SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ewen* [2006] QCA 11
PARTIES:	**R** **v** **EWEN, Simon Matthew** (applicant)
FILE NO/S:	CA No 347 of 2005 DC 312 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Rockhampton
DELIVERED EX TEMPORE ON:	6 February 2006
DELIVERED AT:	Brisbane
HEARING DATE:	6 February 2006
JUDGES:	McMurdo P, Keane JA and Muir J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – GENERALLY - where applicant pleaded guilty to one count of assault occasioning bodily harm whilst armed with a dangerous instrument – where applicant sentenced to two years' imprisonment - where 169 days already spent in custody was declared time already served – where applicant had extensive criminal history including previous convictions for assault - where applicant claims that trial judge erred in failing to appreciate the effect of s 76 and s 134 *Corrective Services Act* 2000 (Qld) – where applicant claims that sentence was manifestly excessive in all the circumstances – whether trial judge should have awarded sentence of more than two years thus making applicant eligible for conditional early release *Corrective Services Act* 2000 (Qld) s 76(1), s 134(1)

R v Tufuga and Kepu; ex parte Attorney-General (Qld) [2003] QCA 171; CA Nos 74 and 75 of 2003, 2 May 2003, distinguished
R v Turner [2002] QCA 79; CA No 364 of 2001, 15 March 2002, cited
Veen v The Queen [No 2] (1987-1988) 164 CLR 465, cited

COUNSEL: A Boe (sol) for the applicant
M J Copley for the respondent

SOLICITORS: Boe Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: The applicant pleaded guilty by way of ex officio indictment in the District Court at Rockhampton to one count of assault occasioning bodily harm whilst armed with a dangerous instrument on 17 June 2005. He was sentenced to two years' imprisonment. One hundred and sixty-nine days spent in pre-sentence custody was declared to be time already served under the sentence. He applies for leave to appeal against his sentence contending that the learned sentencing judge erred in failing to adequately appreciate the effect of s 76 and s 134, *Corrective Services Act* 2000 (Qld) ("the Act") and that in any case the sentence was manifestly excessive.

The applicant was 29 at the time of the offence and at sentence. He had an extensive criminal history in his home State of New South Wales. He was first convicted in November 1998 of four counts of common assault, placed on a two-year recognisance and fined. In December that year he breached the recognisance when he was convicted of malicious damage and was again fined. In March 2001 he was sentenced to 12 months' suspended imprisonment upon entering into a bond for reckless

driving, assaulting a police officer in the execution of his duty, resisting a police officer and failing to comply with the good behaviour bond. He was sentenced to six months' imprisonment. In October 2001 he was sentenced to six months' imprisonment for two assaults occasioning bodily harm and to lesser concurrent terms for offences of assault, resisting police and assault occasioning harm and common assault. On 8 July 2002 he was convicted in the Bathurst Local Court of indecent assault and assault occasioning bodily harm and sentenced to nine months' imprisonment suspended upon him entering into a bond. In August 2002 he was sentenced to 12 months' imprisonment with a non-parole period of nine months for two counts of malicious wounding. In June 2003 he was fined for possessing a prohibited drug. On 25 November 2004 he was sentenced to three months' imprisonment for two contraventions of an apprehended violence order and assault doing bodily harm.

He also had some Queensland criminal history. In 1997 he was fined without conviction for possessing a dangerous drug and in 1999 was convicted and fined for creating a disturbance in licensed premises.

A schedule of agreed facts was tendered at sentence. The complainant, a 31-year-old mechanic, was being driven to work at 6.20 a.m. on Friday, 17 June 2005 by his mother. She stopped at a set of traffic lights at the intersection of Fitzroy and George Streets in South Rockhampton. The applicant was also stopped at those lights. When the lights

turned green the applicant did not drive off immediately. The complainant's mother beeped her horn. The applicant turned around, put his arm out of his car window and gestured towards her raising his middle finger.
Both vehicles then drove through the intersection onto George Street. The complainant's mother overtook the applicant's vehicle in the right-hand lane of the dual carriageway and then moved into the left lane in front of the applicant's car. As the complainant's car passed the applicant, the complainant leant out the passenger side window and said, "Keep your eyes open, mate." The complainant gestured towards the applicant showing his hands palms up. The applicant made some verbal response and then began driving erratically, swerving back and forth and flashing his headlights. The applicant followed the complainant's vehicle for about 2.4 kilometres to the Port Curtis Road turn-off.

