SUPREME COURT OF QUEENSLAND

CITATION:	*R v Thompson* [2019] QCA 209
PARTIES:	**R** **v** **THOMPSON, Kyle John** (applicant)
FILE NO/S:	CA No 339 of 2018 DC No 2435 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 16 November 2018 (Porter QC DCJ)
DELIVERED ON:	11 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	31 July 2019
JUDGES:	Gotterson JA and Henry and Bradley JJ
ORDER:	**Application for leave to appeal sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of grievous bodily harm – where the applicant was sentenced to three years and six months imprisonment, suspended after 14 months for an operational period of four years – where the applicant and an associate got into an altercation with the complainant in the Brisbane CBD – where the applicant punched the complainant in the jaw as the complainant attempted to walk away – where the applicant and his associate then ran away – where the learned sentencing judge found the applicant was the instigator of the violence and was unprovoked – where the learned sentencing judge found the applicant's criminal history revealed a capacity to engage in violent conduct – where the learned sentencing judge considered the starting point for the applicant's sentence was four years imprisonment and moderated the sentence by six months to take into account the time the applicant had spent in immigration detention and the impact of the applicant's almost certain deportation to New Zealand – whether the sentence imposed was manifestly excessive *R v Bryan; Ex parte Attorney-General (Qld)* (2003) 137 A Crim R 489; [2003] QCA 18, cited

R v Castle; Ex parte Attorney-General (Qld) [2014] QCA 276, distinguished
R v Dietz [2009] QCA 392, distinguished
R v Grimley [2000] QCA 64, distinguished
R v Harvey [2003] QCA 286, distinguished
R v Katsidis [2003] QCA 82, distinguished
R v Stringer [2014] QCA 342, distinguished

COUNSEL: M F Bonasia with C B Donnan for the applicant (pro bono)
S Cupina for the respondent

SOLICITORS: Howden Saggers Lawyers for the applicant (pro bono)
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** On 1 November 2018 in the District Court at Brisbane, the applicant, Kyle John Thompson, pleaded guilty to an offence against s 320 of the *Criminal Code* (Qld). The count on which he had been indicted alleged that on or about 9 December 2017 at Brisbane he and another male unlawfully did grievous bodily harm to the complainant, Craig Duncan Marshall.

[2] The applicant was sentenced at a hearing on 16 November 2018. He was convicted and a term of three years and six months imprisonment was imposed. The term of imprisonment was suspended after 14 months for an operational period of four years.

[3] On 13 December 2018, the applicant filed an application for leave to appeal to this court against the sentence.[1]

Circumstances of the offending, its detection and impact

[4] A Schedule of Facts that were agreed was tendered at the sentence hearing.[2] The following history of the offending is drawn from it.

[5] On the evening of 9 December 2017, the complainant, his wife and another couple who were their friends were in the Brisbane CBD. They had been at a bar to watch a band perform. On the same evening, the applicant and a male associate were also in the CBD. They had been at a work function at licensed premises in Eagle Street and then at a food outlet with a bar. The two groups did not know each other.

[6] At around 11 pm, the two groups encountered one another in the vicinity of the intersection of Queen Street and Adelaide Street. The complainant's group was waiting for an Uber ride home. The applicant and his associate were also standing at the intersection.

[7] The applicant's associate yelled something in the direction of the complainant. The complainant said something back.

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1 AB 1-3.
2 Exhibit 5: AB 97-99.

[8] The applicant then approached the complainant and began to threaten him close up to his face. The complainant's wife intervened and the complainant turned and walked away.

[9] Next, the applicant yelled out "you think you're fucking smart. I'll kick your head off your shoulders". The complainant turned towards the applicant who then kicked him in the chest. The complainant caught the applicant's foot and he and the applicant fell to the ground. The complainant said "right mate, we're done". His wife helped him to get up.

[10] About the same time, the male of the couple went to grab the applicant and pull him away from the complainant. The applicant's associate rushed aggressively towards the complainant. He abused and pushed him. The complainant pushed back. The female of the couple reacted by saying "we're going now, we're going home". The complainant's wife stood between the two men with her hands in the air.

[11] At that point, the applicant ran at the complainant and punched him once in the jaw with great force. He was immediately rendered unconscious and fell to the concrete footpath, striking his head on it. A passer-by came to his assistance.

[12] The applicant and his associate then ran away. They were identified by police from CCTV footage taken in the vicinity of the assault and at the bar that the two had attended that evening. Police visited the applicant's residence on 4 January 2018. He denied knowledge of the incident and refused to be interviewed. He said that, for him, the night was a blur. He was so intoxicated he could not say what happened.

