SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lilley* [2021] QCA 52
PARTIES:	**R** **v** **LILLEY, Jak** (applicant)
FILE NO/S:	CA No 108 of 2020 DC No 58 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Cairns – Date of Sentence: 18 May 2020 (Fantin DCJ)
DELIVERED ON:	Date of Orders: 24 March 2021 Date of Publication of Reasons: 26 March 2021
DELIVERED AT:	Brisbane
HEARING DATE:	24 March 2021
JUDGES:	Sofronoff P and Boddice J and Rafter AJ
ORDERS:	**Orders delivered: 24 March 2021** **1. Application for leave to appeal against sentence refused.** **2. Direct that the Registrar issue an amended verdict and judgment record to reflect that the sentencing judge was Judge Fantin and not Judge Morzone QC.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was sentenced to six years' and six months' imprisonment – where the applicant pleaded guilty to: threatening violence, in the night; burglary, by breaking, with violence, while armed; malicious act with intent; assault occasioning bodily harm, while armed; and stealing – where the applicant broke into the complainant's house, stole a painting and inflicted serious injuries with a machete and a knife – where the applicant submitted that there was nothing in the sentencing judge's remarks to indicate that the head sentence was moderated in recognition of the pleas of guilty – where the applicant submitted that offences were out of character – where the applicant's drug usage contributed to his offending– where the respondent submitted that the sentence imposed does not differ significantly from comparable cases so as to give rise

to a conclusion that there must have been a misapplication of principle – where the sentencing judge set the parole eligibility date after the period of 30 months rather than at the one third point of 26 months – where the sentencing judge imposed the sentence to reflect the overall criminality in the offending – whether the parole eligibility date after 30 months rendered the sentence manifestly excessive

R v Free; Ex parte Attorney-General (Qld) (2020) 4 QR 80; [2020] QCA 58, cited
R v Granato [2006] QCA 25, cited
R v Hitchcock [2019] QCA 60, cited
R v Ma'afu [2016] QCA 67, cited
R v Nagy [2004] 1 Qd R 63; [2003] QCA 175, cited
R v Pham (2015) 256 CLR 550; [2015] HCA 39, cited

COUNSEL: N Weston for the applicant
D Nardone for the respondent

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

[1] **SOFRONOFF P:** I agree with the reasons of Rafter AJ and with the order and direction proposed.

[2] **BODDICE J:** I agree with Rafter AJ.

[3] **RAFTER AJ:** On 18 May 2020 the applicant pleaded guilty to threatening violence in the night (count 1); burglary, by breaking, with violence, while armed (count 2); malicious act with intent (count 3); assault occasioning bodily harm, while armed (count 4); and stealing (count 5).

[4] In respect of count 3, the offence of malicious act with intent, the applicant was sentenced to six and a half years' imprisonment. The sentences for the other counts were: count 1 – six months' imprisonment; count 2 – three years' imprisonment; count 4 – two years' imprisonment; and count 5 – six months' imprisonment. All sentences were ordered to be served concurrently. The period of 323 days in pre-sentence custody from 30 June 2019 to 17 May 2020 was declared as imprisonment already served. The applicant's parole eligibility date was fixed on 29 December 2021 (after two and a half years).

[5] The applicant applies for leave to appeal against sentence on the ground that the learned sentencing judge erred by not setting a parole eligibility date after one third of the head sentence. The applicant submits that the parole eligibility date should be on 29 August 2021 after he has served 26 months, rather than the date set by the sentencing judge which was after 30 months.

The applicant's antecedents

[6] The applicant was 34 years of age at the time of sentence. He was 33 at the time of the offences.

[7] The applicant has a criminal history in New South Wales and Queensland. The New South Wales history contains 11 separate appearances before Local Courts between 2004 and 2016. The offences include behaving in an offensive manner, having custody of an offensive implement in a public place, damaging property, possession of a graffiti implement and entering building/land with intent to commit an indictable offence.

[8] The applicant moved to Queensland in 2017. He has appeared in the Magistrates Court on four occasions between 2017 and 2020 for offences of unauthorised dealing with shop goods, contravening a police direction, stealing and possession of a dangerous drug. The applicant has not previously been sentenced to a term of imprisonment.

The circumstances of the offences

[9] The complainant was a 25 year old man. The applicant and the complainant knew each other but they were not close friends or associates.

[10] The applicant had been in a de facto relationship with SM. They separated in August 2018 as a result of the applicant's use of methylamphetamine. They remained friends until May 2019 when they fell out over SM's efforts to help the applicant stop using drugs.

