SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kinersen-Smith & Connor; ex parte A-G (Qld)* [2009] QCA 153
PARTIES:	**R** **v** **KINERSEN-SMITH, Jarryd** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant) **R** **v** **CONNOR, Kayle Perry** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 42 of 2009 CA No 43 of 2009 DC No 309 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	5 June 2009
DELIVERED AT:	Brisbane
HEARING DATE:	13 May 2009
JUDGES:	McMurdo P, Holmes JA and A Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where respondents convicted on pleas of guilty of grievous bodily harm – where each respondent sentenced to two and a half years imprisonment, suspended after six months, for an operational period of three years – where the assault was unprovoked, committed in company and in a public place at night – where respondents pleaded guilty to an ex officio indictment –

where respondents were young men with no previous criminal history – where respondents showed remorse and good prospects of rehabilitation – whether, having regard to other grievous bodily harm cases, sentence manifestly inadequate

R v Dillon; ex parte A-G (Qld) [2006] QCA 521, distinguished
R v Fisher [2008] QCA 307, considered
R v Mules [2007] QCA 47, cited
R v O'Grady; ex parte A-G (Qld) [2003] QCA 137, cited
R v Tupou; ex parte A-G (Qld) [2005] QCA 179, distinguished
R v Verheyen [2008] QCA 150, considered

COUNSEL: A W Moynihan SC, with L Brisick, for the appellant
G M McGuire for the respondent, Kinersen-Smith
A J Glynn SC for the respondent, Connor

SOLICITORS: Director of Public Prosecutions (Qld) for the appellant
Carew Lawyers for the respondent, Kinersen-Smith
Robertson O'Gorman for the respondent, Connor

[1] **McMURDO P:** The appeal should be dismissed for the reasons given by Holmes JA.

[2] **HOLMES JA:** The respondents were convicted of grievous bodily harm on their pleas of guilty to an ex officio indictment. Each was sentenced to two and a half years imprisonment, suspended after six months, with an operational period of three years. The Attorney-General appeals against those sentences on the ground that they are manifestly inadequate.

The offence

[3] At the time of the offence, which was committed on 4 April 2008, Connor was 18 years old and Kinersen-Smith was 17 years old; there was an age difference of nine months between them. In the early hours of the morning, the two were walking with a third male along an inner city street. They saw the complainant, a slightly built young man of 19, sitting on the kerb on the other side of the street, waiting for a lift from a friend. The two respondents, who are both of burly physique, shouted derogatory remarks at him: "Where's your boyfriend?" and "You can suck my dick if you want". The complainant responded with a gesture commonly known as "giving the finger". Kinersen-Smith approached him and asked why he had made the gesture; the complainant did not reply. Kinersen-Smith hit him in the head with an open hand, after which Connor punched him in the head. Those blows were followed by kicks from each of the respondents to the complainant's torso, and another open-handed blow by Connor to the complainant's head. (It was probably that blow which caused the grievous bodily harm to the complainant, in the form of a serious eye injury.) The complainant reeled from the blows, but stayed seated, and the respondents walked off.

[4] These events were filmed by the City Safe camera system. The footage was shown at the sentence hearing and again in this Court on the appeal. It shows the two

respondents as they walked away making congratulatory gestures to each other: shaking hands and hugging, with the respondent Connor miming the acts of punching and kicking the complainant. It is of some reassurance that it also shows them being arrested almost immediately by police officers who had seen what was caught on camera. By that time, however, the complainant had been picked up by his friend and taken home. He did not realise the extent of his injury until the following day, when he experienced blurring and a blind spot in the vision in his right eye.

The impact on the complainant

[5] The complainant had sustained choroidal ruptures, haemorrhaging and retinal detachment in the right eye. The retinal detachment was corrected by surgery, but the choroidal rupture had left him with visual acuity in the right eye of less than 6/60, compared with 6/6 in the left. His loss of sight was not complete, but he was described as "legally blind"; and there was no prospect of improvement. In an impact statement, he described the pain in his eye after the assault as excruciating. Any attempt to read or focus his vision brought on migraine headaches, and for some months he was not able to do anything very active because of the risk of further detachment of his retina. The eye remains useless for reading, driving and focusing vision.

