SUPREME COURT OF QUEENSLAND

CITATION:	*R v Stringer* [2014] QCA 342
PARTIES:	**R** **v** **STRINGER, Luke** (applicant)
FILE NO/S:	CA No 204 of 2014 DC No 96 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	19 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2014
JUDGES:	Holmes, Fraser and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant the application for leave to appeal against sentence.** **2. Allow the appeal.** **3. Vary the sentence imposed in the District Court by ordering that the applicant be imprisoned for a period of two years, instead of the period of three years imposed in the District Court, and that the date the offender be released on parole be fixed at 10 January 2015, rather than the date of 10 July 2015 fixed in the District Court.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – OTHER MATTERS – where the applicant pleaded guilty to unlawful grievous bodily harm and was sentenced to three years imprisonment with parole release after one year – where the applicant had laid in wait to launch a surprise attack – where the applicant had surgery to prevent permanent numbness in his face, and there were few permanent injuries – where the sentencing judge described the complainant as having permanent numbness along his face – whether the sentencing judge erred in characterising the nature of the complainant's ongoing injuries *R v Brand* [2006] QCA 525, considered *R v Craske* [2002] QCA 49, considered *R v Davies* [2013] QCA 73, considered

R v Elliott [2001] QCA 507, considered
R v Kinersen-Smith & Connor; ex parte Attorney-General (Qld) [2009] QCA 153, considered
R v Leapai [2005] QCA 449, considered
R v O'Grady; ex parte Attorney-General (Qld) (2003) A Crim R 273; [2003] QCA 137, considered
R v Tupou; ex parte Attorney-General (Qld) [2005] QCA 179, cited

COUNSEL: A J Edwards for the applicant
D A Holliday for the respondent

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

[1] **HOLMES JA:** I agree with the reasons of Fraser JA and the orders he proposes.

[2] **FRASER JA:** On 10 July 2014 the applicant was convicted on his plea of guilty to an offence of unlawfully doing grievous bodily harm on 7 June 2013. The applicant was sentenced to imprisonment for three years with an order that he be released on parole fixed at 10 July 2015, after he would have served one year in custody. He has applied for leave to appeal against sentence on the grounds that the sentence was, in all the circumstances, manifestly excessive and that the sentencing judge erred in characterising the nature of the complainant's ongoing injuries.

Circumstances of the offence and the applicant's personal circumstances

[3] On the night of 6 June 2013 the 23 year old applicant and the 21 year old complainant, who did not know each other, were at a nightclub in Cairns with their respective friends. At about midnight there was an altercation between an unknown man and a friend of the applicant. The complainant was not involved. Subsequently the applicant and his friends were sitting outside the club. The applicant perceived that a friend was being taunted and mocked from a balcony of the nightclub in relation to the earlier incident. In response the applicant decided to go inside the nightclub with the intention of assaulting the complainant. The applicant went inside and watched the complainant. A short time later, as the complainant walked through the nightclub on his own to near where the applicant was waiting, the applicant struck the complainant in the face with a closed fist. The offence was captured on CCTV and witnessed by an off-duty police officer. The Court watched the video. The following description of the assault given by the prosecutor at the sentence hearing was accurate:

> "And the complainant comes into view and almost immediately the [applicant] physically launches himself at the complainant and swings his right fist in a wide arc with the full weight of his body behind the blow. He also leaps at least half the length of the pool table to the side which gives it an added element of surprise to the complainant."

[4] Upon being struck the complainant lost consciousness and fell to the ground. The applicant was ejected from the club by security staff. Police located him a short time later leaving the area in a taxi. He accompanied them back to a police station and took part in an interview. The applicant told police that: a friend of his had been involved in an incident with a male inside the club; that friend had described a person who had assaulted him as someone physically different from the complainant

and was sure that the complainant and his friend were involved; the complainant had taunted them from the balcony of the club; and the applicant decided to go back inside and retaliate. The applicant also told police that what he did was "probably massively inappropriate".

