

IN THE COURT OF APPEAL
SUPREME COURT OF QUEENSLAND

C.A. 347 of 2005

THE QUEEN

v.

SIMON MATTHEW EWEN

(Applicant)

Application for leave to appeal against sentence
Applicant's submissions

This application

1. Simon Matthew Ewen ("the applicant") seeks leave to appeal the sentence imposed by Sannios DCJ at Rockhampton on 2 December 2005.
 2. The applicant pleaded guilty to an ex-officio indictment containing 1 count of assault occasioning bodily harm with a circumstance of aggravation: s.339(1)(3) *Criminal Code*. He was sentenced to 2 years imprisonment.¹
 3. By operation of ss. 76(1) (b) & (c) of the *Corrective Services Act 2000*, he will have to serve two thirds of that sentence before becoming eligible for any conditional release, i.e. not until 17 October 2006. He is not otherwise eligible to apply for a post-prison community based release order due to s. 134(1)(a)(ii) of the Act. Thus, the sentence imposed means a sentence of 16 months imprisonment in actual custody.
- Maximum penalty**
4. The maximum penalty for this offence is 10 years imprisonment.

¹ R10 – 11. It was declared that the 169 days which the applicant had served in custody in the period from the date of arrest on 17 June 2005 until 2 December 2005 be regarded as time served under this sentence.

The course of proceedings

5. The applicant was arrested on the day that the offence was committed, i.e. 17 June 2005, refused bail and remanded in custody until he was sentenced.
6. The plea was entered on 2 December 2005 having followed consent to the presentation of an ex-officio indictment with an agreed statement of facts.

The relevant facts

7. The facts associated with the offence were set out in a three page document placed before the Court.² The assault followed what has colloquially become known as a “road rage” incident. In brief, the complainant was a passenger in his mother’s car and at about 6.20 a.m. on Friday 17 June 2005 their car was behind one driven by the applicant at a set of traffic lights in Rockhampton. When the light turned green, the applicant did not immediately drive off, the complainant’s mother beeped her horn and in response the complainant gave what is known as the ‘bird’ or a ‘one finger salute’. The complainant’s mother overtook the applicant and whilst doing so, the complainant said: “keep your eyes open mate”, and at the same time showed his hands to the applicant with his “palms up”. He saw the applicant say something back but he did not hear what was said.
8. The applicant then began driving erratically, swerved back and forth and flashed his lights. He followed the complainant’s vehicle until it came to a stop at a railway line. The applicant stopped behind and alighted from his vehicle. Upon seeing this, the complainant also got out and approached the applicant. The applicant had a wheel nut spanner/tyre lever. The applicant said something like: “Have you got something to say cunt?” as he approached with the lever raised slightly over his head. The complainant replied “what are you doing?” as he put his hands over his head to protect himself. The applicant swung a few times and hit the complainant once. The complainant kicked out at the applicant, and was then struck with the tyre lever. He received a cut to his forehead. This was later sutured. It was described as a “deep laceration”. He also suffered some neck pain.

² “Exhibit 3” R3, L51: R30 - 32.

9. The complainant reported the matter to police, who apprehended the applicant a short time later in a hotel room. He took part in a recorded interview with the police. He was arrested, charged and refused bail.

The applicant's background and history

10. The applicant was 29 years old at the time of the offence and when he was sentenced. It seems that he has a good work history and that he was in Rockhampton pursuing an offer of employment when the incident occurred.³
11. However he has a number of convictions for violence, all in NSW. The sentence proceeding did not examine the detail of this conduct⁴ but it cannot be disputed that the applicant appears to have had a significant problem with anger management and violence. There are three separate occasions when courts have sentenced the applicant to a term of imprisonment for criminal violence. No real attempt was made to seek to explain or understand what the underlying issues in respect of these convictions might be: c.f. ss. 9(4)(g) and (j) of the *Penalties & Sentences Act 1992*. It is accepted that such a history permits a court to not be lenient, but it does not permit the imposition of a greater sentence than that which is otherwise appropriate.⁵

12. This history of violence does not sit easily with the undisputed evidence that the applicant had a rather good work history.⁶

Crown submissions below

13. The crown prosecutor called this “an appalling act of violence against a young man who was simply on his way to work”.⁷ He added that the applicant used a “weapon which could quite

³ R6, L45 – 50.

