SUPREME COURT OF QUEENSLAND

CITATION:	*R v Boxall* [2013] QCA 375
PARTIES:	**R** **v** **BOXALL, John Robert** (applicant)
FILE NO/S:	CA No 171 of 2013 SC No 516 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 December 2013
DELIVERED AT:	Brisbane
HEARING DATE:	2 December 2013
JUDGES:	Holmes and Fraser JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring to the order made
ORDER:	**The application for leave to appeal is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to seven years imprisonment with a parole eligibility date set at two years and four months in respect of an offence of malicious act with intent – where the applicant fired a spear from a spear gun into the complainant's stomach, causing him serious injury and lasting disability – where the applicant accepted that a sentence of seven years was appropriate, but contended that a parole eligibility date should have been set after two years, having regard to injuries which the complainant had inflicted on him in an earlier confrontation – where the sentencing judge took the injuries to the applicant into account – where an aggravating feature of the offence was that the applicant was not in any immediate confrontation with the complainant when he fired the spear gun – whether in all the circumstances it was open to the sentencing judge to set the parole eligibility date at one third of the sentence *R v Beer* [2000] QCA 193, cited *R v Brannigan; R v Green* [2009] QCA 271, cited *R v Dempsey* [2001] QCA 141, cited

R v Dunn [2007] QCA 153, cited
R v Mitchell [2006] QCA 240, cited
R v Wease [1993] QCA 7, considered

COUNSEL: J Noud for the applicant
P J McCarthy for the respondent

SOLICITORS: AW Bale & Son for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** The applicant seeks leave to appeal against a sentence of seven years imprisonment, with a parole eligibility date after two years and four months, imposed in respect of an offence of malicious act with intent.

The factual background

[2] The applicant was a 48 year old man at the time of the offence; his victim was 38. A statement of agreed facts was tendered on sentence. According to it, they had in the past shared a residence and had been friends, but they had begun to have heated arguments about money. The applicant owed the complainant around $4,000, but when asked for it either claimed that he had no money or denied borrowing the funds. The applicant tendered statements on sentence showing that the complainant had made a practice of harassing him about the debt.

[3] On the afternoon of 15 November 2011, the complainant, who was drunk, telephoned the applicant demanding the money. Threats were exchanged. The complainant's girlfriend drove him to the applicant's home, where the complainant barged in on the applicant as he was using the toilet. There was an exchange of punches and pushes which was broken up by the applicant's de facto wife. It was submitted on behalf of the applicant during the sentence hearing that he had been injured in that incident, causing him severe neck and back pain and headaches; the sentencing judge accepted that he had been left with a cervical spine fracture for which he was still being treated. There was also some damage done to the applicant's house, involving a partial collapse of the toilet wall.

[4] The complainant left the premises, only to return shortly after. In the interval, the applicant and his de facto wife discussed obtaining a domestic violence order against him. On the complainant's return, he called the applicant to come outside so that he could "flog" him. He made a number of threats, to which the applicant responded from an upstairs window by telling him to leave the property and insisting that he did not owe any money. The complainant picked up an anchor in a boat parked on the front lawn of the property and shouted that he would throw it through the window if the applicant did not come down. He proceeded to throw the object, but struck the wall of the house below the window. The applicant loaded a spear gun and pointed it through the window at the complainant, who was about 15 metres away. The latter called to him, "[W]hat are you going to do with that?" to which the applicant replied "What do you think I'm going to fucking do with it?" In response, the complainant held his arms up and shouted, "Go on shoot me". The applicant did so, striking the complainant in the stomach.

[5] The complainant, after walking a short distance, collapsed and began to convulse. The applicant's de facto wife went to his assistance, in response to which the

applicant shouted at her that she should stop or their relationship would be over. Neighbours also came to the complainant's assistance; the applicant asked them why they were looking after him when the complainant had threatened his de facto wife and him. He was told to go away, and returned to his house with the empty spear gun.