[11] Around this time the complainant and SM were in contact on social media. The applicant had previously told SM that he was jealous that the complainant had been commissioned to do large art jobs and exhibitions. The applicant and the complainant were both artists.

[12] On 29 June 2019 the complainant, SM, and others attended a concert, arriving at about 7.00 pm. The applicant arrived at about 9.00 pm. He was greeted by the complainant at the front of the venue and they shook hands.

[13] A little while later, the complainant was standing with the applicant and others around a table. The applicant turned around and looked at the complainant. He reached into a satchel and pulled out a small foldout knife. The applicant then dragged the knife along the wooden table while staring at the complainant. He pointed to the scratch on the table and then at the complainant. He then dragged his finger across his neck to simulate a cut to the throat. The complainant asked the applicant what was wrong and the applicant said words to the effect "If you come within two metres of me, I'm going to kill you". (count 1)

[14] The complainant was scared and left the venue. He returned home. The complainant told SM what the applicant had done. She confronted the applicant and he confirmed that he had pulled a knife on the complainant and laughed, saying that the complainant needed to be taught a lesson and that he was "Going to cut his … [expletive] hands off."

[15] At about 10.30 am the next morning, the complainant was at home asleep. The applicant went to the complainant's residence and smashed a glass panel in the front door which enabled him to unlock and open it. (count 2)

[16] The applicant entered the complainant's bedroom. The complainant awoke and saw the applicant holding a hammer in his right hand and a machete in his left hand.

The applicant asked the complainant "Do you want me to chop your fingers off? I'll cut your [expletive] hand off." The complainant begged the applicant not to hurt him.

[17] The complainant put his hands palm down on the tiled floor. The applicant bent down next to him and raised the hammer above his head. He brought the hammer down onto the complainant's left hand and repeatedly struck him. (count 3)

[18] The applicant then placed the machete blade across the complainant's fingers and raised the hammer above the machete. He swung the hammer down but the complainant moved his hand away before the hammer struck the blade and his fingers.

[19] The applicant repeatedly told the complainant to give him his other hand. The complainant refused as he was fearful for his life. The complainant put his right hand back down on the tiled floor. The applicant struck his hand with the hammer, breaking his right ring finger. (count 4)

[20] The applicant tapped the machete on the complainant's forehead. The applicant told another occupant of the residence to put his phone away and not to go to the police. He then said to the complainant "If I find out that you have gone to the police, I know where your parents live and I will cut their heads off."

[21] The applicant left the bedroom and went to the complainant's art studio. He searched through some paintings and then removed a painted canvas. He left the residence with the painting. (count 5)

[22] An ambulance was called and the complainant was transported to hospital. He was treated for fractures and a wound to his left hand and a fracture of his right ring finger. The complainant was sent home on the day of the incident with an immobilisation cast and returned a week later for surgery. The surgery involved open reduction and internal fixation of the left hand. If left untreated, the fractures would have been likely to result in a malunited or ununited fracture of the fingers, affecting grip strength and hand function.

[23] The complainant provided a statement to the police while he was at the hospital. The police located the applicant at his residence a short time later. They located the stolen painting, as well as the machete and hammer. The applicant was arrested and taken to the Cairns Police Station. He declined to take part in an interview and was remanded in custody.

[24] The applicant was identified on CCTV footage taken from a nearby residence. He was seen walking calmly towards the complainant's house holding a machete and leaving the house a short time later with the painting under his arm. The applicant's DNA was located on the tiles of the complainant's bedroom, the hammer and the stolen painting.

The approach of the sentencing judge

[25] The sentencing judge noted that the most serious offences were counts 2, 3 and 4. The maximum penalty for counts 2 and 3 is life imprisonment. The maximum penalty for count 4 is 14 years' imprisonment.

[26] The sentencing judge noted the applicant's early pleas of guilty which were entered in the face of a very strong Crown case. The pleas of guilty were indicative of remorse which was reinforced by the applicant's letter of apology.

[27] The sentencing judge described the applicant's criminal history as involving low level offending of a property or nuisance character which was not relevant to the present series of offences.

