

THE QUEEN

v.

TYSON TATTAN LAM
(Applicant)

**Application for leave to appeal against sentence
Applicant's submissions**

The application

1. The applicant seeks leave to appeal sentences imposed by Trafford-Walker DCJ (“the sentencing judge”) at Brisbane on 23 October 2006.¹ The applicant pleaded guilty to an indictment containing 2 counts of assault occasioning bodily harm in company² (“the AOBH charges”) and summary charges of assaulting and obstructing police (“the summary charges”) ³ (all collectively referred to as “the present offences”).
2. The applicant was sentenced to concurrent terms of 2 years imprisonment for each of the AOBH charges and 2 months imprisonment for each of the summary charges.⁴ His Honour also ordered that the applicant’s “parole release date” be set at 12 months.⁵
3. These offences were committed within the operational period of 2 suspended sentences imposed on 6 August 2001 by Noud DCJ and extended on 8 November 2004 for fraud offences⁶ and on 8 November 2004 by Shanahan DCJ for receiving offences.⁷ These breaches were proven and the sentencing judge ordered that the balance of these suspended

¹ R8.

² R1A – R1B; section 339(1)(3) *Criminal Code*.

³ R1D – R1G; section 444(1) *Police Powers & Responsibilities Act 2000*. NB: This section is now section 790 of the *Police Powers & Responsibilities Act 2000* as renumbered by the *Police Powers & Responsibilities and Other Acts Amendment Act 2006 Part 2*. These were remitted pursuant to s. 651 of the *Criminal Code*.

⁴ R8, L15 -39.

⁵ R8, L39 – 41.

⁶ R13 – R18.

⁷ R19 – R23.

sentences namely, 7½ months outstanding on the sentence imposed on 6 August 2001 and 4 months outstanding on the sentence imposed on 8 November 2004, be served, also concurrently.⁸

Maximum penalties

4. The relevant maximum penalties are 10 years imprisonment in respect of the AOBH counts⁹ and 6 months imprisonment or 40 penalty units, i.e. \$3,000.00, in respect of the summary offences.¹⁰

The course of proceedings

5. The applicant was charged on 9 October 2005. There was a committal hearing on 2 May 2006.¹¹ The matter was listed for sentence on 14 September 2006, when the indictment was first presented before the District Court and was then adjourned until 23 October 2006.¹²

The relevant facts

6. A schedule of facts was tendered by the Crown Prosecutor.¹³ The more salient facts are:
 - 6.1. At about 5.15am whilst heading towards a bar in the city the complainant passed “a group of about 10 people” of which the accused was a part. A male in the group said to the complainant “Are you gay?” The complainant stopped, said “No, mate” and kept walking.¹⁴ The applicant is said to have jumped up and whilst walking backwards in front of the complainant, kept saying, “Come around the corner, come around the corner. You can eat me. You can suck me.” The complainant kept saying, “No mate, no” and tried to keep walking. The complainant was presumably intoxicated having drunk 1 heavy beer and 6 UDL vodkas between 10pm and about 5.15am.¹⁵

Count 1:

- 6.2. “The applicant punched the complainant on the nose ... causing it to bleed immediately. The complainant tried backing away and told the accused that he did not want a fight.”¹⁶

⁸ R8, L15 - 21.

⁹ Section 339(3) *Criminal Code*.

¹⁰ Section 444(1) *Police Powers & Responsibilities Act 2000*.

¹¹ R5, L27 – 30.

¹² R5, L30 – 32.

¹³ R5, L9 – 13; Exhibit 3.

¹⁴ R33.

¹⁵ R33.

¹⁶ R33.