[6] At the time he was assaulted, the complainant was studying infomechatronic engineering at university. Not surprisingly, he suffered a good deal of anxiety about the implications of the injury for both his professional and his personal life. He had postponed his university studies for the rest of 2008, although as at the date of sentencing in February 2009 he had resumed studying. He remained unsure about whether he could continue in his proposed career, because it involved dealing with circuit boards and other small items of electronic equipment.

The respondents' antecedents

[7] The respondents declined to be interviewed by the police in relation to the assault, but Kinersen-Smith wrote an apology to the complainant 10 days after the incident. Connor offered an apology, through his counsel, at the sentence hearing. Connor was 19 years old at sentence, Kinersen-Smith 18. Neither had any previous criminal convictions. At sentence, reports were tendered on their behalf: in Connor's case, from a psychiatrist and, in Kinersen-Smith's, from a psychologist. In both cases the examining professional reported an absence of any mental illness or personality disorder. Both respondents had been given to binge drinking, and the offence in question was a product of intoxication. Both had been attending rehabilitative programmes: in Connor's case, psychiatric counselling, in Kinersen-Smith's, a behaviour management programme, both apparently making good progress. Neither was thought to be at risk of further offending.

[8] At the time of the assault, Connor was working as a labourer and trades assistant, while Kinersen-Smith was working as a production scheduler, having deferred university studies for a year. Both had close and supportive families. A number of references, from family friends and a football coach, was tendered on Connor's behalf, indicating that the offence was out of character. Kinersen-Smith provided similar references, as well as one from his supervisor in his employment, describing him as reliable and mature. At sentence, it was pointed out on the respondents'

behalf that the incident was a brief one; that neither appreciated the injury they had done to the complainant, because they left him still sitting with his arms over his head; and that both had complied with strict bail conditions, requiring a curfew and abstinence from use of alcohol or drugs, for several months while awaiting sentence.

The sentencing

[9] The learned sentencing judge noted the serious injury suffered by the complainant, with its significant impact on his life and studies. He described the offence as "cowardly and unprovoked", "a serious example of alcohol-fuelled violence". While his Honour accepted that the complainant's injury was not immediately obvious, the behaviour of the respondents in congratulating each other after the assault was disturbing and callous. He took into account that they were youthful first offenders who had pleaded to an ex officio indictment, and accepted that they were remorseful. He was satisfied that the offence was out of character for both and that both were hard-working young men with good prospects of rehabilitation. General deterrence and the harm to the victim were significant factors; the learned judge concluded that actual imprisonment was the only appropriate penalty. He arrived at two and a half years imprisonment as the appropriate head sentence in each case and allowed for the mitigating factors by suspending it after six months.

Decisions relied on by the appellant

[10] Counsel for the appellant submitted that the head sentence fell below an appropriate range and that its early suspension by way of allowance for mitigating factors was unwarranted. A sentence of three years imprisonment with either a parole release date or suspension after 15 months should have been imposed. Particular reliance was placed on the decision of this Court in *R v Tupou; ex parte A-G (Qld)*[1] for the proposition that that was the appropriate sentence. Reference was also made to *R v Dillon*; *ex parte A-G (Qld)*,[2] *R v Verheyen*,[3] and *R v Fisher*,[4] all of which, it was said, supported the contention that *R v Tupou* was authority for that result.

R v Tupou

[11] In *Tupou*, the Attorney-General successfully appealed against a sentence of three years imprisonment suspended after nine months for an operational period of three years, imposed on the respondent's plea of guilty to grievous bodily harm. That offence occurred late at night at a taxi rank in the inner city. The respondent, who was of extremely solid build, got out of a taxi and punched the complainant, who was waiting in a taxi queue. The complainant had attracted the respondent's attention by saying something, but he had offered no provocation. He was 25 years old, slight in build, and suffered from cerebral palsy. The respondent knocked him down with his first punch, punched him again while he was on the ground and made to kick him. He was in company with another man who did not take part in the assault, and pulled him away from it. The two ran from the scene and took their shirts off, apparently to avoid detection. The respondent ran off again later that night when police approached him in relation to another matter. Some weeks later, after police had identified him as the attacker, he admitted to the offence.

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1 [2005] QCA 179.
2 [2006] QCA 521.
3 [2008] QCA 150.
4 [2008] QCA 307.

