SUPREME COURT OF QUEENSLAND

CITATION:	*R v Tupou; ex parte A-G (Qld)* [2005] QCA 179
PARTIES:	**R** **v** **TUPOU, Kieron Albert Luasii** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 88 of 2005 DC No 90 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	31 May 2005
DELIVERED AT:	Brisbane
HEARING DATE:	31 May 2005
JUDGES:	de Jersey CJ, Atkinson and Mullins JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against sentence allowed** **2. That the sentence imposed in the District Court, imprisonment for three years suspended after nine months for an operational period of three years, be varied to the extent of providing for suspension after 15 months, and otherwise confirmed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER – APPLICATIONS TO INCREASE SENTENCE – OFFENCES AGAINST THE PERSON – where respondent pleaded guilty to unlawfully doing grievous bodily harm – where attack on the complainant was unprovoked, cowardly and vicious – where there was a disproportion in stature between the respondent and the complainant – where attack took place in the central Brisbane district at night – where

respondent made a calculated attempt to avoid detection – where consequences for the complainant were serious – where no weapon used – where respondent appeared to act spontaneously – where respondent was subject to a good behaviour bond at time of attack – where respondent had a limited prior criminal history – where the respondent was sentenced to three years imprisonment, suspended after nine months for an operational period of three years – whether the sentence was manifestly inadequate

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – PURPOSE OF SENTENCE – DETERRENCE – where there was a violent, unprovoked attack in the central Brisbane district at night – whether deterrence is a factor of special significance in determining sentence in these types of cases

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – HEARING IN OPEN COURT AND IN PRESENCE OF ACCUSED – IN PRESENCE OF ACCUSED PERSON – where Judge's sentencing remarks in the record of proceedings reflected very extensive correction to the transcript, including some matters of substance – whether in determining appeal the court should work from what was said at the hearing or the amended version

Penalties and Sentences Act 1992 (Qld), s 10

Amituanai v R (1995) 78 A Crim R 588
R v Bryan; ex parte A-G (Qld) [2003] QCA 18; CA No 410 of 2002, 5 February 2003, considered
R v Craske [2002] QCA 49, CA No 11 of 2002, 1 March 2002, distinguished
R v Hoogsaad [2001] QCA 27, CA No 277 of 2000, 9 February 2001, distinguished
R v Johnston [2004] QCA 12, CA No 263 of 2003, 6 February 2004, quoted
R v Lambert; ex parte A-G [2000] QCA 141, CA No 419 of 1999, CA No 377 of 1999, 28 April 2000, quoted
R v O'Grady; ex parte A-G (Qld) [2003] QCA 137, CA No 35 of 2003, 28 March 2003, considered

COUNSEL: C Heaton for the appellant
A W Moynihan for the respondent

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

THE CHIEF JUSTICE: The Honourable the Attorney-General appeals against a sentence of three years' imprisonment suspended after nine months for an operational period of three years imposed on the respondent following his plea of guilty to the offence of unlawfully doing grievous bodily harm.

The respondent committed the offence on the complainant, a 25 year old real estate sales assistant.

The complainant had left a restaurant in George Street in the City of Brisbane late at night on a Saturday in May 2004. He crossed George Street to a taxi rank outside the Treasury Casino. Security video, which we have watched, shows the taxi pulling up at the rank and the complainant moving to the passenger side front door and waving his arms about somewhat, although apparently not threateningly.

The cab contained the respondent and the respondent's friend, Mr Prescott. They were seated in the back of the cab with the respondent behind the driver, which put the respondent furthest from the kerb.

There was evidence from the respondent's friend that the respondent said to the gesticulating complainant, "What did you say, fuckhead?" The complainant returned to the queue. The respondent then got out of the cab and moved quickly towards the complainant, and without warning punched the complainant severely enough to knock him to the ground.

The 18 year old respondent, I should say, weighed approximately 90 kilos, whereas the complainant, 25 years old, is a lightly built man then weighing approximately 60 kilos. The complainant has cerebral palsy.

The respondent then shaped up to the complainant, who was on the ground, and punched him a second time. The video shows the respondent going to kick the complainant, although it is not clear whether the respondent made contact.

The respondent's friend pulled the respondent away, and they ran off together. The remaining video footage shows the victim rather pathetically responding, fortunately however with others assisting him.

The offender had callously decamped.