[13] The injuries to the complainant consisted of three fractures to the right side of the jaw, nerve damage and a laceration to his right cheek. Three plates were fixed to the mandible with screws to heal the fractures. The complainant has continuing nerve damage symptoms, including an altered and painful sensation to the right side of his face and chin, which are likely to be ongoing. He has had recurrent bouts of depression which have impacted adversely on his family and social life.[3]

The applicant's personal circumstances and history of offending

[14] The applicant was 30 years old when he carried out this offending. He was born in New Zealand and moved to Australia in 2011. He is a field supervisor for an optical fibre hauling team and is well trusted by his employer. He has been in a stable relationship for more than five years.

[15] At the time of the offending, the applicant had not been convicted of any offence in Queensland. He subsequently offended on 4 January 2018 by possessing cannabis and associated equipment. At a Magistrates Court hearing on 3 May 2018, no conviction was recorded and he was placed on a good behaviour bond and recognizance.[4] The applicant was apprehended on 15 October 2018 for tailgating on the highway.

[16] At the time of sentence, the applicant also had four entries on a non-TORUM record, the latest one of which was for "public nuisance – violent behaviour – in other circumstances" committed on 30 September 2015 at Kenmore, for which an

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3 Report of Dr G Springhall dated 13 November 2018 – Exhibit 8: AB 105; Victim Impact Statements – Exhibit 6: AB 102-104.

4 Exhibit 1: AB 88.

enforcement order had been imposed in November 2015.[5] The violent behaviour resulted in the victim being hospitalised for two days.

[17] The applicant also has a history of offending in New Zealand including disorderly behaviour and common assault for which convictions were recorded and community based orders were imposed.[6]

The sentencing remarks

[18] The learned sentencing judge outlined the circumstances of the offending,[7] the injuries to the complainant[8] and their impacts on him and his family.[9] His Honour described the applicant as the instigator of the violence for which no provocation had been offered. There had been ample opportunity for him to have walked away. It was as the complainant attempted to do so that the applicant attacked him in the first act of violence. The complainant signalled that it was over. The applicant's associate entered the fray and accosted the complainant. The applicant again attacked the complainant in a "vindictive and violent act" which manifested a continuation of the unprovoked assault. The blow to the face was so powerful that it rendered the complainant unconscious.[10]

[19] His Honour said that the applicant's flight from the scene demonstrated an awareness of the potential seriousness of the injury to the complainant. Yet the applicant did not call an ambulance or report the incident to police. That, and the denial of involvement when approached by police, evidenced "a self-interested disregard for the harm (the applicant) had plainly done".[11]

[20] The learned sentencing judge also referred to the applicant's personal circumstances including his employers' opinions of him commending his reliability, good general character and effectiveness in management. They were "greatly to (the applicant's) credit", his Honour said.[12]

[21] The records of offending both in Queensland and New Zealand did not show a person with a serious history of violence, in his Honour's view. However, they did reveal a capacity to engage in violent conduct. The subject offending was a serious and alarming example of it given the applicant's age.[13]

[22] The learned sentencing judge took into account the plea. He considered that it did show an understanding of the wrongness of the offending and an acceptance of responsibility for it.[14] His Honour concluded that the applicant had finally arrived at that point despite some lack of candour about this and his offending generally in submissions he made to immigration authorities and in disclosures to a drug counsellor, in the period between the subject offending and the plea.[15] In the former

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5 Exhibit 2: AB 89.
6 Exhibit 3: AB 90.
7 AB 80 ll3-35.
8 Ibid ll38-44.
9 AB 81 l38 – AB 82 l15.
10 AB 81 ll4-31.
11 Ibid ll31-36.
12 AB 82 ll17-24.
13 AB 83 ll5-10.
14 Ibid ll12-19.
15 AB 83 l21 – AB 84 l16.

he told the authorities that the complainant's account to police about the offending was "simply untrue".[16]

[23] The learned sentencing judge was not prepared to infer that the applicant was at no, or a low, risk of reoffending. He was not satisfied that the applicant had identified what caused his tendency towards violence and how to address it.[17]

[24] In July 2018, the applicant was notified that his visa was revoked because of the subject charges. His Honour noted that a few months later, the applicant was apprehended for the tailgating offence and was placed in immigration detention for 32 days. He said that he would take into account the detention in fixing the sentence.