[12] The complainant in *Tupou* suffered fractures to his cheeks, his jaw and his nose, and some loosened teeth. He could not eat solid foods for two months, experienced severe headaches and had difficulty sleeping over a period of months. Nine months later, he was suffering from a lack of confidence which had caused him to change his employment at a considerable loss of income, and was still in need of treatment to restore his appearance and his ability to chew. The respondent was 18 years old. He said that he was intoxicated at the time; he was a diabetic and his failure to take his insulin had compounded the effect of his alcohol intake. He had some convictions for street offences; at the time he committed the offence of grievous bodily harm, he was on a 12 month good behaviour bond.

[13] In this Court, the Chief Justice, with whose judgment the other members of the Court agreed, noted the circumstances properly taken into account as weighing against the respondent: that it was an unprovoked, cowardly and vicious attack; that the respondent had made a calculated attempt to avoid detection and had demonstrated disregard for the complainant; that the consequences for the complainant were serious; and that the respondent was at the time on a good behaviour bond. To those factors, his Honour added the importance of deterrence in sentencing for violent offending, so that citizens using public places at night could do so without the risk of attack. On the other hand, the sentencing judge had correctly recognised these considerations: no weapon was used and the respondent had acted spontaneously; there was an early plea of guilty after a full hand-up committal and co-operation with the police; the respondent had a limited prior criminal history; and there was a need to focus on rehabilitation of young offenders.

[14] The Chief Justice noted that in *R v Bryan; ex parte A-G (Qld),*[5] a sentence of six to seven years imprisonment was described as the appropriate minimum head sentence for an offence of grievous bodily harm involving life threatening injuries inflicted with a knife. In that case, the sentence actually imposed by the Court of Appeal was six years imprisonment, without any recommendation or suspension. Having regard to the general comparability of the circumstances in *Tupou* with *Bryan,* apart from the use of a weapon in the latter case, the Chief Justice observed that a head sentence in the range of three to four years would be appropriate in *Tupou* "after allowing for the plea of guilty and other matters of mitigation". Recognising the moderate approach to be taken on an Attorney-General's appeal, the Court maintained the head sentence of three years imprisonment, but altered the period to be served before suspension to 15 months.

R v Dillon

[15] In *R v Dillon,* the Attorney-General appealed against a sentence of three years imprisonment, suspended after 10 months with an operational period of three years, imposed on a 24 year old respondent convicted on a plea of guilty of grievous bodily harm. While drinking at a tavern he had had words with the complainant, an older man, about his (the respondent's) bad language. Some hours later, when the complainant was on his way home, the respondent stepped out in front of him with his fists clenched. The complainant walked away but was hit from behind and, when he fell to the ground, was kicked in the face by the respondent with the result that he lost consciousness. He suffered multiple fractures to his facial bones, including one which was likely to have endangered his life without treatment. He was left with some loss of sensation in his face and some degree of vision impairment which caused him to need reading glasses.

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5 [2003] QCA 18.

[16] The respondent in *Dillon* had a criminal history for a variety of matters, mostly street offences, but, significantly, had a conviction for assault occasioning bodily harm. That assault was an unprovoked punch to a complainant who was not seriously injured; it was committed eight and a half months before the grievous bodily harm. After the subject offence, the respondent had committed a number of offences, such as receiving stolen property and possessing dangerous drugs, and had breached probation orders. He was said, however, to have had a good employment history and to be making attempts to rehabilitate himself and to stop the alcohol abuse which was at the heart of his offending.

[17] The Court in *Dillon* emphasised the nature of the attack and the serious, life-threatening and perhaps permanent injuries it had caused; the fact that the respondent had relatively recently been dealt with for an offence of violence committed in public while intoxicated; and that he had after the grievous bodily harm gone on to commit further offences associated with alcohol abuse and had re-offended on probation, so that it could not be said he had immediately rehabilitated. The Court pointed out that the attack was as serious as that in *Tupou*, but Tupou was much younger, had a lesser criminal history, and had made an earlier plea of guilty and co-operated more significantly with the administration of justice. In the circumstances of *Dillon*, the sentence imposed in *Tupou* (three years imprisonment suspended after 15 months) was, the Court considered, at the most lenient end of the appropriate sentencing range. Accordingly, that sentence was substituted.