[28] The sentencing judge characterised the applicant's offending in the following way:

> "Count 1 involved a threat to kill while you were holding a knife, which is an aggravating feature. Counts 2 to 6 involved a premeditated and planned violent home invasion using two separate weapons, which was motivated by anger and jealousy. You inflicted significant injuries on the victim who had been asleep in bed in a place where he was entitled to feel safe. It involved gratuitous unprovoked violence. You persisted with the violence despite his pleas. You attacked his hands quite deliberately knowing that he was an artist, and you followed that up by a threat to kill his parents. It was extremely serious offending."

[29] The sentencing judge noted that the applicant had moved to Cairns in about 2017 with his former partner. They were both using drugs, including amphetamines. The relationship broke down. The applicant was abusing alcohol. The sentencing judge accepted that the offending occurred at a time when the applicant's life was spiralling out of control. The applicant was using illicit drugs. In May 2019, the applicant had two admissions to hospital; one as a consequence of self-harm and the other as a consequence of the applicant breaking property which also resulted in him being injured. The applicant's admission to hospital in the time between count 1 and the other offending was because of destructive behaviour. The sentencing judge accepted that the applicant had not previously been violent to other people and that the present offending occurred in the context of a particular period in his life.

[30] The sentencing judge was assisted by the report of Dr Bala, psychiatrist, who had seen the applicant while he was in custody on 1 May 2020 and 11 May 2020. Dr Bala expressed the opinion that at the time of the offending the applicant was intoxicated by alcohol and benzodiazepines. The benzodiazepine intoxication may have been a factor in the violent offending by disinhibiting the applicant's underlying aggressive impulses driven by jealousy and hostility towards the victim.

[31] The sentencing judge accepted Dr Bala's opinion that the applicant had used the opportunity in custody to address his risk of reoffending including by engaging in programs for substance abuse.

[32] The sentencing judge referred to the fact that the applicant had told Dr Bala that on the night of the offending he had been consuming benzodiazepines and alcohol. The applicant had said that he did not remember being discharged from hospital before the violent offending, but did have a blurry recollection of being at the victim's home with a machete and hammer. The applicant had said that he was extremely angry and in a blind rage. The sentencing judge found these accounts to be difficult to reconcile with the medical records which stated that the applicant had

been admitted to hospital after smashing things in his home with his fists and punching a window. He told hospital staff that he was stressed because he had broken up with his partner some time ago and she had been playing mind games with him. The applicant had told hospital staff that he had about 10 drinks and denied any drug use. The applicant did not appear to be intoxicated the following morning and there was no overt sign of psychosis.

[33] The sentencing judge noted that when the applicant was discharged from hospital at about 8 am, the medical staff had recorded that there was no current risk to himself or others. The medical records stated that during the night the applicant was settled and took fluids. The applicant had been sleeping and in the morning he was polite, co-operative and orientated. The sentencing judge found this was difficult to reconcile with a person who was out of control in a blind rage. The sentencing judge stated that upon release from hospital, the applicant had sufficient presence of mind not only to go back to his home and acquire a hammer and machete, but then go on to the victim's house. The applicant's counsel had accepted that the offending was premeditated and planned.

[34] The sentencing judge referred to the applicant's presentations to hospital in May 2019 when he reported that he was not concerned with his substance use and did not have the motivation to change. The applicant had declined outpatient follow-up from mental health or alcohol and drug services. The sentencing judge referred to the observations of Dr Bala that the applicant was reserved and cautious and denied symptoms of psychological vulnerability. The applicant had a tendency to blame his former partner. The sentencing judge said that the applicant's responses indicated a lack of insight into the impacts of his substance abuse. Her Honour was therefore guarded about the applicant's ability to abstain from drugs upon release unless he engaged in extensive rehabilitation.

[35] The sentencing judge referred to Dr Bala's opinion that the applicant's risk of reoffending was low if he controlled his substance abuse, although it was elevated if he returned to alcohol or illicit substance abuse. The sentencing judge regarded that as a significant qualification. Dr Bala said that abstaining from substance abuse would be difficult for the applicant because it is likely that his peers used substances recreationally and the applicant associates those substances with positive impacts.

[36] The prosecution had submitted that for count 3 the applicant should be sentenced to seven years' imprisonment with a serious violent offender declaration which would result in him being required to serve 80 per cent of the sentence before being eligible for release on parole. Alternatively, the prosecution submitted that the appropriate sentence was seven years' imprisonment with a parole eligibility date at one half or more of the term of imprisonment. Defence counsel had submitted that a head sentence of five years' imprisonment should be imposed in respect of count 3 which should be suspended after the applicant had served 20 months. In respect of count 2, defence counsel submitted that the applicant should be sentenced to three years' imprisonment with a parole release date after 20 months.