[5] Those circumstances were set out in a schedule of facts which was tendered in evidence at the sentence hearing. That schedule also describes the complainant's injuries. The complainant was immediately taken to hospital for treatment, where he was observed to have bruising and swelling to left side of his face and eye. He was later found to have a significantly displaced fracture of the left cheekbone. The complainant underwent surgery on 17 June 2013. The fracture was openly reduced and plated. If the fracture had been left untreated the complainant would have suffered significant facial asymmetry and permanent disfigurement and would have been unable to open or chew to a normal range. The displacement of the fracture would have traumatised his nerve, resulting in permanent numbness below the eye to the upper lip, consistent with the damaged nerve supply.

[6] A statement by the complainant described the consequences of the injuries. He missed seven days work because of severe pain and discomfort. He suffered from severe headaches, disorientation, inability to concentrate, impaired vision, and inability to eat solid foods for about seven days. The complainant's surgeon told the complainant that he had a severed facial nerve, which is why the complainant had no feeling in the area of his broken cheekbone, and that without surgery there was a high chance that the feeling would never come back. After surgery the complainant's sleep was affected for about 10 days because of stitches and staples in his left temple, eyebrow and mouth. He suffered other ill-effects. He still suffered from headaches occasionally. The complainant lost income he otherwise would have earned and he incurred expenditure on medicine and anaesthetics.

[7] The applicant had a minor criminal history; he had been fined for one offence for which no conviction was recorded and for two offences for which convictions were recorded. He was 24 years old when he was sentenced. He came to Australia from the United Kingdom at the beginning of 2013. He had been educated to the equivalent of Year 10, left school for work, and undertaken further studies at the equivalent of a TAFE College, where he obtained qualifications as a non-destructive tester. He worked in that capacity in Australia. Counsel for the applicant told the sentencing judge that the applicant was extremely remorseful, he had expressed that remorse immediately to police, he was co-operative with police, he made full admissions, he entered an early plea of guilty, and he had been fully co-operative with the administration of justice throughout the matter. The applicant wrote a letter of apology to the complainant, in which he expressed deep regret for his actions and he offered to compensate the complainant for any financial loss. The applicant's parents and others wrote references which spoke in glowing terms of the character, conduct and contribution to the community of the applicant and of his remorse and regret for his actions.

Ground 2 of the application: the sentencing judge erred in characterising the nature of the complainant's ongoing injuries

[8] The respondent conceded that the sentencing judge erred in characterising the nature of the complainant's ongoing injuries. Counsel for the Crown told the sentencing judge that the displacement of the fractures in the area of the complainant's left

cheekbone "would have traumatised his nerve, resulting in permanent numbness below the eye to the upper lip...consistent with a damaged nerve supply...". Relying upon that submission, the sentencing judge remarked that it seemed that the surgeons could not repair the complainant's nerve damage and he had permanent numbness running almost the length of his face. That significantly overstated the permanent injuries established by the evidence, which were limited to occasional headaches, as the nerve damage had been corrected by surgery.

[9] Accordingly, it is not necessary to consider the ground of appeal that the sentence is manifestly excessive. Rather, the Court is obliged to re-sentence afresh "unless in the separate and independent exercise of its discretion it concludes that no different sentence should be passed": *Kentwell v The Queen* (2014) 88 ALJR 947 at 956 [35], citing *AB v The Queen* (1999) 198 CLR 111, and at 957 – 958 [42].

Re-sentencing

[10] The respondent's counsel acknowledged that the Crown should not make submissions which specified the sentence which should be imposed: *Barbaro v The Queen* (2014) 88 ALJR 372. She emphasised the applicant's conduct in lying in wait to launch a surprise attack upon the unarmed and unsuspecting complainant in the face with significant force, the injuries sustained by the complainant, and the circumstance that the complainant continued to suffer from occasional headaches. It was submitted that general deterrence was a significant consideration because this was yet another assault of a serious nature in a nightclub. The respondent submitted that assistance as to the appropriate sentence could be derived from *R v Tupou; ex parte Attorney-General (Qld)* [2005] QCA 179, *R v Elliott* [2001] QCA 507 and *R v Davies* [2013] QCA 73.

