SUPREME COURT OF QUEENSLAND

CITATION:	*R v Mitchell-Herden* [2023] QCA 39
PARTIES:	**R** **v** **MITCHELL-HERDEN, Rudy Jed** (applicant)
FILE NO/S:	CA No 112 of 2022 DC No 1642 of 2021
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane – Date of Sentence: 17 May 2022 (Loury KC DCJ)
DELIVERED EX TEMPORE ON:	14 March 2023
DELIVERED AT:	Brisbane
HEARING DATE:	14 March 2023
JUDGES:	Mullins P and Gotterson AJA and Henry J
ORDER:	**Application for leave to appeal sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant is applying for leave to appeal his sentence with the object to varying the sentence so that no conviction is recorded – where a conviction recorded had very little prospect of impacting the appellant's economic and social wellbeing and chances of finding employment – whether leave to appeal sentence is refused *Penalties and Sentences Act 1992* (Qld), s 12 *Green v The Queen* (2011) 244 CLR 462; [2011] HCA 49, cited *House v The King* (1936) 55 CLR 499; [1936] HCA 40, cited *R v Cay, Gersch & Schell; Ex parte Attorney-General (Qld)* (2005) 158 A Crim R 488; [2005] QCA 467, cited *R v Illin* (2014) 246 A Crim R 176; [2014] QCA 285, cited
COUNSEL:	K V Juhasz for the applicant S L Dennis for the respondent
SOLICITORS:	Guest Lawyers for the applicant Director of Public Prosecutions (Queensland) for the respondent

HENRY J: On Christmas Day 2019, the applicant committed the offence of assault occasioning bodily harm in company upon his sister's boyfriend. He pleaded guilty to the offence and was sentenced to 12 months' probation, ordered to pay $1,500 compensation, and a conviction was recorded. He applies for leave to appeal his sentence with the object of this Court varying the sentence so that no conviction is recorded.

His counsel approaches that task relying on grounds that the sentence is manifestly excessive and the sentencing judge erred in failing to apply the parity principle. The determinative issue arising from the argument advanced is whether the learned sentencing judge erred in recording a conviction. It is that decision which is said to render the sentence manifestly excessive, and that decision which is said to have involved a failure to apply the parity principle.

It is instructive to first consider the application without regard to the parity principle. In that equation, there being no other specified error in her Honour's reasoning to the decision to record a conviction, the applicant would, if granted leave, have to meet a test of error identified in *House v The King* (1936) 55 CLR 499 at 505. That test would require the applicant to demonstrate the recording of a conviction was of itself an unreasonable or plainly unjust outcome.

Section 12(2) of the *Penalties and Sentences Act 1992* (Qld) requires the Court considering whether or not to record a conviction to have regard to all circumstances of the case, including the nature of the offence, the offender's character and age and the impact that recording a conviction will have on the offender's economic or social wellbeing or chances of finding employment. None of those specific considerations were particularly favourable for the applicant and some were positively unfavourable.

Firstly, as to the nature of the offence, while it was not in the worst case category, the learned sentencing judge correctly observed it was serious, "given that this was a group attack on a single individual".

Four of the applicant's male friends – Conor Tisdell, Conah Morrissey-Harvey, Jarrad

Fairbanks and Brock Stitt – were at his home. The complainant and the applicant's sister were heard to be arguing in her bedroom. After the applicant's sister left the room, Tisdell entered and confronted the complainant. They argued and Tisdell punched him to the face, causing the complainant to fall to the ground with an injured jaw. That act attracted a separate charge of assault occasioning bodily harm in respect of Tisdell.

Tisdell exited the room and the other four offenders then joined in dragging the complainant from the room and throwing him out the front door. He was kicked and punched by Stitt during that process, resulting in a cut above the complainant's eyebrow requiring stitches. Importantly, the applicant was no passive player in this process. He was physically involved in the group dragging of the defenceless complainant, who suffered a variety of adverse consequences from these events.

Secondly, as to the applicant's character and age, her Honour was correct to observe he was still a young man but did not present with unblemished character. He was 22 at the time of the offence – youthful, though well past his teens – and 24 by the time of sentence. Evidence from his mother, a friend, a work colleague and a doctor spoke positively of his character.

As against that, he had a criminal history. He first offended aged 19 by possessing dangerous drugs, restricted drugs, utensils or pipes and property suspected of use in a drug offence. He was placed on a $250 six-month good behaviour bond and drug diversion. No conviction was recorded. Less than a month before the subject offence, the applicant committed a further seven offences of possession: four of dangerous drugs and three of utensils or pipes.

He was eventually sentenced for those in September 2020. By then he had, on 3 April 2020, a little over four months since the subject offence, committed a further three offences of possession of dangerous drugs, utensils or pipes, and a thing used in the commission of a drug offence. When finally sentenced in September 2020, he was fined $1,200, and again no conviction was recorded.

He and his co-offenders were not charged with the present offence until August 2020, eight months after its commission. But he obviously knew of his wrongdoing and that knowledge

did not drive him to self-rehabilitate. Further, in November 2020, three months after he had been charged with the subject offence, he committed another offence of possession of dangerous drugs for which he was fined $350. Again, no conviction was recorded.

