SUPREME COURT OF QUEENSLAND

CITATION:	*R v Stringer* [2014] QCA 342
PARTIES:	**R** **v** **STRINGER, Luke** (applicant)
FILE NO/S:	CA No 204 of 2014 DC No 96 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	19 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2014
JUDGES:	Holmes, Fraser and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant the application for leave to appeal against sentence.** **2. Allow the appeal.** **3. Vary the sentence imposed in the District Court by ordering that the applicant be imprisoned for a period of two years, instead of the period of three years imposed in the District Court, and that the date the offender be released on parole be fixed at 10 January 2015, rather than the date of 10 July 2015 fixed in the District Court.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the applicant pleaded guilty to unlawful grievous bodily harm and was sentenced to three years imprisonment with parole release after one year – where the applicant had laid in wait to launch a surprise attack – where the applicant had surgery to prevent permanent numbness in his face, and there were few permanent injuries – where the sentencing judge described the complainant as having permanent numbness along his face – whether the sentencing judge erred in characterising the nature of the complainant's ongoing injuries *R v Brand* [2006] QCA 525, considered *R v Craske* [2002] QCA 49, considered *R v Davies* [2013] QCA 73, considered

R v Elliott [2001] QCA 507, considered
R v Kinersen-Smith & Connor; ex parte Attorney-General (Qld) [2009] QCA 153, considered
R v Leapai [2005] QCA 449, considered
R v O'Grady; ex parte Attorney-General (Qld) (2003) A Crim R 273; [2003] QCA 137, considered
R v Tupou; ex parte Attorney-General (Qld) [2005] QCA 179, cited

COUNSEL: A J Edwards for the applicant
D A Holliday for the respondent

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

[1] **HOLMES JA:** I agree with the reasons of Fraser JA and the orders he proposes.

[2] **FRASER JA:** On 10 July 2014 the applicant was convicted on his plea of guilty to an offence of unlawfully doing grievous bodily harm on 7 June 2013. The applicant was sentenced to imprisonment for three years with an order that he be released on parole fixed at 10 July 2015, after he would have served one year in custody. He has applied for leave to appeal against sentence on the grounds that the sentence was, in all the circumstances, manifestly excessive and that the sentencing judge erred in characterising the nature of the complainant's ongoing injuries.

Circumstances of the offence and the applicant's personal circumstances

[3] On the night of 6 June 2013 the 23 year old applicant and the 21 year old complainant, who did not know each other, were at a nightclub in Cairns with their respective friends. At about midnight there was an altercation between an unknown man and a friend of the applicant. The complainant was not involved. Subsequently the applicant and his friends were sitting outside the club. The applicant perceived that a friend was being taunted and mocked from a balcony of the nightclub in relation to the earlier incident. In response the applicant decided to go inside the nightclub with the intention of assaulting the complainant. The applicant went inside and watched the complainant. A short time later, as the complainant walked through the nightclub on his own to near where the applicant was waiting, the applicant struck the complainant in the face with a closed fist. The offence was captured on CCTV and witnessed by an off-duty police officer. The Court watched the video. The following description of the assault given by the prosecutor at the sentence hearing was accurate:

> "And the complainant comes into view and almost immediately the [applicant] physically launches himself at the complainant and swings his right fist in a wide arc with the full weight of his body behind the blow. He also leaps at least half the length of the pool table to the side which gives it an added element of surprise to the complainant."

[4] Upon being struck the complainant lost consciousness and fell to the ground. The applicant was ejected from the club by security staff. Police located him a short time later leaving the area in a taxi. He accompanied them back to a police station and took part in an interview. The applicant told police that: a friend of his had been involved in an incident with a male inside the club; that friend had described a person who had assaulted him as someone physically different from the complainant

and was sure that the complainant and his friend were involved; the complainant had taunted them from the balcony of the club; and the applicant decided to go back inside and retaliate. The applicant also told police that what he did was "probably massively inappropriate".

[5] Those circumstances were set out in a schedule of facts which was tendered in evidence at the sentence hearing. That schedule also describes the complainant's injuries. The complainant was immediately taken to hospital for treatment, where he was observed to have bruising and swelling to left side of his face and eye. He was later found to have a significantly displaced fracture of the left cheekbone. The complainant underwent surgery on 17 June 2013. The fracture was openly reduced and plated. If the fracture had been left untreated the complainant would have suffered significant facial asymmetry and permanent disfigurement and would have been unable to open or chew to a normal range. The displacement of the fracture would have traumatised his nerve, resulting in permanent numbness below the eye to the upper lip, consistent with the damaged nerve supply.