[11] Counsel for the applicant accepted that general deterrence was a significant sentencing consideration but argued that the mitigating factors, particularly rehabilitation, were also significant in this case. He argued that the applicant's offer of compensation was a mitigating factor: *R v McMahon* [2013] QCA 240. The applicant's counsel submitted that, taking into account all of the relevant features of the case, a sentence in the order of 18 months to two years with parole release after four to six months should be imposed. The applicant's counsel referred to comparable sentencing decisions: *R v O'Grady; ex parte Attorney-General (Qld)* (2003) A Crim R 273, *R v Craske* [2002] QCA 49, *R v Leapai* [2005] QCA 449, *R v Brand* [2006] QCA 525, and *R v Kinersen-Smith & Connor; ex parte Attorney-General (Qld)* [2009] QCA 153.

Consideration

[12] In *O'Grady*, the Court set aside a sentence of 12 months imprisonment to be served by way of intensive correction order and instead imposed a wholly suspended sentence of imprisonment of two years. That 28 year old offender had no prior criminal history. He crash-tackled and punched a 40 year old man, causing a peri-orbital haematoma associated with a fractured sinus. The offender also punched a 46 year old man, causing a split lip, a bleeding nose and some bruising. After the police arrived, that man urged the police officer to put a gun to the offender, and he placed two fingers to the right side of the offender's neck. The offender reacted by delivering blows directed to that man's right eye which caused him grievous bodily harm; he was knocked unconscious, sustained lacerations, and sustained a facial fracture which required an operation. He still complained of distortion of vision at the sentencing a year later. Williams JA, with whose reasons Atkinson J agreed,

considered that a head sentence of two years imprisonment was appropriate for the offences and that the earlier plea of guilty, remorse, previous good character, and relative youth of the offender ordinarily would have resulted in that head sentence being suspended after serving a short period in actual custody. Having regard to the offender having satisfactorily completed part of the intensive correction order and also to the moderation then applicable in appeals by an Attorney-General, Williams JA considered that a wholly suspended sentence was appropriate. In *Tupou*, the Chief Justice distinguished *O'Grady* on the basis that the sentencing judge had not incarcerated that offender, he had completed two months of the intensive correction order, and he had no prior convictions. Although *O'Grady* was in some respects a more serious case than this one, it did not include the aggravating feature of the aggressor lying in wait before launching his violent attack on an unsuspecting complainant and the offender in *O'Grady* had no criminal record. For these reasons it is difficult to derive reliable guidance from the sentence in that case, but I would regard it as being consistent with a head sentence of two years imprisonment in this case.

[13] In *Craske* the Court found that a sentence of 18 months imprisonment suspended after four months was not manifestly excessive. After a fracas involving the offender, the complainant and others, the offender chased the complainant across a road into a carpark. When the complainant fell to the ground the offender, who was wearing sturdy boots, kicked the complainant once in the head. The complainant sustained fractures to the mandible with displacement of a bone fragment, multiple soft tissue injuries and abrasions, and a fracture of a toe. A neck injury restricted the complainant's breathing and was a potential threat to his life. After an emergency operation the complainant's fractured jaw was repaired and titanium plates, and screws and stainless wires were inserted. About a month after the offence there was persisting sensory loss in the area of the lip and chin and a doctor observed that the injury to the sensory nerve on the left lower lip might never recover normal sensation. Whilst that complainant's injuries were said to be life threatening, other features of the case favoured leniency: the Court endorsed the sentencing judge's approach of tempering the sentence to take into account that certain "obnoxious and loutish" conduct by the complainant directly provoked the original physical altercation, that offender was only 18 years old, he had no criminal history and submitted himself to counselling after he committed the offence. The decision that the sentence in *Craske* was not manifestly excessive does not imply that a more severe sentence should not be imposed in this case.

[14] In *Leapai* the Court refused an application for leave to appeal against a sentence of two years imprisonment suspended after six months. That 22 year old offender punched a security guard who was also being punched by a co-accused. In an ensuing brawl involving other security guards the complainant was punched and suffered a fracture in the left orbit with bruising and loss of blood. After surgery he was left with some residual loss of feeling or numbness in parts of his face and an occasional twitch in an eyelid. White J remarked that if a wholly suspended sentence had been imposed, an appeal by the Attorney-General would not have succeeded, as the Crown conceded; but that was in a case in which there was no satisfactory explanation for a delay of three or four years between the offence and the sentence and there was very impressive evidence of the offender's rehabilitation during that period. White J's remark and the refusal of the application in *Leapai* do not imply that a more severe sentence should not be imposed in this case, but the decision is consistent with a head sentence of two years imprisonment here.