[37] The sentencing judge considered that a sentence of seven years' imprisonment with a serious violent offender declaration would be excessive. On the other hand her Honour considered that a sentence of five years' imprisonment would not adequately reflect the very serious nature of the offending and the need for general deterrence and denunciation.

[38] The sentencing judge determined that the total criminality should be reflected in a sentence of six and a half years' imprisonment in respect of count 3 without a serious violent offender declaration. Her Honour stated that the mitigating factors would be reflected in a parole eligibility date at slightly more than one third of the head sentence, but not as high as one half. The sentencing judge fixed a parole eligibility date after the applicant has served two and a half years.

The applicant's submissions

[39] The applicant accepts that the offending was serious and warranted a significant term of imprisonment. However, it was submitted that by comparison with the sentence in *R v Granato*[1], a sentence of six and a half years' imprisonment is at the upper end of the applicable range. The applicant submits that there is nothing in the sentencing judge's remarks to indicate that the head sentence was moderated in recognition of the pleas of guilty. The applicant does not submit that the head sentence is excessive, but that the sentencing judge erred in fixing the parole eligibility date after the period of 30 months rather than at the one third point of 26 months.

[40] The applicant accepts that an offender does not have an entitlement to parole eligibility at the one third point of the head sentence. However, it was submitted that the following factors justified a parole eligibility date at the one third point: the applicant's early pleas of guilty accompanied by genuine remorse; the fact that the offences were out of character; the expert evidence that the applicant's drug usage contributed to his offending and that he had taken positive steps in prison to rehabilitate himself; there was little reason to think that the applicant cannot be safely supervised on parole; and it was not apparent from the sentencing remarks why the parole eligibility date was set at 30 months rather than after 26 months.

[41] The applicant submits that a parole eligibility date on 29 August 2021 would properly reflect the mitigating features while also satisfying the needs of deterrence and community protection.

The respondent's submissions

[42] The respondent submits that the sentence was arrived at after consideration of all relevant matters. While the sentencing judge accepted that the applicant had made positive steps towards rehabilitation while on remand, there were factors that supported the conclusion that the Parole Board of Queensland would be in the best position to assess the applicant's risk of reoffending and progress towards rehabilitation.

[43] The respondent submits that the sentence imposed does not differ significantly from comparable cases so as to give rise to a conclusion that there must have been some misapplication of principle.

[44] The respondent submits that the sentence in *R v Granato*[2] of five years' imprisonment with a recommendation for post-prison community-based release after 21 months does not mark the upper limit of the sentencing discretion. It was also submitted that the sentence in *R v Ma'afu*[3] of seven years' imprisonment with a

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1 [2006] QCA 25.
2 [2006] QCA 25.
3 [2016] QCA 67.

parole eligibility date after three years supported the contention that the present sentence is not manifestly excessive.

Consideration

[45] The applicant's submissions proceed upon the erroneous premise that the sentence in *R v Granato*[4] places the present sentence of six and a half years' imprisonment with parole eligibility after two and a half years at "the upper end of the applicable range."

[46] In *R v Granato*, the applicant pleaded guilty to burglary and malicious act with intent. The applicant was 33 years of age at the time of the offences and had no relevant prior criminal history. He was sentenced to five years' imprisonment with a recommendation for post-prison community-based release after 21 months. The applicant and the complainant had known each other for some time. They had a falling out and in a confrontation the complainant lost his temper and punched the applicant. The offences occurred a week later when the applicant, accompanied by two other men, entered the complainant's dwelling. The complainant was asleep in bed. The applicant struck the complainant all over his body with a baton. One of the other offenders used a baseball bat to strike the complainant. The complainant suffered a fractured skull, a small pneumothorax and lung contusions, and a compound fracture of the little finger. In refusing the application for leave to appeal against sentence, de Jersey CJ said that "notwithstanding the applicant's pleas of guilty, his lack of history, and the references in his favour, a term at least of the order of that imposed was, in my view, appropriate."

