

SUPREME COURT OF QUEENSLAND

CITATION: *R v MCP* [2018] QCA 154

PARTIES: **R**
v
MCP
(applicant)

FILE NO/S: CA No 314 of 2017
DC No 41 of 2017

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Childrens Court at Southport – Date of Conviction:
31 August 2017 (Kent QC DCJ)

DELIVERED ON: 6 July 2018

DELIVERED AT: Brisbane

HEARING DATE: 3 April 2018

JUDGES: Fraser and Gotterson and Morrison JJA

ORDER: **The application is refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS AND OTHER RELATED OFFENDERS – where the applicant and a co-offender were sentenced in the Childrens Court on one count of robbery in company, with violence – where each received a sentence of two years’ probation without a conviction being recorded – where a video recording of the events existed – where it was submitted that the co-offender initiated the offensive conduct – where the learned sentencing judge characterised their participation in the offence as equal – where the applicant participated in a recorded police interview, made admissions and expressed remorse and his co-offender did not – where the applicant spent a night in detention and his co-offender did not – where the applicant was a year younger than his co-offender at sentence – whether there was error in not moderating his sentence in accordance with the parity principle

Lowe v The Queen (1984) 154 CLR 606; [1984] HCA 46, cited *R v AAH & AAG* (2009) 198 A Crim R 1; [\[2009\] QCA 321](#), cited

COUNSEL: F Richards for the applicant
M J Hynes for the respondent

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

- [1] **FRASER JA:** I agree with the reasons for judgment of Morrison JA and the order proposed by his Honour.
- [2] **GOTTERSON JA:** I agree with the order proposed by Morrison JA and with the reasons given by his Honour.
- [3] **MORRISON JA:** On 11 December 2017 the applicant and a co-offender (**DWC**) were sentenced in the Childrens Court on one count of robbery in company, with violence. Each received a sentence of two years' probation without a conviction being recorded.
- [4] The applicant challenges his sentence on the basis that there was error in not moderating his sentence in accordance with the parity principle.

Circumstances of the offending

- [5] On 5 December 2016 the complainant (a 15 year old student with learning difficulties) went to McDonalds at the Pacific Fair Shopping Centre, with a friend. A group of teenagers were in the food court. The applicant and DWC were part of that group.
- [6] The complainant's friend walked over to the group of teenagers and greeted an associate. DWC asked the friend for a dollar, but he responded that he did not have any money. DWC repeatedly demanded money, standing close to the friend's face. He threatened to take the money from him.
- [7] The friend left the group and returned to the complainant. He told the complainant that one of the boys wanted his money. The complainant and friend left the food court and walked towards another store. The applicant and DWC, as part of the group of about eight teenagers, followed the complainant.
- [8] DWC pushed the complainant's back and said "Hurry up, get outside, we'll sort it out". The complainant replied "I didn't come here for trouble, I just wanted to get some breakfast". The complainant had his mobile phone in his right hand and a McDonald's drink in his left hand. He had a bag around his shoulder.
- [9] A girl in the group of teenagers recorded the events on her mobile phone. That recording became part of the evidence.
- [10] The complainant walked out of the shopping centre. The applicant and DWC walked beside him and in front of him. DWC walked aggressively around the complainant. The remainder of the teenage group followed them closely. At the carpark DWC grabbed the complainant's sleeve, swung the complainant forward and pushed him further into the carpark. The complainant continued to walk away from the group, even when the applicant removed the complainant's baseball cap from his head. The applicant smiled into the camera and showed off the cap.
- [11] DWC continued to talk and walk aggressively next to the complainant. He pushed the complainant's arm forward again. An unknown boy who was part of the group kicked the complainant's bag. DWC reached over and tried to grab the

complainant's mobile phone. The complainant swung his hand back away from DWC's reach.