The complainant's mother stopped her vehicle at a railway crossing to allow a train to pass. The applicant pulled up behind and got out of his car. The complainant was concerned for his mother's safety and got out of the car to walk back to meet the applicant who was carrying a 45 centimetre long wheel spanner/tyre lever. The applicant had recently changed a tyre with the implement which had been beside him in the cabin of his vehicle. The applicant said, "Have you got something to say, cunt?" as he held the implement raised slightly above his head. The complainant said, "What are you doing?" and put his hands over his face to protect himself. The applicant

repeated his inquiry and swung the wheel spanner at the complainant several times hitting him at least once.

The complainant kicked out as he put his arms up to protect his head. The applicant struck the complainant in the forehead with the wheel spanner directly between the eyes causing immediate pain and a bleeding laceration. The complainant stumbled back to his mother's car telling her to take the registration number. The applicant again approached the complainant holding the spanner in a poised position. The complainant said, "Just stop, man, you've proved your point, just look at me." The applicant then returned to his vehicle and drove off.

The complainant was treated at Rockhampton Base Hospital where his deep laceration was sutured and his cervical spine was X-rayed because of his neck pain. No victim impact statement was tendered at sentence but it appeared the complainant has made a full recovery. Photographs of the weapon and of the injured complainant were tendered at sentence and have been viewed by this Court.

The applicant was located later that day and took part in an electronically recorded interview with police. He said that he was defending himself with the implement but was embarrassed because he realised he had over-reacted to the complainant's punches. He insisted that the complainant had been the aggressor throughout. This was not, of course,

entirely consistent with the agreed statement of facts on which the plea of guilty was ultimately based.

The Prosecutor at sentence submitted that the applicant's serious recidivist criminal history suggested that a term of imprisonment should not be suspended to take into account the early plea of guilty by way of ex officio indictment but this should be reflected instead by reducing the head sentence because the criminal history suggested that he would inevitably breach a suspended sentence. The Prosecutor contended that a sentence of two years' imprisonment was appropriate but suggested that, if there was to be an early suspension, a sentence of between two and a half to three years' imprisonment should be imposed.

The applicant's counsel at sentence emphasised that the applicant was still only 29 years old. He had an excellent work history and had travelled to the Rockhampton area to take up employment. Having now spent a lengthy period in pre-sentence custody, he had gained some insight into his behaviour, was remorseful and understood that the offence was serious. Fortunately the complainant had no lasting injuries. The applicant used the tyre lever opportunistically in a moment of anger when it was beside him in the front seat of the car after earlier changing a shredded tyre. At the time he had been frustrated by a job opportunity falling through, had drunk heavily the night before and had been arguing with his travelling partner.

The applicant accepted that he grossly over-reacted to the complainant's taunts and was embarrassed about his conduct. He had the support of his family and employment in New South Wales and was keen to return there.

Counsel reminded his Honour that because the sentence was less than two years a recommendation inferentially for early community release could not be made and submitted that a head sentence of between 18 months and two years' imprisonment would ordinarily be appropriate but urged the judge to suspend that term, either immediately because of the pre-sentence custody, or after a further short period, making a total actual custodial period of six or eight months. Counsel especially emphasised the applicant's co-operation with the criminal justice system in pleading guilty by ex officio indictment.

His Honour noted that it was fortunate the complainant did not suffer more serious injuries and was concerned about the applicant's significant criminal history for offences of violence. His Honour also noted the applicant's age, plea of guilty, co-operation with the administration of justice and good work history. His Honour stated that he accepted the Prosecutor's submissions as to the appropriate sentence and that taking all favourable factors into account a sentence of two years' imprisonment should be imposed with a declaration as to pre-sentence custody.