⁴ R3, L20 – 30: the applicant’s NSW criminal history was “Exhibit 2”: R3, L15.

⁵ *Veern (No 2)* (1988) 164 CLR 465: per Wilson J: “I cannot support the approach of the trial judge in so far as his Honour treated the applicant’s previous convictions as matters of aggravation justifying a longer sentence than the maximum sentence which the circumstances of the offence, viewed objectively, would warrant. In my view the proper benchmark of an appropriate sentence is determined by reference to the objective features of the crime: matters personal to an offender, including any record of previous convictions and also the likelihood of any potential threat to the community, are relevant only to the question whether the case admits of any leniency being shown to the offender.”

⁶ R6, L1 – R8, L35.

⁷ R5, L32 – 33.

easily have caused a far more serious injury, even death”.⁸ The sentence ultimately imposed, viz., two years, was urged by the crown prosecutor with the rider that if the court was proposing to suspend any part of the sentence that the head term should be “two and a-half to three years”.⁹

14. These submissions from the Crown Prosecutor proceeded on the basis that the appropriate head sentence was circa 2 ½ to 3 years imprisonment. The crown did not place any comparable sentences or cases of principle to assist the court in this regard.

Applicant's submissions below

15. The applicant's counsel made a number of submissions including that:

- The applicant was 21 years old. He had been brought up by his mother following his parents' separation and that his father had passed away when the applicant was about 11.¹⁰
- He had completed year 12 and also completed a trade qualification through a TAFE course in Sydney. He had since worked most of his adult life, albeit in varied places and largely in areas involving limited training or education.¹¹
- He had played representative sport.¹²
- He has a supportive family, and, after having spent several months in custody isolated from them, was keen to return to their supportive environment.¹³

16. As to the facts, it was said that despite the inherent seriousness of the assault, there was no “lasting injury”.¹⁴ It was also submitted that immediately prior to the offending conduct, the applicant had been through a difficult few days. He had been drinking the previous evening, and was suffering from uncertainty following some false promises or expectations concerning the availability of work. He was also in conflict with the person that he was travelling with.¹⁵

⁸ R5, L35 – 36.

⁹ R5, L49 – 54.

¹⁰ R6, L1 – 8.

¹¹ R6, L9 – 47.

¹² R6, L18 – 21.

¹³ R6, L49 – R7, L2.

¹⁴ R7, L7 – 8.

¹⁵ R7, L21 - 28.

17. The applicant's counsel did not provide any comparable case or schedule of cases to seek to support his submission that a sentence "between 18 months and two years" with an order for suspension after "six to eight months" should be imposed.¹⁶ His primary submission was that the ex-officio plea and the applicant's good work history justified an order for suspension.¹⁷

Sentencing judges observations and comments

18. Samios DCJ ultimately acceded to the Crown Prosecutor's primary submission that a two year gaol term be imposed.¹⁸ His Honour also agreed with the crown prosecutor's preferred course of not suspending any part of the appropriate head sentence. From the context of proceedings it can be inferred that his Honour's starting point was that 3 years imprisonment was appropriate. In seeking to give weight to the ex-officio plea, youth and good work history he reduced the head sentence.¹⁹

19. His Honour said that the offence involved "significant violence".²⁰ He referred to the ex-officio plea;²¹ the applicant's "appalling" criminal history²² as well as his good work history.²³

20. His Honour was not provided with any cases to compare the present case with and to comply with the need to fix a sentence that is just in all the circumstances: s.9(1)(a) *Penalties & Sentences Act* 1992. In passing sentence, his Honour made no reference to any comparable sentence.