- [12] At 10.22 am DWC jumped upon the complainant's back from behind, locked his arms around the complainant's throat and swung the complainant with the full force of his own weight to the ground. The complainant landed on his back on the cement floor. DWC also fell to the floor but got up immediately.
- [13] DWC said "C'mon C'mon" and punched the left side of the complainant's head three times with full force while the complainant was still on the ground. Simultaneously the applicant also punched the left side of the complainant's head twice. Notwithstanding this, the complainant got up and walked away from them. By this stage the complainant was holding his bag with his right hand, by one of its straps.
- [14] DWC, the applicant and the group followed the complainant. An unknown boy kicked the complainant's back again. The applicant also kicked the back of the complainant's hips with greater force.
- [15] DWC demanded "Give us your phone". The applicant pulled the complainant's bag away with his hand, while DWC pushed the complainant forward by pushing his back. The unknown teenager delivered another kick. The applicant left with the complainant's bag. DWC and the unknown boy walked up to the complainant and DWC snatched the complainant's phone from his hand. Notwithstanding this, the complainant walked away with his friend, and the teenage group returned to the shops.
- [16] When two people approached to help the complainant the teenage group told them to stay out of it.
- [17] The incident was detected when the video was uploaded on to Facebook by the girl who took it. The complainant's mother saw the video and sent it to police.
- [18] Police searched the houses of each of DWC and the applicant. On 31 January 2017 the applicant participated in an interview at the police station, during which he made admissions to the offence. His admissions included that he:
- (a) was a person depicted in the video in a particular beige bucket hat, which he later threw in the bin; and
 - (b) punched the complainant once or twice while the complainant was on the ground; he said that his punches connected with the complainant's left jaw and left shoulder; in this respect the Crown maintained that the applicant had punched the complainant's head twice as depicted in the video;
 - (c) took the complainant's hat and gave it to a friend as he (the applicant) already had a hat;
 - (d) removed the complainant's bag and also gave that to another friend, as that sort of bag was not his preferred style of bag;
 - (e) kicked the complainant's arm at the end in a "scissor kick"; in this respect the Crown maintained that the applicant kicked the complainant's hips as depicted in the video; and
 - (f) intended to kick the complainant's head, but could not reach that high.

- [19] The applicant said that had he known of the complainant's learning disability he would not have robbed him and admitted that the robbery was a "silly choice" on his part. He was aware that someone from the group stole the complainant's mobile phone.
- [20] As a result of the incident the complainant sustained swelling on both temples, left cheek and jaw, bumps on the back of his head, cuts and grazes on both legs (a long graze on the right leg that bled), a long graze along his right elbow, scratches and small cuts on both hands and around both knees. The complainant also sustained cuts inside his mouth from his braces, when his face was punched. The shirt that the complainant wore during the robbery was ripped at the back due to the assault.
- [21] The complainant's mobile phone was worth \$950 and the complainant had only had it for about two months. The complainant's bag contained his mobile phone charger, Apple earphones and other miscellaneous items including \$3.00 in cash. The bag was worth about \$50 and the baseball cap was worth about \$45. None of the stolen items were recovered.

The video evidence

- [22] I have viewed the video of the events. In that fashion a comparison of the applicant's and DWC's participation can be made. The table below sets out the time elapsed on the video and the event:

Time	Applicant	DWC
00:08	Bumps his right shoulder onto complainant	
00:43	Strikes complainant on the chest	Grabs left arm and pulls him forward
00:48		Pushes complainant from behind
00:55	Grabs cap	
01:01	Shows cap to camera	
01:12		Light push from behind
01:24		Grabs at phone
01:28	Has arm out towards complainant	
01:44		Comes from behind, grabs around neck and flings complainant to the ground; punches him three times while complainant is on the ground
01:46	Punches complainant twice while he is on the ground	
02:04	Hard kick on complainant's right hip	
02:12	Rips bag from complainant's hand	Pushes complainant in the back
...		Takes phone