[6] The spear was approximately four feet long, and six to eight inches of it were embedded in the complainant's stomach. It had to be cut with a grinder before he could be placed in an ambulance. He was given a blood transfusion en route to hospital, where surgery was performed to remove the remainder of the spear. It had perforated the bowel in four places and caused a four centimetre laceration in the left iliac vein. A section of the complainant's bowel had to be removed. The life-endangering aspect of the grievous bodily harm entailed in the charge of malicious act with intent was particularised as the prospect of fatal bleeding from the iliac vein and of life-threatening infection from the bowel injuries. The complainant remained in intensive care for almost a fortnight and was discharged from hospital about three weeks after the wounding. At the time of sentencing, he was waiting for further surgery to treat hernias along the abdominal scar. The injury had left him with some difficulty in movement and in lifting. His employment had usually involved physical work, which he was no longer able to perform.

[7] The applicant told police after the event that the complainant had threatened his family on a number of occasions and had threatened to cut his throat and shoot him. He recounted the incident earlier in the day when the complainant had pushed him off the toilet. He had loaded the spear gun after the complainant threw the anchor. In fact he had loaded two spear guns, but one did not work, so he used a second. He was aiming at the applicant, but not at any particular part of his body. He had not wanted to kill him but to put him in his place and stop him from threatening his family and friends.

The sentence hearing

[8] The applicant was originally charged with attempted murder, with the malicious act with intent count as an alternative. At the commencement of the sittings in which the matter was listed for trial, the Crown entered a nolle prosequi on the attempted murder charge and the applicant pleaded guilty to the remaining count. The Crown accepted that the guilty plea had obviated the need for it to marshal its witnesses and conduct a trial which would have lasted about a week. The Crown's submission on sentence was that a sentence of between six and eight years would be appropriate, and, more particularly, that the sentence should be at the lower end of that range with a serious violent offence declaration made.

[9] The applicant had no criminal history. A number of references and statements was tendered on his behalf at sentence, the effect of which was that he was not a violent man; was a good father to his teenaged children; and was a reliable employee. His mother addressed a letter to the court which said that he had suffered depression as a result of a marriage breakdown and his sister's death from kidney failure. He was currently working as an appliance repairman, and had been in consistent employment over his adult life. The applicant's counsel put before the court material relating to the complainant's behaviour some nine months after the offence. The latter had driven past the applicant's house and threatened to kill him, which had resulted in his being charged with threatening violence.

[10] The applicant's counsel accepted that the range of six to eight years imprisonment was appropriate, but submitted that a serious violent offence declaration was not warranted. She relied in particular on the decision of this Court in *R v Wease*,[1] which bore some strong factual similarities to the present case. The applicant for leave to appeal there had been sentenced after a trial to nine years imprisonment with a recommendation for parole after three years. She had been engaged in an altercation and argument with her victim who kicked and then opened the front door of her house. The applicant had loaded a shotgun and pointed it at the victim, who taunted her, called her names and said "shoot me", which she did. The shot struck the man in the arm and seriously injured him, although it is not clear from the judgment whether he suffered any residual disability. That applicant was 28 years old and had no prior criminal history. She was responsible for the care of two children and expecting another. The court held that the sentence imposed was manifestly excessive and substituted a sentence of seven years imprisonment with a recommendation for parole after two years. Counsel for the applicant at sentence submitted that he should receive the same sentence as the applicant in *Wease*.

[11] The learned judge in his sentencing remarks noted that although the complainant had been guilty of significant provocative behaviour, it was relevant that the applicant had not taken the sensible step of calling the police in response, despite having earlier contemplated doing so. His Honour also noted that there were features which pointed to the making of a serious violent offence declaration: the nature and use of the dangerous weapon, the applicant's having armed himself with it and loaded it in a way which was not spontaneous, although not the subject of great premeditation, and its discharge causing significant life-threatening injuries, with a lasting physical impact on the complainant. On the other hand, the offence was a "more or less spontaneous reaction" to an accelerating course of bad conduct by the complainant. Those circumstances and the applicant's previous good character made it unlikely that the offence would be repeated or that any declaration was needed to protect the community from the applicant. His Honour referred to the similarity of the facts to those in *Wease*. He noted the early plea and the applicant's co-operation with the authorities in making admissions, before concluding that a sentence of seven years imprisonment with parole eligibility date set a third of the way through was appropriate. A short period spent in pre-trial custody was declared.