Video footage shows the respondent and Prescott later taking their shirts off, apparently in the hope of reducing the prospect of being detected. The respondent remained in the city. He was later involved in a disturbance at a night club and the police were called. As the police sought to speak with him, he ran off and the police pursued him. While trying to elude the police, the respondent ran into a car and injured his face. He was then arrested for obstructing a police officer.

The arresting officer subsequently identified the respondent as the person who had attacked the complainant. When

interviewed by the police about three weeks later, the respondent admitted that he had been the offender. He told the police that he was intoxicated at the time. The learned sentencing Judge referred to his being a diabetic and his failure to take his insulin that night, compounding the adverse effect upon him of the alcohol.

The complainant suffered a depressed fracture of his right cheek, a fracture to the left cheek, a broken nose, a fractured jaw, and the loosening of three teeth. He spent the night in hospital. He was unable to eat solid foods for two months after the incident and lost seven kilos in weight. He experienced severe headaches for a couple of months and had difficulty sleeping over a period of three months.

He was off work for three months and lost self confidence. He redeveloped a stutter which had previously subsided from his earlier years. He changed work from sales assistant, in which he had earned approximately $90,000 the previous year, to property manager, drawing a lesser income of $52,000 per annum.

As at the 1st March this year, he was still suffering from numbness in one cheek, his teeth were still loose and he still lacked some confidence. He will need ongoing dental treatment and possibly maxilo facial treatment to restore his appearance and ability to chew. There remains a chance he will lose the loosened teeth.

The respondent had previously committed three of what are customarily termed street offences, behaving in a disorderly manner, obstructing a police officer and committing a public nuisance. The last two attracted fines. For the first, he was on 20th October 2003 placed on a 12 month good behaviour bond. When he committed the instant offence, he was subject to that bond which is a matter of some significance to the sentencing. That is so notwithstanding none of the offences was a crime of substantial violence.

The learned sentencing Judge's remarks included in the record of proceedings reflect very extensive correction and change to the transcript produced following the sentencing hearing. Her Honour made those revisions as appears from the revised green transcript included in the papers provided to the members of the Court. While many concern aspects of style or grammar or syntax, some bear on matters of substance. For example, as to whether the complainant offered provocation to the attack upon him, her Honour said this at the sentencing hearing:

> "On any view of this case, this is a case where you have committed an unprovoked, cowardly and vicious attack upon another member of the public who was going about his business in the city. Your only reaction that night was clearly excessive and even if I were to accept that you may have perhaps believed that the complainant had said something or in fact had said something to you when he approached the cab that night, your actions subsequent to that insult were extreme."

In the revised transcript, her Honour has amended this to read:

> "On any view of this case this is a case where you have committed a cowardly and vicious attack upon another member of the public in the city. Your only reaction that night was clearly excessive even if I were to accept that the complainant had said something or you believed he had said something to you when he approached the cab that night."

The significant amendment was the deletion of the unequivocal confirmation at the sentencing hearing that the attack was unprovoked.

For the purposes of determining this appeal, we should in these circumstances work from what was said by the Judge at the hearing, not her amended version. If her Honour believed she had erred in what she had said in Court and she considered it went to a matter of significance, the proper course would have been to reconvene and explain herself, as she saw accurately, to the respondent.

A prisoner being sentenced is entitled to hear from the Judge, orally, in Court, the Judge's reasons for the sentence being imposed and it is that expression of reasons to which the Court of Appeal should ordinarily attend.

Sentencing remarks are usually delivered extempore in this State. That is an appropriate and efficient course.
In revising a transcript of such remarks, a sentencing Judge should only correct errors in transcription, spelling, punctuation, grammar or syntax, errors in citations or other obvious errors, provided that would not significantly change the meaning conveyed in Court.

Transcripts of sentencing remarks should be approached broadly similarly, though not as stringently, as transcripts of summings-up, of which the Guide to Judicial Conduct published for the Council of Chief Justices in the year 2002 makes these observations:

> "The transcript of the summing-up to a jury is, like the transcript of evidence, intended to be a true record of what was said in Court. Apart from errors of spelling or punctuation which may alter the meaning if uncorrected, there should be no change to the transcript of a summing-up unless it does not correctly record what the Judge actually said."

I consider, as I have indicated, that there may in revising sentencing remarks be scope for correcting as well errors in grammar and syntax or obvious errors, but always provided the change would not bear significantly on the prisoner's appreciation of why he or she was dealt with as did occur.