R v Verheyen

[18] *Verheyen* was an application for leave to appeal against a sentence of three years imprisonment with a parole release date after 12 months, said to be manifestly excessive. Although the relevant offence was, as here, grievous bodily harm, the facts were dissimilar: the applicant, when asked to leave a motel, had an argument with the motel owner. He hit the man from behind with a three quarters full plastic bottle, knocking him to the ground, and while he was lying face down, punched him three times to the face, fracturing his jaw. The applicant had criminal convictions, although none for offences of violence. His plea of guilty came after a full committal hearing, and the sentence was a contested one. Referring to *Tupou* (as a case also involving a gratuitous, unprovoked assault causing grievous bodily harm) and the sentencing range of three to four years imprisonment found appropriate there, the Court held that the sentence imposed on Verheyen at first instance was within a proper range.

R v Fisher

[19] *R v Fisher* involved a 19 year old applicant for leave to appeal against sentence. In company with three other young men, he set upon a 35 year old man walking alone in the early hours of the morning. The applicant hit him from behind without warning, and punched him repeatedly until he fell to the ground. As he tried to get up, despite his indication that he did not want to fight, the applicant knocked him again to the ground. He was punched and kicked in his head and back by the applicant and his three co-offenders. They eventually walked away, leaving him bleeding on the footpath. He had numerous facial fractures and required surgery to correct numbness and double vision; his teeth were damaged and could not be repaired; and he suffered from post-traumatic stress disorder. The applicant gave a false account of the complainant's having provoked a fight, and the matter was

ultimately listed as a contested sentence, but on the day on which it was to take place he pleaded guilty. The applicant had a prior criminal history including offences of dishonesty, but none of violence.

[20] The Court in *Fisher* summarised these factors as relevant in concluding that the offending deserved punishment at the higher end of the three to four year range referred to in *Verheyen* and *Tupou*:

> "The applicant was the principal offender, he assaulted the [complainant] in company, the assault was entirely unprovoked, the assault took place in a public place; the applicant not only punched but also kicked the complainant several times once he had fallen to the ground, the applicant recommenced his attack on the complainant after he had fallen to the ground and was completely unable to attempt to defend himself; the complainant suffered serious and lasting injuries; the applicant's false version in the police interview showed a lack of remorse and the plea of guilty was not an early one."[6]

The sentence imposed at first instance, of four years imprisonment with parole eligibility date after one third, was not manifestly excessive.

Discussion

[21] The appellant relies on the reference in *Tupou* to a range of three to four years after allowing for mitigating circumstances, to argue that the respondents here should likewise be sentenced to three years imprisonment with parole release or suspension after 15 months. It is said that the circumstances in *Tupou* were less serious than those here, but there is room for argument on that point. Certainly, the offence in this case was committed in company, a significant aggravating factor not present in *Tupou*; and, as the appellant correctly points out, the eye injury to the complainant in this case was more severe than any of the injuries suffered by the complainant in *Tupou*. On the other hand, Tupou's blows seem to have been considerably more forceful, producing multiple facial fractures; and they caused a range of injuries which added to the plight of a man who already suffered from a significant disability. Tupou ran from the scene, though it was clear that the complainant was injured; and he took steps to avoid being apprehended. In this case, the respondents' behaviour immediately after the incident was rightly described as disturbing and callous, but it was a callousness manifested in ignorance of the damage they had actually done to the complainant, and they did not thereafter do anything to avoid detection.

[22] It seems to me, in short, that, as is usual in any comparison of the facts of two sentencing cases, there are distinguishing features, some to the respondents' advantage, others not; but I do not think one can readily characterise one case as more serious than the other.

[23] The appellant points to the fact that the head sentence of three to four years in *Tupou* was described as appropriate *after* mitigating circumstances were taken into account. But the mitigating circumstances in *Tupou* did not loom large. They seem to have been limited to the facts that the respondent eventually admitted to the

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6 [2008] QCA 307 at [32].

offence and pleaded guilty and that he was young (18), with a prior criminal record which was not extensive, consisting of street offences. Unlike Tupou, both respondents here had evinced remorse; their pleas were made to an ex officio indictment; neither had any criminal history at all; both had undertaken counselling or treatment; both had gone some considerable way towards their rehabilitation, as was evidenced by their progress in those programmes and their compliance with extremely rigorous bail conditions; and both tendered reports and references which lent considerable support to the view that they were unlikely to re-offend. Importantly, unlike Tupou, they had not earlier been extended the lenience and opportunity of a good behaviour bond, only to breach it. Given those features, the argument that no greater allowance should have been made for mitigating circumstances than that in *Tupou* is not, in my view, tenable.

