bodily harm.

[19] It was accepted that the applicant was heavily intoxicated at the time of the offence. He was 51 years old and had a long criminal history which included a number of offences of violence, the most significant of which was a conviction of manslaughter, for which he had been sentenced to eight years imprisonment. The sentencing judge noted that the offence had occurred in circumstances where the complainant had offered no provocation; the violence inflicted was potentially deadly and had had continuing consequences for the complainant; and the applicant had an extensive criminal history including a large number of offences of violence, often with alcohol as a factor. The sentencing judge took into account the plea of guilty entered by the applicant, although it was not an early one. He imposed a sentence of seven years imprisonment; taking into account the seriousness of applicant's conduct, the serious risk he posed to others and the need to protect the community, he concluded that a serious violent offence declaration was warranted. This court upheld that sentence, noting that considerations of deterrence, denunciation and community protection were important features. The sentence was a heavy one, but was not manifestly excessive, even allowing for the applicant's plea, intoxication and the injuries sustained; the assault was serious, involving a prolonged and unprovoked attack with a potentially lethal instrument by an applicant with a very extensive and relevant criminal history.

The contentions on appeal

[20] Mr Copley SC, for the applicant here, accepted that the case was an appropriate one for the making of a serious violent offence declaration. However, he pointed out that where such a declaration was made, a plea of guilty could only be reflected in reduction in the level of the head sentence. In *Holland*, Keane JA had referred to a range of four and seven years imprisonment for grievous bodily harm intentionally

inflicted through the use of a weapon by a mature offender with a history of personal violence. Here, although the maximum penalty was the same as for inflicting grievous bodily harm with intent, the element of actually causing grievous bodily harm was missing; the applicant had no prior convictions for offences of violence; and he had pleaded guilty. Nonetheless he had received both a head sentence at the top of the range identified in *Holland* and been declared to be convicted of a serious violent offence. *Lowe* was of relevance, because it involved a conviction of grievous bodily harm with intent in which the Court of Appeal considered the appropriate sentence was one of six years imprisonment without a serious violence offence declaration. It was a case of comparable seriousness in terms of its facts. *Marks*[11] involved a more serious set of facts: the use of a firearm by a respondent previously convicted for an offence of violence, who did not have the mitigating factor of a plea of guilty.

[21] Mr Vasta, for the respondent, contended that the injuries suffered by the victims in *Mitchell*, *Lowe* and *Holland* were not as serious as those suffered by the respondent in this case. (There is, I think, considerable difficulty in accepting that contention, having regard to the long-term effects, physical and psychological, on the complainant in *Mitchell* and the multiple fractures sustained by the victims in *Lowe* and *Holland*, which seem at least comparable in severity to the harm done to the complainant here). Keane JA's statement in *Holland*, it was submitted, should not be regarded as an authoritative statement of the range but merely as a general statement in respect of the sentence in that case. Offences of street violence were to be regarded more seriously; a significant feature of the case here was that the violence was inflicted on a stranger, rather than in the context of a domestic relationship. It was to be noted that the maximum penalty applicable in *Bryan* was 14 years, and the court in that case had described a sentence of between six and seven years as the minimum that could be considered as a head sentence. It followed that the range for the present offence should be higher. A sentence greater than seven years could have been imposed; the mitigating factors had been reflected by the learned judge in choosing instead to impose the sentence of seven years.

Conclusions

[22] In my view, Mr Copley's submission that the learned judge erred by both setting the penalty for the offence at the high end of the sentencing range and imposing the serious violent offence declaration, must be accepted. This case, serious though it was, did not, on its facts, involve offending of the proportions of most of the cases cited by way of comparable decisions. The initial aggression was not as entirely unprovoked as that in *Bryan* and *Thomason*, for example. Here the return of the larger group of young men had led to the perception that a fight was imminent, although the conduct of the applicant and Steimel actually precipitated it. The real culpability lay in the applicant's use of the fishing knife, which was entirely disproportionate to the low level physical altercation which ensued. One of the features which distinguish this case from others, though, is that the applicant initially had the knife in his possession for an innocent purpose.

[23] It may be accepted that deterrence is a more powerful factor in street violence offences than in those occurring in the domestic relationship context; but it does not mean that offending of the former kind is necessarily more culpable than wounding or grievous bodily harm committed in the context of a home invasion of the kind

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11 [2002] QCA 34.

involved in *Marks*, or as a reprisal for resisting sexual advances, as in *Mitchell*. This case seems, as Mr Copley submitted, more comparable in terms of seriousness with that of *Lowe* than the others cited. There is, I consider, no reason to regard Keane JA's observation in *Holland* as to the applicable range of four to seven years as other than accurate. The observation was not limited to the circumstances of that case, although it may be noted that they were more serious than those here, in the respects identified by Mr Copley. Of particular significance is the absence of the record of personal violence which was an element in Keane JA's assessment. Mr Vasta's proposition that the learned sentencing judge could properly have considered a head sentence of more than seven years before allowance for mitigating factors must, in my view, be rejected.

[24] The cases referred to indicate that seven years imprisonment would have been at the extreme of the available sentencing range, on the facts of this case. If the learned judge adopted a higher starting point for sentencing, he did so in error. If, on the other hand, seven years was his starting point and he made the serious violent offence declaration without alleviation of the head sentence, he failed to make any proper allowance for the mitigating factors. They were significant: the applicant was a relatively young man with good prospects of rehabilitation and had pleaded guilty at the earliest opportunity once the charge of wounding with intent was brought. Whatever the mechanism of error, the resulting sentence was, in my view, manifestly excessive.

Orders

[25] The application for leave to appeal should be allowed and the sentence varied by substituting a sentence of five and a half years imprisonment for the head sentence of seven years imprisonment. The declarations as to conviction of a serious violent offence and as to imprisonment already served under the sentence should remain.

[26] **MULLINS J:** I agree with Holmes JA.

[27] **ANN LYONS J:** I agree with the reasons of Holmes JA and with the orders proposed.