[6] A statement by the complainant described the consequences of the injuries. He missed seven days work because of severe pain and discomfort. He suffered from severe headaches, disorientation, inability to concentrate, impaired vision, and inability to eat solid foods for about seven days. The complainant's surgeon told the complainant that he had a severed facial nerve, which is why the complainant had no feeling in the area of his broken cheekbone, and that without surgery there was a high chance that the feeling would never come back. After surgery the complainant's sleep was affected for about 10 days because of stitches and staples in his left temple, eyebrow and mouth. He suffered other ill-effects. He still suffered from headaches occasionally. The complainant lost income he otherwise would have earned and he incurred expenditure on medicine and anaesthetics.

[7] The applicant had a minor criminal history; he had been fined for one offence for which no conviction was recorded and for two offences for which convictions were recorded. He was 24 years old when he was sentenced. He came to Australia from the United Kingdom at the beginning of 2013. He had been educated to the equivalent of Year 10, left school for work, and undertaken further studies at the equivalent of a TAFE College, where he obtained qualifications as a non-destructive tester. He worked in that capacity in Australia. Counsel for the applicant told the sentencing judge that the applicant was extremely remorseful, he had expressed that remorse immediately to police, he was co-operative with police, he made full admissions, he entered an early plea of guilty, and he had been fully co-operative with the administration of justice throughout the matter. The applicant wrote a letter of apology to the complainant, in which he expressed deep regret for his actions and he offered to compensate the complainant for any financial loss. The applicant's parents and others wrote references which spoke in glowing terms of the character, conduct and contribution to the community of the applicant and of his remorse and regret for his actions.

Ground 2 of the application: the sentencing judge erred in characterising the nature of the complainant's ongoing injuries

[8] The respondent conceded that the sentencing judge erred in characterising the nature of the complainant's ongoing injuries. Counsel for the Crown told the sentencing judge that the displacement of the fractures in the area of the complainant's left

cheekbone "would have traumatised his nerve, resulting in permanent numbness below the eye to the upper lip…consistent with a damaged nerve supply…". Relying upon that submission, the sentencing judge remarked that it seemed that the surgeons could not repair the complainant's nerve damage and he had permanent numbness running almost the length of his face. That significantly overstated the permanent injuries established by the evidence, which were limited to occasional headaches, as the nerve damage had been corrected by surgery.

[9] Accordingly, it is not necessary to consider the ground of appeal that the sentence is manifestly excessive. Rather, the Court is obliged to re-sentence afresh "unless in the separate and independent exercise of its discretion it concludes that no different sentence should be passed": *Kentwell v The Queen* (2014) 88 ALJR 947 at 956 [35], citing *AB v The Queen* (1999) 198 CLR 111, and at 957 – 958 [42].

Re-sentencing

[10] The respondent's counsel acknowledged that the Crown should not make submissions which specified the sentence which should be imposed: *Barbaro v The Queen* (2014) 88 ALJR 372. She emphasised the applicant's conduct in lying in wait to launch a surprise attack upon the unarmed and unsuspecting complainant in the face with significant force, the injuries sustained by the complainant, and the circumstance that the complainant continued to suffer from occasional headaches. It was submitted that general deterrence was a significant consideration because this was yet another assault of a serious nature in a nightclub. The respondent submitted that assistance as to the appropriate sentence could be derived from *R v Tupou; ex parte Attorney-General (Qld)* [2005] QCA 179, *R v Elliott* [2001] QCA 507 and *R v Davies* [2013] QCA 73.

[11] Counsel for the applicant accepted that general deterrence was a significant sentencing consideration but argued that the mitigating factors, particularly rehabilitation, were also significant in this case. He argued that the applicant's offer of compensation was a mitigating factor: *R v McMahon* [2013] QCA 240. The applicant's counsel submitted that, taking into account all of the relevant features of the case, a sentence in the order of 18 months to two years with parole release after four to six months should be imposed. The applicant's counsel referred to comparable sentencing decisions: *R v O'Grady; ex parte Attorney-General (Qld)* (2003) A Crim R 273, *R v Craske* [2002] QCA 49, *R v Leapai* [2005] QCA 449, *R v Brand* [2006] QCA 525, and *R v Kinersen-Smith & Connor; ex parte Attorney-General (Qld)* [2009] QCA 153.