¹⁶ R8, L45 – 54.

¹⁷ R8, L54 – R9, L2.

¹⁸ R11, L31 – 33.

¹⁹ R11, L15 – 50.

²⁰ R11, L23.

²¹ R10, L15; R11, L19.

²² R11, L8.

²³ R11, L11.

Submissions on appeal

21. Leave is sought to amend the grounds of appeal:

Ground 1

The sentencing judge erred in failing to adequately appreciate the effect of ss.76 and 134 of the *Corrective Services Act* 2000.

Ground 2

The sentence imposed was manifestly excessive.

Ground 1

22. The applicant's timely plea to an ex-officio indictment warranted a discernible reduction in the custodial term that would otherwise be applicable: s. 13 *Penalties & Sentences Act; Cameron v. The Queen* (2002) 209 CLR 339.²⁴

23. It is clear that the sentencing judge intended to give regard to this feature.²⁵

24. However, in the result, the sentence imposed did not achieve any tangible reduction. This followed a miscomprehension, albeit one which counsel did not greatly assist in addressing, as to the operation of ss. 76 and 134 of the *Corrective Services Act*. In *R v Turner* [2002] QCA 79 this Court held that such an error was sufficient to establish that the sentencing discretion miscarried.²⁶

25. It is assumed, for the present argument in respect of Ground 1, that the 'range' for the 'head' sentence for this conduct is between 18 months to 3 years and that the applicant's bad criminal history permitted a sentencing judge to fix it at the higher end of this notional range i.e. at say 2 ½ to 3 years imprisonment, as urged by the crown prosecutor below.²⁷ Given the timeliness and completeness of the applicant's co-operation a reduction of circa one third was appropriate. It is permissible for a court to direct this reduction to either the head sentence (i.e. reduce to 2 years) or to the bottom (i.e. 3 years imprisonment suspended after 1 year or a recommendation for eligibility for parole after that period).

²⁴ This co-operation and course indicates remorse, an acceptance of responsibility and a willingness to facilitate the course of justice.

²⁵ R10, L16-20.

²⁶ *R v Turner* [2002] QCA 79 at pp 5 to 7 per Philipides J with McPherson JA and Muir J concurring.

²⁷ R5, L45-55.

26. However, the adoption of the first alternative, in all the circumstances of this case, had the practical effect of only marginally, if at all, affecting the actual term of imprisonment to be served by virtue of certain provisions of the *Corrective Services Act*. A sentence of 2 ½ years imprisonment (with no other order) would have meant that the applicant would have been eligible for post prison community based release after he had served 15 months: s 135(2)(e) of the *Corrective Services Act*.²⁸ As is pointed out above, the sentence actually imposed – 2 years – in fact means he will serve slightly more time in custody in respect of a 2 ½ year head sentence and only marginally less in respect of a 3 year head sentence, before becoming similarly eligible: s. 76 of the Act.²⁹ Thus the notional reduction of the head sentence, to take into account the plea and co-operation had little or no net effect.

27. It would thus be quite illusory to say that a reduction from a notional 2 ½ years to 3 years imprisonment to a sentence of 2 years imprisonment has in fact reduced the actual sentence imposed upon the applicant.³⁰ An assessment of any sentence for comparison cannot fairly be left at head sentences, rather, the actual term in custody should be the primary point for comparison.³¹

28. Consequently, it is submitted that no proper regard has been given to the applicant's co-operation and plea despite his Honour recognising that such regard was appropriate and due. In the result the sentencing discretion miscarried.

Ground 2

29. In any event, that is, whether a sentencing error is established under ground 1 that the period that the applicant will serve, i.e. the effective sentence in the final result was manifestly excessive. His Honour erred - 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

²⁸ A sentence of 3 years would mean he would be eligible for a post prison release order after 18 months.

²⁹ i.e. 16 months.

³⁰ C.f. s.13(1)(b) *Penalties & Sentences Act*.