[25] The learned sentencing judge considered that it was almost certain that the applicant would be deported to New Zealand at the first opportunity. His Honour reasoned that deportation to that country would be a very modest extra-curial punishment for the applicant but that he would take it into account in sentencing.[18]

[26] As to comparable sentences, the prosecutor referred the learned sentencing judge to the decisions of this Court in *R v Tupou; Ex parte Attorney-General*,[19] *R v Anderson*[20] and *R v Davies*[21] and submitted that they supported a sentence here of between two and a half years and three years.[22] His Honour regarded that as a "modest submission" and stated his view that the circumstances of this offending left open a higher head sentence.[23]

[27] The learned sentencing judge referred to the observations of de Jersey CJ in *Tupou*[24] that in a number of recent decisions, this Court had emphasised the strength of the importance of deterrence in sentencing for violent offending of this general character, that is to say, physical violence in the street at night.[25] His Honour continued:[26]

> "No two cases are the same. Each of the cases referred to shows material difference. *Tupou* was a young offender, *Davies* involved exaggerated self-defence of a father, *Anderson* a one-off blow. There are elements, on the other hand, which might make the offending in those cases seem worse. In the end, what is required for me as a sentencing judge, is to impose a just sentence according to law and the particular circumstances of this case as I have set them out. Here, I think a head sentence of four years is a proper sentence bearing in mind the circumstances of the offending which I've explained in detail. My concern that Mr Thompson cannot be properly be seen as being of little or no risk to reoffending, whether to citizens here or of New Zealand; the serious impacts on Mr Marshall and his wife; the modest, but concerning criminal history

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16 Exhibit 5 – Attachment B dated 25 February 2018: AB 100-101.
17 AB 84 ll17-31.
18 AB 84 l38 – AB 85 l28.
19 [2005] QCA 179.
20 [2012] QCA 264.
21 [2013] QCA 73.
22 AB 85 ll33-35.
23 Ibid ll35-38.
24 At p10.
25 AB 85 ll40-44.
26 AB 86 ll4-28.

> and pattern in a man of mature age; and while, on the other hand, recognising remorse in Mr Thompson, his plea of guilty and his otherwise good character.
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> I moderate that head sentence for the time served and for the relevant though modest impact of his deportation to three years and six months. Given his likely deportation and the fact that after deportation, he'll be subject to further compulsory Parole Act conditions when deported to New Zealand, I intend to suspend his sentence after serving one third of the sentence taking into account his plea of guilty of 14 months. I'll make it an operational period of four years.
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> Can I say, in respect of that, that I allowed a considerable allowance for the time served and for the New Zealand issue from the four years to try and make sure there wasn't any question that those factors and the question of remorse had been fully taken into account."

The ground of appeal

[28] Although the application for leave to appeal listed two grounds of appeal, counsel for the applicant who with their instructing solicitor appeared *pro bono* in this matter, clarified in written submissions that only one ground was pursued.[27] It is that the sentence is manifestly excessive.[28]

Applicant's submissions

[29] At the hearing of the application, counsel for the applicant explained that there were two reasons underlying the submission of manifest excess. The first was that the learned sentencing judge had placed too much weight on the applicant's criminal history. The second was that the starting point of four years imprisonment was not consistent with comparable decisions for similar offending.[29]

[30] As to the first reason, the applicant referred to the statements by the learned sentencing judge towards the conclusion of his sentencing remarks that the applicant could not properly be seen as being at little or no risk of reoffending and that he had a modest and concerning criminal history. These attributes, the applicant argued, went beyond his Honour's earlier finding that the applicant's New Zealand criminal record gave some cause for concern about his capacity for violence and the ultimate acceptance by his Honour that the violence in the Kenmore incident involved a fight between two brothers in which one of them produced a hammer and the applicant sided with the other in retaliation.[30]

[31] In regard to the second reason, the applicant invited the Court to compare the sentence imposed on him with those imposed in *R v Stringer*,[31] *R v Castle; ex parte Attorney General*,[32] *R v Katsidis*,[33] *R v Grimley*[34] and *R v Harvey*.[35] Although none

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27 Appeal Transcript ("AT") 1-3 ll10-14.
28 Applicant's Outline of Submissions ("AOS") paragraph 3.
29 AT 1-3 ll31-35.
30 AB 82 l46 – AB 83 l2.
31 [2014] QCA 342.
32 [2014] QCA 276.
33 [2003] QCA 82.
34 [2000] QCA 64.
35 [2003] QCA 286.

of them were truly comparable, they all involved the infliction of grievous bodily harm and had serious features in terms of how the offending was committed.[36] It was submitted that those cases demonstrated that the applicant's sentence is manifestly excessive in all the circumstances.[37]

[32] The orders sought by the applicant are that his sentence be set aside and that he be sentenced to two and a half years imprisonment, suspended after 10 months for an operational period of three years.[38]

Respondent's submissions

[33] The respondent submitted that the learned sentencing judge did not overstate the applicant's risk of reoffending. He did not exceed the findings he had made with respect to previous instances of offending with violence in which the applicant had been involved.