Consideration

[12] In *O'Grady*, the Court set aside a sentence of 12 months imprisonment to be served by way of intensive correction order and instead imposed a wholly suspended sentence of imprisonment of two years. That 28 year old offender had no prior criminal history. He crash-tackled and punched a 40 year old man, causing a peri-orbital haematoma associated with a fractured sinus. The offender also punched a 46 year old man, causing a split lip, a bleeding nose and some bruising. After the police arrived, that man urged the police officer to put a gun to the offender, and he placed two fingers to the right side of the offender's neck. The offender reacted by delivering blows directed to that man's right eye which caused him grievous bodily harm; he was knocked unconscious, sustained lacerations, and sustained a facial fracture which required an operation. He still complained of distortion of vision at the sentencing a year later. Williams JA, with whose reasons Atkinson J agreed,

considered that a head sentence of two years imprisonment was appropriate for the offences and that the earlier plea of guilty, remorse, previous good character, and relative youth of the offender ordinarily would have resulted in that head sentence being suspended after serving a short period in actual custody. Having regard to the offender having satisfactorily completed part of the intensive correction order and also to the moderation then applicable in appeals by an Attorney-General, Williams JA considered that a wholly suspended sentence was appropriate. In *Tupou*, the Chief Justice distinguished *O'Grady* on the basis that the sentencing judge had not incarcerated that offender, he had completed two months of the intensive correction order, and he had no prior convictions. Although *O'Grady* was in some respects a more serious case than this one, it did not include the aggravating feature of the aggressor lying in wait before launching his violent attack on an unsuspecting complainant and the offender in *O'Grady* had no criminal record. For these reasons it is difficult to derive reliable guidance from the sentence in that case, but I would regard it as being consistent with a head sentence of two years imprisonment in this case.

[13] In *Craske* the Court found that a sentence of 18 months imprisonment suspended after four months was not manifestly excessive. After a fracas involving the offender, the complainant and others, the offender chased the complainant across a road into a carpark. When the complainant fell to the ground the offender, who was wearing sturdy boots, kicked the complainant once in the head. The complainant sustained fractures to the mandible with displacement of a bone fragment, multiple soft tissue injuries and abrasions, and a fracture of a toe. A neck injury restricted the complainant's breathing and was a potential threat to his life. After an emergency operation the complainant's fractured jaw was repaired and titanium plates, and screws and stainless wires were inserted. About a month after the offence there was persisting sensory loss in the area of the lip and chin and a doctor observed that the injury to the sensory nerve on the left lower lip might never recover normal sensation. Whilst that complainant's injuries were said to be life threatening, other features of the case favoured leniency: the Court endorsed the sentencing judge's approach of tempering the sentence to take into account that certain "obnoxious and loutish" conduct by the complainant directly provoked the original physical altercation, that offender was only 18 years old, he had no criminal history and submitted himself to counselling after he committed the offence. The decision that the sentence in *Craske* was not manifestly excessive does not imply that a more severe sentence should not be imposed in this case.

[14] In *Leapai* the Court refused an application for leave to appeal against a sentence of two years imprisonment suspended after six months. That 22 year old offender punched a security guard who was also being punched by a co-accused. In an ensuing brawl involving other security guards the complainant was punched and suffered a fracture in the left orbit with bruising and loss of blood. After surgery he was left with some residual loss of feeling or numbness in parts of his face and an occasional twitch in an eyelid. White J remarked that if a wholly suspended sentence had been imposed, an appeal by the Attorney-General would not have succeeded, as the Crown conceded; but that was in a case in which there was no satisfactory explanation for a delay of three or four years between the offence and the sentence and there was very impressive evidence of the offender's rehabilitation during that period. White J's remark and the refusal of the application in *Leapai* do not imply that a more severe sentence should not be imposed in this case, but the decision is consistent with a head sentence of two years imprisonment here.