The application for leave to appeal against sentence

[12] The applicant in his outline of argument accepted a sentence of between six and seven years was appropriate, but contended that he should have been given a parole eligibility date after two years. He submitted that the sentencing judge did not give sufficient weight to the fact that the earlier incident in which the complainant went to the applicant's house involved a home invasion and lasting injury to the applicant. But while plainly all relevant matters must be taken into account, the weight ascribed to them is a question for the judge in the exercise of his or her discretion; and nothing suggests that the sentencing judge overlooked that aspect of the case.

[13] In fact, it seems to me that his Honour took a view of those facts which was particularly favourable to the applicant, in finding that he had suffered a fracture of the cervical spine for which he was still being treated. The medical evidence spoke

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[1] [1993] QCA 7.

only of a loss of vertebral body height in the cervical spine which was "suspicious for fracture" and of "indeterminate age" in the context of degenerative change. No medical opinion attributed the fracture to the assault. And although the applicant's counsel (not counsel on the appeal) had submitted that patient notes from the applicant's general practitioner showed that he was seeking medical assistance "on an ongoing basis" for the sequelae of the assault, in fact the last note of his being seen for back and neck pain was made at the beginning of January 2012. The general practitioner's records showed that in October 2012 and January 2013 he was seen for depression and anxiety and thereafter that letters were sent to him about attending to discuss the hospital x-ray reports; but it does not appear that he did so. If anything, the sentencing judge seems to have given rather a lot of weight to very scant evidence. It was suggested that the case had some similarity to those dealing with extra curial punishment. However that may be, his Honour plainly took the injury to the applicant, such as it was, into account.

[14] Reference was made in the applicant's outline of argument to a number of cases raised in the course of submissions at sentence: *Wease* (already mentioned), *R v Dunn*[2]; *R v Brannigan; R v Green*[3]; *R v Beer*;[4] *R v Dempsey*;[5] and *R v Mitchell*[6]. None of those decisions indicates that the sentence of seven years imprisonment with parole eligibility after 28 months in this case was excessive. *Dunn*, *Mitchell* and *Brannigan & Green* are readily distinguished, because the circumstances were more serious and a serious violent offence declaration was imposed and upheld in each of those cases. The applicant's point about some of the cases was that the offenders received sentences of seven years imprisonment, as he did, in circumstances which did not involve provocation of, and injury, to the offender. In *Beer* and *Dempsey*, the applicants, having gone to trial, received sentences of seven years without the benefit of early parole eligibility. *Wease* has already been outlined.

[15] But those cases, while worse in some respects, did not possess a serious aggravating feature present here: that the applicant at the time he reacted was not in any immediate confrontation with the complainant. He fired his shot from a position of distance and safety, when he could easily have called the police to deal with the complainant. Indeed, the applicant concedes that seven years imprisonment was not excessive; what he argues for is parole eligibility at an earlier date, after two years, as was imposed in *Wease*. To alter the sentence in the way suggested, setting parole four months earlier, would amount to tinkering of a kind which this court does not countenance, in circumstances where no error has been shown. The sentencing judge might have given an earlier parole eligibility date, having regard to the applicant's previous good character and the unlikelihood of his reoffending, but his decision not to do so was entirely open to him in the exercise of his discretion.

Order

[16] I would refuse the application for leave to appeal.

[17] **FRASER JA:** I agree with the reasons for judgment of Holmes JA and the order proposed by her Honour.

[18] **DAUBNEY J:** I respectfully agree with Holmes JA.

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2 [2007] QCA 153.
3 [2009] QCA 271.
4 [2000] QCA 193.
5 [2001] QCA 141.
6 [2006] QCA 240.