[47] In *R v Ma'afu*[5], a sentence of seven years' imprisonment with a parole eligibility date after three years imposed for grievous bodily harm with intent was held not to be manifestly excessive. The applicant drank excessively at a New Year's Eve party and proceeded to commit three offences involving escalating levels of violence. He slapped a 14 year old child after a minor verbal altercation (common assault). The applicant eventually caught a cab home but left his wallet at the party and needed to return. When the cab driver told him that it would cost him another $20 each way, he punched the cab driver in the face. The cab driver suffered bruising on the left cheek and a swollen left eye (assault occasioning bodily harm). After the cab driver left, the applicant retrieved a machete from the back of his house and walked down the street, yelling out. A nearby resident confronted the applicant. The applicant swung the machete at the complainant but missed. The applicant and the complainant wrestled over the machete, during which the complainant grabbed the blade to stop it being used on him. This resulted in his hands being cut deeply. During the incident the applicant struck the complainant on the left shoulder with the machete, causing a deep laceration. The complainant's injuries required surgical repair in an attempt to avoid permanent loss of function in the affected fingers, thumb and shoulder. The applicant had a minor and largely irrelevant criminal history.

[48] The High Court explained in *R v Pham*[6] that comparable cases provide guidance as to the identification and application of sentencing principles and may show sentencing patterns and a range of sentences against which to examine a proposed or impugned sentence. However, that does not mean that the range of sentences is

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4 [2006] QCA 25.
5 [2016] QCA 67.
6 (2015) 256 CLR 550 at 558 [26] – [27].

necessarily the correct range or determinative of the upper and lower limits of the sentencing discretion. As the Court emphasised "Appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle."[7]

[49] The sentence of six and a half years' imprisonment with a parole eligibility date after two and a half years was moderate and took into account all relevant factors, including those in mitigation. The decisions of this Court have consistently held that there is no inflexible rule that a plea of guilty must be reflected in a non-parole period of one third of the head sentence of imprisonment.[8]

[50] In *R v Hitchcock*[9], Sofronoff P explained that:

> "[18] … The discretion to fix a parole eligibility date is unfettered and the significance of a guilty plea for the exercise of that discretion will vary from case to case. Consequently, there can be no fixed mathematical approach to setting such a date. And I would add, nor can there be any rule that effect must be given to a plea by reducing either the head sentence or the parole eligibility date. There is no justification in the statute or in principle to support such a proposition."

[51] The sentencing judge expressly stated that the sentence imposed on count 3, malicious act with intent, was intended to reflect the total criminality and that lesser concurrent sentences would be imposed for the other offences. This accords with the approach approved in *R v Nagy*.[10] Therefore the sentence of six and a half years' imprisonment for count 3 was intended to reflect the overall criminality in the offending which involved the threat to kill while holding a knife, breaking into the complainant's residence and intentionally inflicting serious injuries to his left hand, the strike to the right hand with the hammer, causing a broken finger and stealing a painting.

[52] The total sentence of six and a half years' imprisonment with a parole eligibility date after two and a half years is not manifestly excessive. The decision in *R v Free; Ex parte Attorney-General (Qld)*[11] shows that where a sentencing judge considers that a serious violent offender declaration is not warranted, it is wrong to automatically fix a parole eligibility date after one third of the head sentence. The Court said:

> "[55] We are also persuaded that the sentencing discretion was affected by a second error, which arose because the learned sentencing judge moved directly from the conclusion about the serious violent offender declaration, to a conclusion that parole eligibility after the 'conventional' one-third was appropriate,

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7 (2015) 256 CLR 550 at 559 [28] (French CJ, Keane and Nettle JJ).

8 *R v Hyatt* [2011] QCA 55; *R v James* [2012] QCA 256; *R v Rooney, R v Gehringer* [2016] QCA 48; *R v Crouch, R v Carlisle* [2016] QCA 81 at [29]; *R v Moody* [2016] QCA 92 at [73]; *R v Amato* [2013] QCA 158 at [20].

9 [2019] QCA 60 at [18] (Fraser and Philippides JJA agreeing).

10 [2004] 1 Qd R 63.

11 (2020) 4 QR 80.

> without considering the overall effect of that conclusion, and whether there were factors (including punishment, denunciation, deterrence and community protection) favouring a later release date. The discretion to fix a parole eligibility date is unfettered; and there can be no mathematical approach to fixing that date, including on the basis of convention."

Conclusion and orders

[53] For the reasons given, the application for leave to appeal against sentence should be refused.

[54] The verdict and judgment record incorrectly states that the sentencing judge was Judge Morzone QC. I would direct that the Registrar issue an amended verdict and judgment record to reflect that the sentencing judge was Judge Fantin. I propose the following orders:

1. Application for leave to appeal against sentence is refused.
2. Direct that the Registrar issue an amended verdict and judgment record to reflect that the sentencing judge was Judge Fantin and not Judge Morzone QC.