Submissions

- [23] For the applicant it was submitted that there were distinguishing features between the two offenders. DWC was 14 years old at the time of the offence, and 15 at sentence. The applicant was just 13 years and three months at the time of the offence, and 14 at sentence. It was submitted that DWC initiated the offensive conduct and “the applicant took a marginally less active role in the offence”. DWC self-reported having anger issues. The applicant participated in a recorded police interview, made admissions and expressed remorse. He also spent a night in detention.
- [24] It was contended that the parity principle recognised in *Lowe v The Queen*¹ required an appellate court to intervene where the disparity between sentences imposed on co-offenders is “such as to give rise to a justifiable sense of grievance ... or to give the appearance that justice has not been done”.² The differences between the two offenders was said to have created a justifiable sense of grievance at the fact that the same sentence was imposed on each.
- [25] For the Crown it was submitted that the learned sentencing judge was entitled to the view that the involvement of both offenders was about equal. Both were part of the group of teenagers that pursued the complainant and robbed him of items of his property. Both co-offenders punched the complainant while he was on the ground. Whilst DWC was the first to push the complainant and swung him to the ground, the applicant kicked him in the hip when he got up. It was submitted that perfect consistency between co-offenders is not necessary, and there was no justifiable sense of grievance.³
- [26] It was further submitted that a sentence of probation was geared towards rehabilitation of young offenders. Two years was an appropriate period to reflect the seriousness of an unprovoked and persistent group attack on a lone boy who offered no resistance.

Approach of the learned sentencing judge

- [27] The learned sentencing judge did not set out the facts in detail, but characterised the applicant’s and DWC’s participation as follows:
- “... the two of you were part of a group who chose to attack the unfortunate complainant, who was on his own and fairly defenceless against a group of perhaps six or seven people.”⁴
- [28] Having noted that the complainant was physically much bigger than either DWC or the applicant, the learned sentencing judge expressed his view that it was a “cowardly attack, by a group, upon a defenceless person on their own”.⁵
- [29] His Honour then characterised the features of the attack in a way that inevitably compared the conduct of the applicant with that of DWC:
- (a) it was a protracted pursuit and multiple blows were struck;
 - (b) the applicant was part of a group of people;

¹ (1984) 154 CLR 606 at 623-624; [1984] HCA 46.

² *Lowe v The Queen* (1984) 154 CLR 606 at 623.

³ Referring to *R v AAH & AAG* (2009) 198 A Crim R 1; [2009] QCA 321 at [9]-[12].

⁴ Appeal Book (AB) 27 lines 6-8.

⁵ AB 27 line 13.

- (c) a number of personal items were taken in what was a terrifying incident for the complainant;
- (d) it was correct to conclude “that the involvement of the two of you is about equal”;⁶
- (e) both had taken part in a restorative justice program; that process required each of them to write a full page letter of apology, apologising and sharing what was learned at the conference;
- (f) DWC had been attending an educational institution which spoke well of him (at least in part); he had made a good effort and behaved himself; he had a good upbringing, but issues in relation to anger management;
- (g) the applicant was remorseful and doing well at school; he had an involvement in AFL football;
- (h) the applicant was slightly younger than DWC, had co-operated with police and made admissions;
- (i) the applicant had spent a night in juvenile detention; and
- (j) the seriousness of the offence warranted the period of two years’ probation in the applicant’s case, rather than a period shorter than that for DWC.⁷