[15] In *Brand*, Williams JA, with whom Jerrard JA agreed, considered that whilst three years imprisonment might well be regarded as being towards the upper limit, that period of imprisonment suspended after nine months was within the appropriate range for that 25 year old offender who had previously been sentenced to imprisonment for a short period and who carried out an unprovoked and sustained attack on a 72 year old man. The offender was older than the applicant, the assault was markedly worse (that offender kicked and repeatedly punched the vulnerable complainant for about one and a half minutes), that complainant's injuries were more serious than here (that complainant suffered multiple severe displaced facial fractures), and there was little, if any, remorse by the offender. Accordingly, Williams JA's remark that the sentence might be towards the upper limit suggests that the applicant's sentence should be less severe than three years imprisonment with release after nine months.

[16] In *Kinersen-Smith* the Court dismissed an appeal by the Attorney-General against sentences of two and a half years imprisonment suspended after six months. It is difficult to draw comparisons with that decision, because, although the two offenders together assaulted the smaller complainant and caused a more serious injury (an eye injury which rendered one eye useless for reading, driving and focussing vision and caused the complainant to at least postpone his university studies), the offenders were only 17 and 18 years old and the head sentence was described as being lenient. The fact that the sentence was found not to be inadequate does not imply that a more severe sentence could not have been imposed.

[17] In *Elliott*, an application for leave to appeal against a sentence of two and a half years imprisonment with a recommendation for parole eligibility after 10 months, with a lesser concurrent sentence for an assault occasioning bodily harm, was refused. That was a more serious case in so far as the 23 year old offender with a substantial criminal history for violent offences entered a house with a friend, although they were not invited, and assaulted both a young man and that man's father. On the other hand the injuries sustained by those complainants were less serious. Chesterman J described the sentence as "substantial" and the President considered that a slightly more lenient sentence might have been imposed but the sentence was "by no means manifestly excessive". Not much guidance for this case can be derived from the conclusion that the sentence in that case was not manifestly excessive.

[18] In *Davies*, a sentence imposed after a trial of two years and three months imprisonment, with an order for release on parole on a date which was approximately at the mid-point of the term of imprisonment, was held not to be manifestly excessive. The violence of the assault was similar to that here, but the complainant in that case was left with scarring from surgery, a post traumatic stress disorder and permanent facial and nerve damage and ongoing dental issues. The offender was not remorseful. That offender had a criminal history which included offences of violence and he had been imprisoned more than once. Nevertheless, the decision does not indicate that the applicant's head sentence must be less severe. In that case the offender was sentenced on the basis that he used excessive force in his violent reaction to the complainant having pushed the offender's father, the offender did not lie in wait as did the applicant, and the decision was only that the sentence was within the range of sentences open to the sentencing judge in the particular circumstances of that case.

[19] In *Tupou*, a sentence of imprisonment for three years suspended after nine months was varied to the extent only of substituting an order for suspension after 15 months. Since the case was in most respects markedly more serious than the present case, it is sufficient to observe that the sentence imposed upon the applicant should be less severe.

[20] The sentence must take into account the applicant's blameworthy conduct in lying in wait to launch his violent, surprise attack upon the complainant. That makes this example of the offence worse than many otherwise similar cases. On the other hand, the sentence must also be mitigated to take into account the substantial mitigating factors, notably including the applicant's relative youthfulness and excellent prospects of rehabilitation, his otherwise good character, his genuine remorse, his offer to pay compensation, and his plea of guilty and cooperation with the system of justice. Furthermore, without in any way discounting the seriousness of the complainant's injuries, the respondent conceded that the lasting effects of the complainant's injuries are less serious than the sentencing judge was led to believe and which informed the heavy sentence she imposed. In all of the circumstances and consistently with such guidance as may be derived from the comparable sentencing decisions, the appropriate sentence is two years imprisonment with parole release after about six months.

Proposed order

[21] I would make the following orders:

1. Grant the application for leave to appeal against sentence.
2. Allow the appeal.
3. Vary the sentence imposed in the District Court by ordering that the applicant be imprisoned for a period of two years, instead of the period of three years imposed in the District Court, and that the date the offender be released on parole be fixed at 10 January 2015, rather than the date of 10 July 2015 fixed in the District Court.