Because the sentence imposed was not more than two years' imprisonment the applicant will have to serve two-thirds of that sentence, 16 months' imprisonment, before becoming eligible for conditional release (see s 76(1) and s 134(1) of the Act) unless granted an exceptional circumstances parole order under s 133 of the Act. The applicant contends that the learned sentencing judge erred in fixing a sentence of two years' imprisonment because he did not appreciate this effect of the Act. Had his Honour imposed a sentence of two and a half or three years' imprisonment, the applicant would have been eligible to apply for post-prison community-based release after serving 15 to 18 months. The Prosecutor contended that a sentence of two and a half to three years' imprisonment was only apposite if the sentence was to be suspended, that is inferentially some time earlier than at that half-way point. The applicant contends that if his Honour proceeded on the basis of this erroneous understanding of the effect of the Act on the sentence imposed, this Court should intervene. (See *R v Turner* [2002] QCA 79, CA No 364 of 2001, 15 March 2002.)

There is, however, nothing to suggest that his Honour, an experienced sentencing judge, did act on such an erroneous basis, especially in the light of submissions referred to earlier by defence counsel. The sentence imposed by his Honour was reached after careful consideration. Unlike a suspended sentence, it has the advantage that when the

applicant has served his period of imprisonment, and any period of conditional release, he will not have any further term of imprisonment hanging over his head like the sword of Damocles should he again re-offend. It has the additional benefit that, unlike a suspended sentence, the applicant, if conditionally released, can be made subject to appropriate conditions for the brief remaining period of the two-year sentence (s 80 of the Act). This ground of appeal fails.

The applicant's second contention is that the sentence is, in any case, manifestly excessive.

The maximum penalty was 10 years' imprisonment. The 29-year-old applicant cannot rely on youthful impetuosity as a mitigating factor. Furthermore, he has been given many past opportunities by courts to address his aggression. He clearly has difficulty controlling his anger and his criminal history suggests he is becoming a recidivist violent offender. His previous criminal history should be taken into account in determining the appropriate sentence but it cannot, of course, result in a penalty disproportionate to the gravity of the offence (*Veen and The Queen* (1988) 164 CLR 465).

The offence has very serious aspects. Although the complainant was fortunately not seriously injured, he so easily could have been. Pressures and stresses of 21st

century life require members of our increasingly crowded and diverse community to be more, not less, tolerant of each other. Conduct such as this, commonly referred to as "road rage", is unacceptable and justifies a condign deterrent penalty, especially where the offender has a history of violence.

In *R v Tufuga and Kepu; ex parte A-G (Qld)* [2003] QCA 171, CA Nos 74 and 75 of 2003, 2 May 2003, this Court dismissed an Attorney-General's appeal and the applicants' applications for leave to appeal. Tufuga was sentenced to an effective term of 18 months' imprisonment suspended after three months with an operational period of 18 months and Kepu to two years' imprisonment suspended after five months with an operational period of two years for an assortment of road rage related offences including assault occasioning bodily harm in company. Both were co-operative with the authorities and pleaded guilty at an early time. The complainants were not seriously injured. Unlike this applicant, neither Kepu nor Tufuga had any significant criminal history and they had dependent children. This Court noted that "everything pointed to the fact that neither would be likely to commit such serious offences again." The sentences imposed in that case do not suggest that the applicant's sentence of two years' imprisonment here was manifestly excessive even in the light

of his early plea of guilty to an ex officio indictment and his co-operation with the administration of justice.

I would refuse the application for leave to appeal against sentence.

KEANE JA: I agree. No doubt it is true to say that the severity of injury inflicted must necessarily have an important bearing on the sentence imposed, but there are other considerations which have to be balanced. Some are especially relevant in this case. In particular there is the consideration of general deterrence.

Incidents of violent conduct as a consequence of road rage must be actively discouraged. They are apt not only to terrify and injure the immediate victim, but also to alarm and imperil the safety of other users of public roads.

Further, in this case, there are strong considerations of specific deterrence which are compelling in the case of the present applicant having regard to his criminal history, involving, as it does, frequent and recent episodes of actual personal violence. These considerations mean, in my respectful opinion, that the sentence imposed by the learned sentencing judge was not excessive and certainly not manifestly so.

I agree with the learned President that the application should be dismissed and for the reasons which she gave.

MUIR J: I agree with the reasons previously given and with the order proposed.

THE PRESIDENT: The application is refused.