Revising sentencing remarks may be approached differently from the revision of judgments delivered extempore in civil cases where the Judge is rightly allowed considerable licence. The constraint in the Criminal Court stems from the stipulation mentioned earlier, the right of the prisoner to hear from the Judge in person the reasons behind the penalty imposed. This is reflected statutorily (see Section 10 of the *Penalties & Sentences Act*).

Of course, a civil litigant also must be told the reasons for the decision, but it is the particular gravity of the criminal proceeding and its consequences, possibly including deprivation of personal liberty, which entitle the prisoner to

expect from a sentencing Judge a precise justification delivered in the prisoner's presence of the reasons for the course being ordained.

Her Honour's particular revision of this transcript has no ultimate relevance to the disposition of the appeal in that we should proceed on the basis of the unrevised transcript, there being no ground for doubting its accuracy. It is the extent of revision made here which, nevertheless, meant it could not properly pass without comment. It is critical to the essential transparency of the judicial process that Judges approach the revision of accurate transcripts with basic circumspection.

I return now to my analysis of the question of penalty. As circumstances against the respondent, the learned Judge relevantly, and fairly, noted that it was an unprovoked cowardly and vicious attack; that the respondent's subsequent conduct involved a calculated attempt to avoid detection and demonstrated disregard for the complainant; that the consequences for the complainant had been serious; and that the respondent was at the time subject to a good behaviour bond. On the other hand, her Honour rightly pointed out that no weapon was used and the respondent appeared to have acted spontaneously; there was an early plea of guilty following a full hand-up committal and co-operation with the police; and that the respondent had a limited prior criminal history; and her Honour recognised the need to focus on the rehabilitation of young offenders.

In a number of recent decisions, the Court of Appeal has emphasised the strength of the importance of deterrence in sentencing for violent offending of this general character. The public rightly expects the Courts by their sentences to achieve so much as can be achieved to help ensure the cities of this State are safe places for those who venture out during the night.

In *R v Bryan; ex parte A-G (Qld)* [2003] QCA 18, a case similar to the present save for the use of a knife and consequent life threatening injuries, Justice Williams made these observations, paragraph 30:

> "Deterrence must be the major factor influencing sentencing (in these cases). Ordinary citizens must be able to make use of areas such as the Mall, even at night, sure in the knowledge that they will not be savagely attacked. The only way Courts can preserve the rights of citizens to use public areas in going about their own affairs is by imposing severe punishment on those who perpetrate crimes such as this".

For the offence of doing grievous bodily harm in *Bryan*, the Court of Appeal imposed a penalty of six years imprisonment. Justice Williams said that six to seven years imprisonment was "the minimum" which could be considered as the head sentence. The distinguishing feature was that Bryan used a knife to inflict life threatening injuries.

Mr Heaton, who appeared in the current appeal for the Attorney-General, submitted that the disproportion in stature between the present respondent and the complainant put this respondent at an advantage over the complainant comparable with the resort by otherwise similar offenders to weapons.

That is a fair submission, but the feature that no material weapon was used here nevertheless places the case at a substantially less serious level than *Bryan*. Considerable importance should nevertheless attach to *Bryan* in our disposition of this appeal. As observed by Justice McPherson in *R v Johnston* [2004] QCA 12:

> "The Queen against Bryan is one of two or more recent decisions of this Court that establish a benchmark in cases of this kind that may be higher or more severe than has been common in the past".

He was not, I believe, confining that to cases involving weapons. As a member of the Court in *Bryan*, I may say that it was certainly not my intention that *Bryan* be interpreted in any other way.

If the minimum head sentence appropriate in *Bryan* was six to seven years imprisonment following the plea of guilty, then allowing here for the absence of a weapon but the cases' otherwise general comparability, I would think a head sentence in this case of three to four years imprisonment to be appropriate. In *Bryan*, it should be noted, there was no suspension or recommendation as to post-prison community based release added. Accordingly, that three to four year level should be seen as taking account of the plea of guilty in particular.

On this basis, the manifest inadequacy in the penalty imposed here was the suspension after but one quarter of the head term, and I suspect it is the prospect of this respondent's serving only nine months in gaol for this crime which largely

has provoked public criticism. I consider that criticism reasonable.