Discussion

- [30] At the outset of the argument before this court, Mr Richards, for the applicant, stressed that it was not contended that the period of two years’ probation was manifestly excessive itself. The argument was one confined to parity on the basis that when the applicant’s conduct was compared to that of DWC, there were distinguishing features which warranted some amelioration. The features were the difference in age, the lesser part played by the applicant and his significant co-operation with the investigation.
- [31] I do not consider that the difference in age is significant in itself. Each of the applicant and DWC were young offenders in circumstances where their conduct occurred as part of a mob attack on a single boy. At all times the complainant adopted a non-confrontational approach, walking away from the persistent attack upon him. Both the applicant and DWC were school boys, yet to finish their school participation. Each, in their own way, committed assaults against the complainant, administering gratuitous violence particularly while the complainant was on the ground. Each of them participated in what was, as the learned trial judge rightly said, a cowardly attack by a group upon a defenceless person.
- [32] Given that actual custody was not an issue, nor was the imposition of a period of probation, the age difference between the applicant and DWC diminishes in significance. The difference between them, according to their counsel, was simply the length of probation, rather than anything else. In that circumstance the fact that one is somewhat younger than the other is not compelling.
- [33] As for the circumstances of the attack itself, it was, in my view, rightly characterised by the learned sentencing judge as being “about equal”. True it is that

⁶ AB 27 line 30.

⁷ AB 28 lines 34-36.

one can identify more individual moments of physical assault on the part of DWC than on the part of the applicant, but it was the applicant and not DWC who stole the complainant's cap and bag. The applicant plainly relished his involvement in that, as one can see when he shows off to the camera, having taken the complainant's cap.

- [34] It is also true to say that the applicant made admissions to the offence. However, those admissions also contain matters which tell against the applicant. First, he threw his own hat in the bin in a fairly obvious attempt to conceal his identity. He clearly knew that the video was being made, as he showed off to the camera when he took the cap in the first place. Secondly, his admissions tried to minimise his physical involvement. His admission was that he punched the complainant once or twice while he was on the ground, and kicked the complainant's arm at the end. The video shows that he pushed the complainant in the chest, then punched him two times, then kicked the back of his hips. Thirdly, he said that he intended to kick the complainant in the head, but could not do so because he could not kick high enough. Plainly, his intention at the time was to do greater harm than he did. Fourthly, the robbery of the complainant's personal effects had nothing by way of need about it, as both items that he took were not required by him in any way, as he had a hat already and the bag was "not his preferred style of bag". In each case he gave the items to a friend, and they were not recovered. Fifthly, he told police that had he known of the complainant's learning disability he "would not have robbed him". That is a limited qualification. He was not saying that he would not have participated in the attack, only that he would have not taken the complainant's property.
- [35] When these matters are understood about what was said to be "full admissions" it can be seen that his co-operation was qualified and designed to minimise his physical involvement.
- [36] In the course of oral argument it was suggested that there was a distinction between the applicant and DWC as to the extent to which they were remorseful. It was said that there was evidence of remorse from the applicant but "we just don't know how the co-offender might have progressed".⁸
- [37] I do not find that submission persuasive. Both DWC and the applicant participated in the restorative justice process.⁹ Whilst DWC declined to be interviewed¹⁰ the applicant's admissions and participation with the investigation suffered as set out above.
- [38] Next it was submitted that probation was nonetheless a punishment and that an amelioration of a two year period, even by six or eight months, would be a significant matter for a boy so young.¹¹
- [39] When that was explored in argument the only factor that was identified as being a significant impost by reason of probation was the requirement to fulfil obligations requested of him and to attend upon and be supervised. I do not find that argument persuasive. The fact is the applicant was and still is at school, and will be until after

⁸ Appeal Transcript T1-6 line 15.

⁹ AB 33 and 34.

¹⁰ Possibly because of the presence of his father at the time: AB 31.

¹¹ Appeal Transcript T1-6 lines 21-27.

the probation period ceases. Based upon the letter provided by his mother¹² he still lives at home with his mother and his siblings. He has progressed well at school and continued his close involvement in AFL football. His mother described him as a happy boy who helped around the house and with his siblings' schoolwork. None of that suggests that probation would be a significant impost upon the applicant, and certainly not to the extent that it would overwhelm the appropriate sentence otherwise.

[40] I am not persuaded that the imposition of the same period of probation on the applicant as was imposed on DWC can give rise to a justifiable sense of grievance. It does not give the appearance that justice has not been done.

[41] I would refuse the application.

¹² Exhibit 6, AB 38.