- 6.3. A male in the group jumped up and threw a punch as well, striking the complainant on his left cheek but not causing him any damage.¹⁷
- 6.4. The applicant then punched the complainant in the mouth, cutting his (the applicant's) hand in the process. This blow loosened one of the complainant's teeth.¹⁸ He "backed away across the road and was followed by the two men." The applicant punched the complainant in the forehead; who attempted to duck and cover his head with his hands. He then felt 2 of 3 punches to his face but is unable to say which of the two men threw these punches. They ceased assaulting the complainant and began walking away from him.¹⁹
- 6.5. "...the complainant suffered two lumps on his forehead (underneath one eyebrow and above the other eyebrow) which did not bruise, a bruise to his nose, a bloody nose from the first punch, a loose tooth (it was loose for 2 or 3 weeks) and a cut lip".²⁰

Count 2:

- 6.6. The applicant has then come out of an alcove and approached the complainant again. He said, "You dog!" The complainant turned and saw the applicant, who punched him in the left side of the head. The accused said, "You dog!" again, and punched the complainant several times.²¹
- 6.7. "Two or three other men then joined the accused in assaulting the complainant. He felt punches all over his face and to his upper body. The complainant put his head down into his hands to protect it. He was knocked to the ground. The applicant kicked the complainant whilst he was on the ground, and the other men joined in and began kicking the complainant as well. The complainant received kicks to the head, arms, legs, stomach and back. The complainant went limp, pretending to be knocked out. His assailants then desisted. The applicant was the last person to desist in the assault."²²
- 6.8. "...the complainant suffered two lumps to either side of his head, a broken fingertip (which resulted in the complainant having to take two weeks off work), bruises on the top of his right arm (near his shoulder), bruising to his right side ribs (at the front of the torso), and a scrape on the elbow from when he hit the ground".²³ "... the complainant also suffered (as a result of one or both of the assaults) general soreness to other parts of his body".²⁴

¹⁷ R33.

¹⁸ R33.

¹⁹ R34.

²⁰ R35.

²¹ R34.

²² R34.

²³ R35.

²⁴ R35.

Counts 3 & 4:

- 6.9. The applicant was identified to police by the complainant as he stood at a taxi rank in Albert St. As two police approached he attempted to enter a taxi with other people but was refused. He then walked off ignoring police directions to stop but after a short foot pursuit turned on the two officers and shaped up to fight them and moved towards them such that both officers believed they were about to be assaulted. Capsicum spray was used but the prisoner ran off again.²⁵
- 6.10. He was finally detained and handcuffed, after a violent struggle, at the corner of Edward and Elizabeth Streets.²⁶
7. The applicant sustained some cuts and bruises to his hands as a result of the altercation.

Crown submissions below

8. The crown prosecutor made the following submissions:
- 8.1. "... the plea, of course, is in his favour, but against that is the committal hearing and the full evidence given by the complainant and the witness in the face of a strong Crown case."²⁷
- 8.2. It is "...a strong Crown case."²⁸
- 8.3. "...these were cowardly, unprovoked assaults involving more than one assailant and the second one is made that much worse by the use of kicks whilst the complainant was on the ground"²⁹
- 8.4. "Courts have been taking a serious view of street violence at night in the inner city and accordingly, in my submission, the appropriate range is two to three years' imprisonment and really should be towards the top of that range".³⁰
- 8.5. "I'm not going to argue for the suspended terms to be served cumulatively on the sentence for these offences. It may be open to do so given the different nature of the offending, but I would say, your Honour, that the release date – the parole release date your Honour sets should certainly be beyond the end of the period that's owing".³¹

²⁵ R36.

²⁶ R36.

²⁷ R5, L35 – 37.

²⁸ R5, L37 – 42.

²⁹ R5, L44 – 47.

³⁰ R5, L49 - 52.

³¹ R5, L54 – R6, L1.

- 8.6. “That is, I would say your Honour should impose for the breaches the whole of the remaining suspended period, either concurrently or cumulatively with one another, and a concurrent sentence of say, three years with a parole release date at 12 months.”³²

Applicant’s submissions below

9. The matters which were urged on the applicant’s behalf included:
- 9.1. The applicant was intoxicated.³³
 - 9.2. He had no criminal history for violence.³⁴
 - 9.3. The complainant did not suffer any significant injury.³⁵
 - 9.4. The applicant had a good family and was working as an apprentice chef.³⁶
 - 9.5. He has had a drug addiction which he had managed to overcome.³⁷
10. His counsel then urged a head sentence of 2 years imprisonment³⁸ suggesting that whilst the conduct ordinarily would attract 12 to 18 months imprisonment the applicant’s previous criminal convictions “might take it up to 2 years.”³⁹ He also submitted that the suspended sentences should be ordered to be served concurrently.⁴⁰
11. He also sought a parole release order at 12 months.⁴¹

³² R6, L1 - 5.