[24] In any case, I think that the appellant has placed undue emphasis on what was said in *Tupou* as to range. The Chief Justice's remarks there were concerned with the circumstances of *Tupou's* case, and the sentencing range appropriate to those circumstances. While, clearly, the result in that case offers guidance as to an appropriate sentence in other, similar cases, it did not purport to dictate the applicable head sentence for all cases of grievous bodily harm (not involving a weapon) in public places at night. Nor did it suggest that in no case could mitigating circumstances operate to produce a different result from that in *Tupou*. Indeed, this Court has on other occasions emphasised the breadth of the sentencing range for offences of grievous bodily harm.[7]

[25] Nor does anything said in *Dillon* suggest a view that *Tupou* set the parameters for sentencing in all similar cases of grievous bodily harm. Instead, in terms of relativity, given the significant and relevant criminal history of the respondent in *Dillon* before and after the relevant offence, that case tends to support the appropriateness of the sentence imposed on the respondents in this case. *Verheyen* and *Fisher*, of course, are of less assistance, because they do no more than indicate that the sentence actually imposed is not manifestly excessive; but again on their facts and given the criminal histories of the offenders in those cases, they do not suggest that the sentence here is out of proportion for youthful first offenders.

[26] There is no doubt that deterrence is an important factor in sentencing offenders who commit serious violence in public places. On the other hand, this Court has emphasised the community interest in the rehabilitation of young offenders:

> "youthful offenders with limited criminal histories and promising prospects of rehabilitation who have pleaded guilty and cooperated with the administration of justice, even where they have committed serious offences like [robbery with violence], should receive more leniency from courts than would otherwise be appropriate."[8]

[27] That approach was adopted by the majority in *R v O'Grady; ex parte A-G (Qld).*[9] In that case, the respondent, who was 28 years old and had no previous criminal history, had been with a group which for no apparent reason set upon two middle aged couples in the city around midnight. The respondent crash-tackled and

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7 *R v Brand* [2006] QCA 525 at [15]; *R v Swayn; ex parte A-G (Qld)* [2009] QCA 81 at [14].

8 *R v Mules* [2007] QCA 47 at [21]; see also *R v Horne* [2005] QCA 218 at 5-6; *R v Mladenovic; ex parte A-G (Qld)* [2006] QCA 176 at [27].

9 [2003] QCA 137.

punched one of the two men, causing a relatively minor facial injury, and punched the other, splitting his lip and making his nose bleed. On the arrival of the police, the second victim put his fingers to the respondent's neck in a gesture suggesting he should be shot. The respondent responded with a single punch causing grievous bodily harm. He knocked the man unconscious, in the process fracturing his orbital bone. That injury was repaired by an operation, but there was some residual distortion of vision. At first instance, the respondent was sentenced to 12 months imprisonment, to be served by way of intensive correction order. Williams JA, with whose judgment Atkinson J agreed, described the offence as:

> "a case of unprovoked, gratuitous street violence … the culmination of a reasonably prolonged attack on two passers-by who were unknown to the respondent."[10]

It called, he said, for a custodial sentence; the intensive correction order was manifestly inadequate. A head sentence of two years imprisonment was the appropriate punishment; in ordinary circumstances, the early plea of guilty, the respondent's remorse, his previous good character, and his relative youth would have resulted in its being suspended after a short period in actual custody. However, since the respondent had already completed two months of the intensive correction order, and because of the principles relevant to an appeal by an Attorney-General, it was not, in the circumstances, appropriate to require any time in actual custody. Instead, the respondent was sentenced to imprisonment for two years to be wholly suspended with an operational period of three years. The comments of the majority and the result in *O'Grady* tend to confirm the adequacy of the sentence imposed here.

Conclusion

[28] The head sentence, while lenient, was not outside a proper range; and the allowance for mitigating factors, particularly the youth and strong prospects of rehabilitation of the respondents, was appropriately made. The need for real punishment of the brutish and mindless assault on the complainant was properly recognised by the penalty of six months actual imprisonment; a severe penalty for offenders of the respondents' youth, who had not previously fallen foul of the criminal justice system. Added to that is the prospect they face, for another two and a half years after they emerge from custody, of spending another two years in jail should they re-offend. The deterrent effect, both personal and general, of such a punishment for first-time offenders is likely to be considerable.

[29] The sentence was not inadequate. I would dismiss the appeal.

[30] **A LYONS J:** I agree with the reasons given by Holmes JA that the appeal should be dismissed.

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[10] At [25].