[34] As to sentences for grievous bodily harm, the respondent cited the following observations of Williams JA in *R v Bryan; Ex parte Attorney-General*:[39]

> "It is difficult, if not impossible, when dealing with the offence of grievous bodily harm to speak meaningfully of a "range" when considering penalty. A great variety of acts may result in the commission of that offence. A single blow with the hand, the negligent use of a dangerous object, excessive force in resisting an attack, and blows struck in a highly emotional situation may all result in the offence being committed. Also the nature of the injuries sustained and the permanent consequences thereof may vary greatly. All of those factors will have some impact in determining the appropriate sentence. There is no doubt, and the learned sentencing judge referred to some, that on occasions sentences in the range of two to four years have been imposed for the offence of doing grievous bodily harm. But that does not mean that other instances of that offence do not call for a sentence beyond that range. Indeed on the schedules placed before the sentencing judge and this court there were quite a number of sentences for grievous bodily harm in the range five years to nine and a half years…"

[35] The respondent also referred to the decision in *R v Dietz*[40] as an illustration of a sentence where grievous bodily harm was caused by one punch and without a weapon. The offender in that case was sentenced to six years imprisonment.

Discussion

[36] The applicant's prior offending had involved assaults with violence. There was a conviction in New Zealand for common assault and the incident at Kenmore. With regard to the latter, the learned sentencing judge did not accept an implication in the prosecutor's submissions that the applicant had initiated the use of a hammer in the affray. His Honour proceeded on the basis that the applicant voluntarily joined in

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36 AOS paragraph 36.
37 Ibid paragraph 35.
38 Ibid paragraph 42.
39 [2003] QCA 18 at [32] (de Jersey CJ and Cullinane J agreeing).
40 [2009] QCA 392.

the physical dispute siding with one brother against the other. It was the latter who had introduced the hammer.

[37] Those events justified the description by his Honour of the applicant as having a concerning criminal history. What was of concern was that there were antecedents to the subject violent assault which, taken with it, displayed a concerning pattern of violence on the applicant's part. It need also be said that in light of this history, it was not an overstatement for the learned sentencing judge to have observed that the applicant could not be seen as being at little or no risk of reoffending. That was not a positive statement that the applicant was at a serious risk of reoffending and his Honour did not sentence on that basis. There is no substance to the applicant's first reason in my view.

[38] I now turn to the sentencing decisions to which reference has been made.

[39] There were some similarities in this case with the offending in *Dietz*. There was a single punch; no weapon was used; and there was no rational reason for the violent assault. Although the offender in that case was only 20 years old, other circumstances made his offending considerably worse than that of the applicant. He was a proficient boxer and had already knocked another man to the ground. The injuries to the victim were worse. As well, the offender was sentenced after a trial and demonstrated no remorse. This Court refused leave to appeal the sentence as manifestly excessive.

[40] Clearly, the circumstances in *Dietz* warranted a higher sentence than did those in the applicant's case. I note that that was also the situation with the circumstances in *Bryan* which was referred to in *Dietz* and in which this Court increased the period of imprisonment from four years to six years.

[41] In oral submissions, Counsel for the applicant focused on the decision in *Stringer*. In that case, the 23 year old offender and the 21 year old victim were unknown to each other. They were at the same nightclub. At about midnight, there was an altercation between an unknown male and a friend of the offender. The victim was not involved. The offender and his friends were sitting outside the club. He perceived that his friend was being taunted from a balcony of the nightclub in relation to the earlier incident. The offender went inside the nightclub with the intention of assaulting the victim. He did so by striking the victim in the face with a closed fist causing a fracture of the left cheekbone which required surgery.

[42] The offender cooperated with police, made full admissions and entered an early plea. He was extremely remorseful for his offending. At first instance, he was sentenced to three years imprisonment. On appeal, the sentence was reduced to one of two years imprisonment with parole release after six months.

[43] The circumstances of the actual offending in *Stringer* are similar to those in the applicant's case. However, the utility of that decision as a comparator here is diminished by the applicant's conduct in fleeing the scene, initially denying involvement in the assault, and delaying in accepting responsibility for it. As well, he remained at some risk of reoffending.