³³ R6, L47 – 49: ““This offence involves him drinking far too much alcohol, being with a group of friends or associates and behaving in an extraordinary offensive manner.”

³⁴ R6, L49 – 54. This was incorrect. There is one entry on 18 June 2001 which is further discussed below.

³⁵ R7, L6 – 13.

³⁶ R6, L11 – 19: “... he currently resides with his mother, father and sister. He comes from what could be described as a good family. They’re a large family. He had an unremarkable upbringing. He played a lot of sport. He has been treated for epilepsy over the years. He is not currently taking any medication at this point in time. He went to Grade 12. He is currently an apprentice chef. That involves some training though the Hospitality Training Association.”

³⁷ R6, L40 – 45: “He currently is in full-time employment...He receives about \$272 per week. Mr Lam’s downfall is not an uncommon reason, it’s his involvement in drugs as a young man. I am instructed that he doesn’t have a drug problem now. He was in prison, he is in full-time work, and he seems to have taken himself away from that world.”

³⁸ R6, L56 – R7, L4.

³⁹ R7, L30 – 38: “In my submission if he were to come before the Court for these offences without any previous convictions, he might have received at worst a head sentence of 12 to 18 months, probably more towards 18 months given his age. So in my submission where it is aggravated it might take it up to two years. If he had previous offences of violence I would submit that three years might well be in order, and I would ask that your Honour make an order for parole at about 12 months from today.”

⁴⁰ R7, L15 – 30.

⁴¹ R7, L36 - 38.

Sentencing judge's remarks

12. In passing the sentences recorded above, the sentencing judge made the following comments:

“You are 29 years of age. You have a serious criminal history. If you continue to be involved with drugs you will be in and out of prison for the rest of your life, and I am sure nothing I say is going to make any difference to the way you think. You have to take responsibility for your own life.”⁴²

“For the two offences of assault occasioning bodily harm in company, this is conduct which must be deterred. In the Brisbane city area persons should be allowed to go about their business without fear of being assaulted on the way home from an evening out.”⁴³

Submissions on appeal

13. The AOBH counts are serious indictable offences and given that they were committed during the operational period of two suspended sentences; it is not suggested, in this application, that the orders made under s.147 of the *Penalties & Sentences Act 1992* (“PSA”) that they be served, was attended with any error. It is accepted that the applicant must serve these terms which total 7½ months.

14. However, it *is* submitted that the effective terms of imprisonment imposed in respect of these counts were manifestly excessive.

15. The transcript reveals that neither counsel below referred the sentencing judge to any comparable sentences to arrive at their respective submissions to fix the appropriate sentence for this level of offending. In passing sentence, his Honour did not cite any either.

16. Before turning to the comparable decisions of this Court there are some observations that are sought to be made about some other aspects of the present matter. Firstly, the applicant pleaded guilty. This should ordinarily have warranted a discernible reduction in the custodial term, by about one third.⁴⁴ In the very brief sentencing remarks, the sentencing judge made no reference to the plea of guilty at all: cf. s. 13 PSA. The Crown referred to the fact of a committal having been conducted, but a perusal of the depositions suggest that it was done appropriately, respectfully if not very gently. No contrary assertions were put to the complainant. As the applicant was severely intoxicated, his own recollection must have been

⁴² R8, L1 – 10.

⁴³ R8, L25 – 33.

⁴⁴ Section 13 *Penalties & Sentences Act*; *Cameron v. The Queen* (2002) 209 CLR 339. This co-operation and course indicates remorse, an acceptance of responsibility and a willingness to facilitate the course of justice. C.f. *R v O'Brien* [2006] QCA 462.

poor. In these circumstances it does not seem unreasonable for him to have wished to hear and see what it was that was being alleged that he had done. Most importantly, he entered a guilty plea upon the first presentation of the indictment. No trial was ever set. Thus, although it was not entered at the earliest opportunity, it was still a timely plea.