[22] **MORRISON JA:** I have read the reasons of Fraser JA and agree with those reasons and the orders his Honour proposes.

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.

SUPREME COURT OF QUEENSLAND

CITATION:	*R v Fisher* [2008] QCA 307
PARTIES:	**R** **v** **FISHER, Shannon Wade** (applicant)
FILE NO/S:	CA No 171 of 2008 DC No 70 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Bundaberg
DELIVERED ON:	3 October 2008
DELIVERED AT:	Brisbane
HEARING DATE:	24 September 2008
JUDGES:	Keane JA, Jones and Atkinson JJ 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 is refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – 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 grievous bodily harm – where applicant hit and kicked complainant causing facial fractures and other significant injuries necessitating hospitalisation - where applicant was the principal offender – where unprovoked assault was in company and in a public place – where applicant was sentenced to imprisonment for four years with a parole eligibility date after he had served one third of his sentence – whether sentence is manifestly excessive *R v Amituanai* (1995) 78 A Crim R 588, [1995] QCA 80, considered *R v Craske* [2002] QCA 49, considered *R v Dillon; ex parte A-G (Qld)* [2006] QCA 521, considered *R v Tupou; ex parte A-G (Qld)* [2005] QCA 179, considered *R v Verheyen* [2008] QCA 150, considered

COUNSEL: The applicant appeared on his own behalf
G J Cummings for respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **KEANE JA:** I have had the advantage of reading a draft of the reasons for judgment prepared by Atkinson J. I agree with her Honour's reasons and the order proposed by her Honour.

[2] **JONES J:** I agree with the reasons of Atkinson J and with the order she proposes.

[3] **ATKINSON J**: On 3 June 2008 the applicant was convicted in the District Court in Bundaberg upon his plea of guilty to one count of grievous bodily harm. He was arraigned with three other co-accused, each of whom proceeded to sentence immediately whereas the applicant's sentence was to be contested. The applicant was sentenced on the following day but by then his sentence was not contested as he agreed to be sentenced on the facts presented by the prosecution. He was sentenced to four years imprisonment with a parole eligibility date of 4 December 2009, after he had served one-third of his sentence. He seeks leave to appeal against the sentence on the ground that the sentence is manifestly excessive.

[4] The circumstances of his offending were set out in a schedule of facts tendered before the learned sentencing judge. The four defendants were aged between 17 and 19 years of age. The applicant was 19 and was the cousin of the other 19 year old defendant. Each was conjointly charged with unlawfully doing grievous bodily harm (count one) and alternatively assault occasioning bodily harm while in company (count two). One of the co-offenders was also charged with stealing (count three). The applicant pleaded guilty to count one and his co-offenders pleaded guilty to count two.

[5] The complainant was a 35 year old electrician who worked for a mining company based in Blackwater. He visited Bundaberg for the Easter long weekend, travelling alone and staying at a backpacker's hostel in Bundaberg. The offence occurred on Saturday 8 April 2007. He did not know and had not met the applicant or the other three defendants at the time of the offence.

[6] On the night of the offence the complainant was in the company of another man who also worked at the mines. They watched football on television at a hotel and the complainant drank about six to seven pots of mid-strength beer. Later at another hotel he drank a similar amount of beer and the two men left that hotel with other patrons at closing time at 3.00 am. The complainant was affected by alcohol at that time but said that he was coherent and knew what was happening.

[7] They were waiting at a taxi rank for about an hour when the complainant's friend got into a taxi with a woman. The complainant decided to walk as it was only three or four blocks from the hotel to the backpacker's hostel. Whilst he

was walking to the hostel, the complainant asked for and obtained a cigarette from a passer by who continued walking in the opposite direction.

[8] The applicant was one of a group of young men, including his co-accused, who had been out socialising and drinking. About two minutes after the complainant had borrowed a cigarette, the applicant approached the complainant from behind and asked him for a cigarette. The complainant told him that he did not have any and that he had borrowed the one he had. The complainant then continued walking. Without warning, the applicant attacked the complainant from behind punching him first to the back of the head towards the right side of his face and then repeatedly punching him until the complainant fell to the ground. Of the four co-accused, only the applicant threw punches at that stage. Then applicant then started to walk away from the complainant.