It may be accepted that the applicant's criminal history was limited to repeat drug offending and that, as sometimes occurs with such offending, he had experienced difficulty in refraining from a long entrenched pattern of drug use. It may also be accepted that his criminal history did not involve such serious offending or other offences of violence as to push the primary component of the applicant's appropriate sentence towards a higher penalty range than the 12 months' probation imposed. However, it remains that the applicant's history of repeat offending, including after committing the subject offence, was a consideration which did not favour him in the assessment of whether a conviction should be recorded.

As to the impact which the recording of a conviction would have upon his economic or social wellbeing or chances of finding employment, little information was proffered. In submitting it was "open" to not record a conviction, the applicant's counsel emphasised the applicant's cooperation in pleading guilty, his age, and that this was his first conviction for violence. He continued:

> "All I can submit in terms of … relevant considerations under section 12 in terms of future employment is that Mr Mitchell-Herden is in the construction industry. At the moment the – the company that he works for doesn't build schools or, say prisons … it builds new homes. So there's no requirement to have a blue card or anything like that but, of course, those who work in that industry, when one job or one contract finishes, it might be the case that, if he does have a conviction recorded, that might limit him in terms of future jobs in terms of any other building companies he may be able to work for."

It was scarcely surprising her Honour observed it seemed there was no, or very little, prospect of impact on the applicant's economic and social wellbeing and chances of finding employment. Loss of a specifically identified opportunity is not required in order for prospective impact upon employment to be considered – see *R v Cay, Gersch & Schell; Ex parte Attorney-General (Qld)* (2005) 158 A Crim R 488 at 495 [43]. However, the discretion at hand required regard to a mix of considerations and the vague information proffered here

about the prospective impact upon future employment inevitably made that consideration a less weighty consideration in the mix.

It is true the mix of circumstances here did not make the decision to exercise the discretion to record a conviction inevitable. However, the decision to do so was well open given this was an offence of violence, committed by a youthful but no longer very young offender, with a history of criminal offending which continued after the offence. It was not an unreasonable or plainly unjust decision. Nor, taken with the balance of a sentence outcome which was moderate in the circumstances, can it be said that the decision rendered the sentence manifestly excessive.

It remains to now consider the issue by reference to the complaint that her Honour failed to apply the parity principle. In fact, her Honour sentenced the applicant and Stitt on a date prior to the sentencing of the other offenders, so the complaint is technically confined to a failure as regards to her reasoning on that occasion. However, the argument was also advanced by the applicant, and met by the respondent, on the basis that the parity or disparity of all four co-offenders' sentences was relevant in considering the alleged failure.

The parity principle requires that like cases be treated alike and justifies appellate interference, even where a sentence is not manifestly excessive, if the extent of disparity with the sentence of a co-offender may give rise to a legitimate sense of grievance or create the appearance that justice has not been done – see *Green v The Queen* (2011) 244 CLR 462 at 472-473. There is logically no reason why it might not be applied in respect of that component of a sentence which involves the recording of a conviction, though the mix of relevant considerations personal to the offender in that context will diminish the chances of them being alike as between co-offenders. As was explained in *R v Illin* (2014) 246 A Crim R 176, 185 at [24], the parity principle does not justify interference where disparity is explicable by differences in the offender's personal circumstances.

The applicant's three co-offenders also pleaded guilty. Their sentences were as follows:

- Stitt: $500 fine, $1,500 compensation, and no conviction recorded.
- Fairbanks: 18 months' probation, $1,500 compensation, conviction recorded.

- Morrissey-Harvey: $500 fine, $1,500 compensation, no conviction recorded.

Comparison with Fairbanks does not assist the applicant in that a conviction was recorded against him. He was 21 at the time of the offence and had already had a conviction recorded against him for dangerous driving, for which he was on probation when he offended. Further, he was placed on a suspended jail sentence for disqualified driving after the subject offence. Those circumstances also explain why he received a longer period of probation than the applicant.

Stitt had punched and kicked at the complainant while the applicant and others dragged him. Despite Stitt's arguably more serious role, his personal circumstances were favourable. He was 21 at the time of the offence, had no criminal history and there was an identified risk that the recording of a conviction could impact the licencing required to run a business.

Morrissey-Harvey was also 21 at the time, and his only criminal history was a single subsequent offence of stealing for which he was placed on a good behaviour bond with no conviction recorded. There was also an identified risk that the recording of a conviction could limit access to the permits required in his trade.

In contrast, the applicant was 22 at the time and had a multiple offence criminal history. The risk of impact of recording a conviction upon his future employment was less compelling than as for Stitt and Morrissey-Harvey. But even ignoring that, the differences in their criminal histories readily explain the different outcomes in the decision whether to record a conviction.

If it matters, Tisdell, who committed a separate offence and had spent 30 days in pre-sentence custody, received 18 months' probation, 100 hours community service, a $4,000 compensation order and no conviction was recorded. He was only 20 at the time of the offence and had twice been sentenced for minor drug offences for which no convictions were recorded. His only offending after the offence had been two breaches of bail conditions for which no conviction had been recorded. There was evidence that the recording of a conviction would imperil his ability to obtain a licence needed for his established field of employment. Once again, the variation in relevant circumstances as between him and the

applicant exposes no problem with parity.

There was no error in respect of the parity principle, nor is there a relevant disparity bearing upon the otherwise unfounded complaint of manifest excess. There being no substance to any of the proposed grounds of appeal, I would order application for leave to appeal sentence refused.

MULLINS P: I agree.

GOTTERSON AJA: I also agree.

MULLINS P: So the order of the Court is:

Application for leave to appeal sentence is refused.