[44] The offender in *Castle* was 24 years old. His victims were 73 and 64 year old brothers-in-law. He encountered them when they were having an evening meal at a hotel beer garden. He viciously attacked the men without any reason, kicking and

hitting them about the head multiple times. He caused grievous bodily harm to one of them. The offender had a history of assault and nuisance offences.

[45] On his plea of guilty, the offender was sentenced to four and a half years imprisonment with parole eligibility after one third for the grievous bodily harm offence and a concurrent term of three years for the serious assault offence. The applicant pointed out that the starting point for his sentence was only six months less than that.

[46] In that case, there was evidence that the offender was deprived of the capacity to know not to do the offending acts but that his lack of capacity had been contributed to significantly by his intoxication. On an Attorney-General's appeal, his sentence was regarded as being "relatively lenient, particularly in relation to the minimum custodial period". This Court was, however, of the view that it was not manifestly inadequate as would have justified appellate intervention.[41]

[47] In *Katsidis*, the applicant was a 21 year old professional boxer who, apart from a previous conviction for an assault occasioning bodily harm for which he was sentenced to a good behaviour bond and recognizance, appeared to have led a blameless life. The subject offending involved a confrontation with an intoxicated man who had urinated on a car that belonged to an acquaintance of the offender. The victim responded to a question as to what he was doing, by attempting, but failing, to land a blow on the offender. In response, the offender struck the victim with several severe blows, fracturing his jaw and leaving him disfigured.

[48] The offender was tried and convicted of unlawfully doing grievous bodily harm. He was sentenced to two years imprisonment suspended after eight months. His application for leave to appeal the sentence was refused.

[49] The offender in *Grimley* was sentenced following a trial to two years and six months imprisonment. He was 46 years old and had previously been convicted of assault occasioning bodily harm. For no reason, the offender punched his victim breaking his jaw in two places, but not causing any permanent injury. An appeal against conviction was unanimously dismissed. By majority, this Court held that the sentence was manifestly excessive and reduced it to one of one year and eight months imprisonment.

[50] Lastly, in *Harvey*, the 28 year old offender, a barman at a bar and bistro, delivered a single punch to an intoxicated patron who was attempting to re-enter the bar. The punch rendered the victim unconscious. There were residual permanent symptoms affecting his bite and sensation to a lip.

[51] The offender, who did not have a criminal record, was tried and convicted. He was sentenced to two years imprisonment. On appeal, this Court referred to *Grimley* and noted that the difference of four months in the sentences would not normally have warranted intervention. However, certain amendments that had been made to the *Corrective Services Act* 2000 (Qld) influenced the Court to order that the two year sentence be suspended after 12 months for an operational period of three years.

[52] There are significant differences in the offending and its consequences or the personal circumstances of the offender and the history of offending which distinguish the circumstances in each of the decisions to which the applicant has

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41 Per Fraser JA at [34] (Muir JA and Mullins J agreeing).

referred from those in his case. I have listed those differences so far as the decision in *Stringer* is concerned and referred to them in the course of discussion of the others. I do not accept that those decisions compel a conclusion that the applicant's sentence is manifestly excessive.

[53] In the applicant's case, the offending was unprovoked. It was protracted in that the applicant continued with it after others had attempted to quell the friction. The blow to the complainant rendered him unconscious. The fracture to his jaw required surgery. He has resultant ongoing physiological and psychological symptoms.

[54] This was a case in which the offending was exacerbated by the applicant's subsequent conduct in fleeing the scene, not calling an ambulance and then denying any involvement when questioned by police. He maintained the denial in submissions to immigration authorities several months later.

[55] These particular circumstances, together with the applicant's history of offending including violence, called for a sentence which carried with it appropriate denunciation and general and personal deterrence. A sentence of two years or so imprisonment would have been inadequate for that purpose.

[56] In my judgment, a starting point of four years imprisonment was at the upper end of the range of sentences that might have been imposed in the applicant's case. However, that was not the sentence that was imposed. The starting point was significantly moderated by an allowance of six months for the period of immigration detention and the impact of deportation which, in my view, was generous. In the result, the sentence imposed is not one that is manifestly excessive.

Disposition

[57] As the applicant's sole ground of appeal cannot succeed, his application for leave to appeal must be refused.

Order

[58] I would propose the following order:

1. Application for leave to appeal sentence refused.

[59] **HENRY J:** I have read the reasons of Gotterson JA. I agree with those reasons and the order proposed.

[60] **BRADLEY J:** I agree with the reasons of Gotterson JA and with the order his Honour proposes.