³¹ c.f. *Postiglione v The Queen* per Dawson & Gaudron JJ at...: “However, the head sentence is but one component of the sentences. A proper comparison involves a consideration of all components” and “In these circumstances, the proper course, in our view, is to have regard to the total effect of the sentences imposed on them, not merely the period by which their prior sentences were increased.”

that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.”

30. The circumstances in this case that suggest that an effective sentence in the middle rather than the top of the appropriate range for like offences was warranted are, the absence of any significant injury;³² the small measure of contribution to the incident on the part of the complainant and his mother which although short of provocation was at least provocative; the timely plea and co-operation with the administration of justice and his good vocational history and youth.

31. The absence of significant injury, in circumstances where a weapon of this kind has been wielded suggests that some degree of restraint must have been shown by the applicant. He is entitled to the good fortune that no significant injury was sustained.

Comparable cases

32. It has already been observed above that Samios DCJ was not provided with any comparable cases, nor did his Honour cite any to justify the sentence imposed.

33. This may in part be explained by the fact that despite the objective seriousness of an assault which involves the use of a tyre lever as a weapon, yet fortunately for both parties no serious injury was in fact caused and in particular grievous bodily harm was not sustained. This is an unusual combination.

34. A case that has similar hallmarks as to the nature of the lead up is *Tootoo* [2000] QCA 312. It is not relied upon as an overly useful comparable as there, a mug was thrown³³ following some “road rage” which can most obviously be distinguished from the deliberate act of wielding and using an iron bar. The initial features which caused the conflict and the

³² The complainant suffered a “deep” cut but there is no suggestion of a long lasting injury or cosmetic disfigurement: *R v Tufuga & Kepu* [2003] QCA 171 para 20: “This is a case where the remarks of Pincus JA in *R v Amittuanai* (1995) 78 A Crim R 588 are apposite; there he said that the punishment may depend upon the extent of the damage the victim happens to sustain. Generally in the criminal law a blow which by good luck has caused little damage will attract a lower penalty though there was a risk of it causing catastrophic results.” Also see s.9(4)(d) of the *Penalties & Sentences Act*.

³³ *Tootoo* [2000] QCA 312 at para 18: “In his sentencing remarks the learned judge stated ‘Here we are again driving a motor vehicle at nearly 50 kilometres per hour throwing a missile into another motor vehicle which could easily have resulted in peoples death’.”

resultant injuries are however somewhat similar.³⁴ Also, the comparables discussed at paragraphs [20-22] in that case are also of some assistance. Finally, this Court's approach in *Hudson* [2002] QCA 239 which was dealing with grievous bodily harm and also the sentences imposed by some District Court judges on more closely comparable cases viz., *Carroll* per Shanahan DCJ, 14 December 2004, *Cook Robertson* DCJ, 21 November 1998 and *Robertson* Wylie DCJ, 24 August 1997 suggest that a sentence imposing 18 months actual imprisonment is too high. These authorities³⁵ suggest, giving proper regard to the absence of any lasting or significant injury and the ex-officio plea, that a sentence that meant actual imprisonment circa 9 to 12 months would be appropriate.³⁶

Orders sought

35. The orders sought are:
- 35.1. Leave to appeal granted.
- 35.2. Appeal allowed.
- 35.3. Sentence of 2 ½ to 3 years imprisonment suspended after 9 to 12 months imprisonment for an operational period of 12 months. Alternatively, a sentence of 18 months imprisonment would achieve a similar result.



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 LAWYERS
 27 January 2006

³⁴ *Tootoo* [2000] QCA 312 at para 7: The injury was described as relatively minor. She was said to have "a small scar" as a result, and to have suffered from headaches during the following summer months.

³⁵ It is accepted that it is not correct to regard District Court dispositions as authoritative or binding upon this Court but they do provide some assistance as to achieving consistency.

³⁶ At the time of the listed date for argument, the applicant will have served a little over 7 months imprisonment.