I mention a number of other relevant cases to which we were referred. *R v O'Grady; ex parte A-G (Qld)* [2003] QCA 137, was given a two year fully suspended term. There are two aspects of *O'Grady* which complicate its application here. First, the primary Judge had not actually incarcerated O'Grady; and second, O'Grady had already completed two months of the intensive correction order, performing community work every Sunday, reporting twice weekly to community correctional officers and embarking on various programmes. Also, unlike the present respondent, O'Grady had no prior convictions.

R v Craske [2002] QCA 49, is distinguishable because the complainant instigated the altercation which preceded and lead into the ultimate attack. Further, the only issue before the Court of Appeal in that case was whether the sentence imposed was manifestly excessive.

That was also the situation in *R v Hoogsaad* [2001] QCA 27, which was factually more serious than the present because it involved strikes with a crowbar. That prisoner was sentenced to five years imprisonment. He had no prior criminal history. *Hoogsaad* was decided two years before *Bryan* where, as I have indicated, I believe the Court of Appeal, acknowledging contemporary conditions, signalled a need for heavier penalties for violent offenders in cases generally like these.

Mr Moynihan, who appeared for the respondent, submitted that the case fell into a category of cases of which *Amituanai v R* (1995) 78 A Crim R 588 is an example. These are cases of:

> "Serious unprovoked gratuitous street violence in which a punch or a kick, or combination...causes serious facial fractures or other non-life threatening injury".

Amituanai received a penalty of three years imprisonment with a recommendation for parole after nine months, similar to the penalty imposed here save that this imprisonment was suspended after nine months. *Amituanai* was more serious than the present case because of the consequences to the victim, who suffered very severe injuries including brain damage. On the other hand, a feature of *Amituanai* not present here was that Amituanai was insulted before his attack by someone from a group of people who included the complainant. Amituanai had no prior criminal history. He had just completed a University course. As said in *R v Lambert; ex parte A-G* [2000] QCA 141:

> "Some very special factors operated in (Amituanai's) favour".

It is very important to note also that Amituanai was sentenced prior to amendments in 1997 to the Penalties and Sentences Act which strengthened the position in relation to sentencing young offenders for violent offending.

Other cases to which Mr Moynihan referred – *R v Dodd* [1998] QCA 323, *R v Camm* [1999] QCA 101, *R v Lambert; ex parte A-G* [2000] QCA 141, *R v Cuff; ex parte A-G* [2001] QCA 351 and *R v Elliott* [2001] QCA 507, substantially preceded *Bryan*.

I have concluded that the learned Judge was unduly influenced by circumstances personal to the respondent and was distracted from the prime significance of the need for general deterrence

in cases like these. Her Honour's concluding remarks when sentencing the respondent, especially her references to his being home "by Christmas" (he was sentenced on the 8th of March 2005), themselves suggest a disposition towards the plight of the respondent which may be felt somewhat yielding. Gratuitous unprovoked assaults of this gravity occasioning grievous bodily harm to the victim necessitate stern punishment influenced strongly by the need for deterrence.

I earlier referred to an appropriate range, after allowing for the plea of guilty and other matters of mitigation, of three to four years imprisonment. Allowing for the moderate approach taken by the Court when allowing an Attorney's appeal, I would vary the penalty imposed in the District Court, leaving the term of imprisonment at three years, but suspending it after fifteen months rather than nine months. By that means, the term of imprisonment the respondent will actually have to serve will be substantially increased. I make it clear that the suspension after fifteen months, leaving the term at three years, is intended to reflect the moderate approach appropriate to the disposition of an appeal by the Attorney-General.

I would order that the appeal be allowed and that the sentence imposed in the District Court, that is imprisonment for three years suspended after nine months for an operational period of three years, be varied to the extent of providing for suspension after fifteen months, but otherwise confirmed.

ATKINSON J: In my view, the appropriate head sentence in this case, particularly when compared with the sentence imposed in *R v O'Grady; ex parte Attorney-General* [2003] QCA 137, was the three years imprisonment imposed by the learned sentencing Judge. It is difficult to see, however, that the amelioration for the plea of guilty should be any more than the suspension of that period of imprisonment after serving fifteen months. I therefore agree with the variation proposed by the Chief Justice to the sentence and his Honour's reasons for varying the operational period.

MULLINS J: I agree with the reasons of the Chief Justice and the orders proposed by the Chief Justice.

THE CHIEF JUSTICE: The orders are as I have indicated.