[15] In *Brand*, Williams JA, with whom Jerrard JA agreed, considered that whilst three years imprisonment might well be regarded as being towards the upper limit, that period of imprisonment suspended after nine months was within the appropriate range for that 25 year old offender who had previously been sentenced to imprisonment for a short period and who carried out an unprovoked and sustained attack on a 72 year old man. The offender was older than the applicant, the assault was markedly worse (that offender kicked and repeatedly punched the vulnerable complainant for about one and a half minutes), that complainant's injuries were more serious than here (that complainant suffered multiple severe displaced facial fractures), and there was little, if any, remorse by the offender. Accordingly, Williams JA's remark that the sentence might be towards the upper limit suggests that the applicant's sentence should be less severe than three years imprisonment with release after nine months.

[16] In *Kinersen-Smith* the Court dismissed an appeal by the Attorney-General against sentences of two and a half years imprisonment suspended after six months. It is difficult to draw comparisons with that decision, because, although the two offenders together assaulted the smaller complainant and caused a more serious injury (an eye injury which rendered one eye useless for reading, driving and focussing vision and caused the complainant to at least postpone his university studies), the offenders were only 17 and 18 years old and the head sentence was described as being lenient. The fact that the sentence was found not to be inadequate does not imply that a more severe sentence could not have been imposed.

[17] In *Elliott*, an application for leave to appeal against a sentence of two and a half years imprisonment with a recommendation for parole eligibility after 10 months, with a lesser concurrent sentence for an assault occasioning bodily harm, was refused. That was a more serious case in so far as the 23 year old offender with a substantial criminal history for violent offences entered a house with a friend, although they were not invited, and assaulted both a young man and that man's father. On the other hand the injuries sustained by those complainants were less serious. Chesterman J described the sentence as "substantial" and the President considered that a slightly more lenient sentence might have been imposed but the sentence was "by no means manifestly excessive". Not much guidance for this case can be derived from the conclusion that the sentence in that case was not manifestly excessive.

[18] In *Davies*, a sentence imposed after a trial of two years and three months imprisonment, with an order for release on parole on a date which was approximately at the mid-point of the term of imprisonment, was held not to be manifestly excessive. The violence of the assault was similar to that here, but the complainant in that case was left with scarring from surgery, a post traumatic stress disorder and permanent facial and nerve damage and ongoing dental issues. The offender was not remorseful. That offender had a criminal history which included offences of violence and he had been imprisoned more than once. Nevertheless, the decision does not indicate that the applicant's head sentence must be less severe. In that case the offender was sentenced on the basis that he used excessive force in his violent reaction to the complainant having pushed the offender's father, the offender did not lie in wait as did the applicant, and the decision was only that the sentence was within the range of sentences open to the sentencing judge in the particular circumstances of that case.

[19] In *Tupou*, a sentence of imprisonment for three years suspended after nine months was varied to the extent only of substituting an order for suspension after 15 months. Since the case was in most respects markedly more serious than the present case, it is sufficient to observe that the sentence imposed upon the applicant should be less severe.

[20] The sentence must take into account the applicant's blameworthy conduct in lying in wait to launch his violent, surprise attack upon the complainant. That makes this example of the offence worse than many otherwise similar cases. On the other hand, the sentence must also be mitigated to take into account the substantial mitigating factors, notably including the applicant's relative youthfulness and excellent prospects of rehabilitation, his otherwise good character, his genuine remorse, his offer to pay compensation, and his plea of guilty and cooperation with the system of justice. Furthermore, without in any way discounting the seriousness of the complainant's injuries, the respondent conceded that the lasting effects of the complainant's injuries are less serious than the sentencing judge was led to believe and which informed the heavy sentence she imposed. In all of the circumstances and consistently with such guidance as may be derived from the comparable sentencing decisions, the appropriate sentence is two years imprisonment with parole release after about six months.

Proposed order

[21] I would make the following orders:

1. Grant the application for leave to appeal against sentence.
2. Allow the appeal.
3. Vary the sentence imposed in the District Court by ordering that the applicant be imprisoned for a period of two years, instead of the period of three years imposed in the District Court, and that the date the offender be released on parole be fixed at 10 January 2015, rather than the date of 10 July 2015 fixed in the District Court.

[22] **MORRISON JA:** I have read the reasons of Fraser JA and agree with those reasons and the orders his Honour proposes.