17. Secondly, and perhaps most importantly, the complainant's injuries were, fortunately, relatively minor. They are detailed in paragraphs [6.5] and [6.8] above. Although the conduct to which he pleaded was cowardly, violent and sustained, the applicant is entitled to share the benefit of this fortuitous result: *Amituanai* (1995) 78 A Crim R 588 at 589.⁴⁵ It can readily be seen from decisions of this Court in respect of this offence and relating to the more serious offence of grievous bodily harm; the appropriate ranges are significantly set by the extent of the resultant injuries.⁴⁶
18. Thirdly, although the applicant has criminal history that spans several pages and includes terms of imprisonment, there is only one entry which involved any aspect of violence, being the conviction which is recorded as "CSA Prisoner Offences (Assault etc)" on 18 June 2001 for which the applicant received 2 months imprisonment.⁴⁷ The circumstances surrounding the incident were not discussed below however it was obviously in connection with an event whilst he was in custody, more than 5 years ago and when the applicant was a much younger man. The balance of his criminal history does not suggest a violent disposition in his past. Thus, the present conduct can be viewed as an aberration in the sense discussed in *Veen v R* [No. 2] (1988) 164 CLR 465 at 477⁴⁸ where it was remarked that the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence

⁴⁵ Per Pincus JA: "No doubt it often happens that heavy blows which are struck cause no permanent injury. Here, unfortunately, that was not so; the victim suffered serious brain damage. It is the extent of that damage which is the principal justification for the sentence imposed below. One could perhaps defend a legal system in which the particular consequences for the victim of such a blow are treated as of little significance and the court is required to focus solely on the circumstances of the blow itself. But that is not our system; for reasons which are evidence enough, the offender will find that his punishment may depend on the extent of the damage the victim happens to sustain. That is, the risk that a blow which might by good luck have caused little damage in fact has catastrophic results, as it had here, is one which is shared by the victim and the offender".

⁴⁶ See attachment A.

⁴⁷ R10.

⁴⁸ "There are two subsidiary principles which should be mentioned. The first is that the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences: *DPP v Ottewell*. The antecedent criminal history is relevant, however to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience to the law. In the latter case, retribution, deterrence and prosecution of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind."

to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence.

Comparable sentences

19. A schedule of Court of Appeal decisions that might assist in determining this application is set out in **Attachment A** to these submissions. These cases include matters where even serious grievous bodily harm was caused. They suggest that a “head” sentence of 2 years was at the high end of the appropriate range. Moreover, they reveal that even when a 2 year sentence was imposed; it was significantly ameliorated by either a complete suspension or after a short term of imprisonment circa 4- 6 months was served.
20. It is illusory to view the sentence imposed in this case as merely one of 2 years imprisonment. It is necessary to look at all components of the sentences imposed to sensibly compare or assess them.⁴⁹ In order to arrive at a parole release date at 12 months; given the plea of guilty and applying ordinary regard for such a plea, his Honour had to have started at a head sentence of 3 years imprisonment for the present offences. Indeed, this was the sentence urged by the Crown.⁵⁰
21. The starting point of 3 years imprisonment is just too high. There is no decision of this Court which would support a head sentence of 3 years imprisonment *or* an effective jail term of 12 months for this conduct where there was no significant injury suffered by the complainant and where a weapon was not resorted to or threatened with.
22. In this respect the sentencing judge erred in the exercise of his sentencing discretion:⁵¹
23. It is accepted that the applicant’s own counsel urged for a parole release date at 12 months as well, although he curiously started at a head term of 2 years imprisonment and then made no

⁴⁹ *Postiglione v The Queen* (1997) 189 CLR 295 at 302.

⁵⁰ See paragraph [8.6] above; R6, L1 - 5.

⁵¹ In the sense identified in *House v The King* (1936) 55 CLR 499 at 503: “It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.”

allowance, in formulating his submissions for the guilty plea. However, his concession should not unduly impair the applicant in this application.⁵²

24. The sentences that should have been imposed were concurrent head sentences of between 15 to 18 years imprisonment suspended after say 6 to 8 months imprisonment or with a parole release date after that time. As noted above the orders that the remaining term of the suspended sentences be served concurrently is not argued against.

A. Boe

BOE LAWYERS

4 December 2006

⁵² *GAS v R; SJK v R* (2004) 217 CLR 198 at 211: “There may be an understanding between counsel as to the submissions of law that they will make, but that does not bind the judge in any sense. The judge’s responsibility to find and apply the law is not circumscribed by the conduct of counsel.”