[9] One of the applicant's group (who was not charged with any offence) went over to the complainant and tried to help him up off the ground. The applicant then returned to confront the complainant saying "Do you want to have another go". The complainant indicated that he did not want to fight. Nevertheless the applicant started attacking him again.

[10] He was once again knocked to the ground. This time the applicant repeatedly punched and kicked the complainant whilst he was on the ground, in particular to his head and back. His three co-offenders then joined in and did likewise. The complainant was not able to offer any resistance except to attempt to cover his head and face with his hands. Very shortly into the attack he was incapable of any resistance.

[11] The attack eventually ended with the applicant and his co-accused walking away. The complainant was left bloodied and bleeding in the middle of the footpath. The complainant's memory after the assault is affected by his injuries. He recalls getting into the front of a taxi which had a passenger and asking to be taken to the police station. He was dropped off outside the police station but was unable to go inside because he could not see or walk properly. He then used his mobile telephone to call an ambulance which took him to the Bundaberg Base Hospital for treatment.

[12] When seen at the hospital the complainant was found to have sustained the following injuries: a blowout fracture of the left orbit; a fracture of the nasal bone; a fracture of the anterior wall of the left maxillary sinus; haematomas on the left pre-septal region, cheek and left maxillary sinus; and a fracture of the left eleventh rib posterially.

[13] He was transferred to the maxillofacial unit of the Royal Brisbane Hospital where the fractures of the left orbital floor and the rib were confirmed and fractures to four anterior teeth requiring significant dental treatment were found.

[14] The complainant suffered double vision and ongoing numbness to his face. Surgery was undertaken a month later to repair the fracture of the left orbital floor and relieve pressure on the left infraorbital nerve. His altered sensation

and double vision would otherwise have been permanent. His teeth were repaired but, because of the trauma to them, after about a year the repair failed. The complainant suffers from post-traumatic stress disorder and at the time of sentence was still suffering psychological symptoms.

[15] The applicant took part in an interview with the police in which he gave a false version of the complainant's having made racist comments towards him and having attempted to instigate a fight with the applicant by baiting him. The applicant alleged that he tried to get the complainant to move along and stop baiting him but that instead the complainant effectively invited him to have a fight down the street. He said that was the reason that he followed the complainant down the street and that when he got there the complainant was shaping up waiting to have a fight. He alleged that the complainant pushed him first and that the initial fight was consensual. He attempted to minimise his own involvement and that of his cousin and blame two of his co-accused.

[16] The learned sentencing judge took into account the circumstances of the offending which was a vicious attack incapable of any rational explanation. The judge had regard to a number of aggravating features: that the applicant punched the complainant many times without provocation until the complainant fell to the ground; that he recommenced with the assault when the complainant was on the ground; he continued to assault the complainant despite others trying to stop him; he was joined by others; he continued to kick the complainant after he became unresponsive; he told the police that his kicks were "fairy kicks" which was offensive and against the facts and showed his lack of remorse; his lies in the police record of interview showed his lack of remorse; and he left the scene.

[17] The sentencing judge took into account the injuries caused to the complainant, his need for significant surgery and his significant ongoing problems. The judge described the offence of grievous bodily harm as brutal, vicious, and cowardly and which resulted in permanent physical and psychological injuries to a man who was simply walking down a city street.

[18] Other factors taken into account by the sentencing judge were that the applicant was entitled to recognition for the plea of guilty although it was not an early plea because the matter was to be a contested sentence on the day on which he pleaded guilty. The judge also took into account his youth and his lack of any comparable prior criminal history although he had a criminal history for trespass and attempting to enter premises in 2005, breach of community service order and unlawful use and possession of vehicles in 2006.

[19] The judge also took account of what was referred to as his slight prospects of rehabilitation shown in two references that had been tendered. The judge later described him as having "some prospects of rehabilitation."

[20] The cases in this court which set the range for offences of this type include *R v Dillon; ex parte A-G (Qld)* [2006] QCA 521; *R v Tupou; ex parte A-G (Qld)* [2005] QCA 179; and *R v Verheyen* [2008] QCA 150.

[21] In *R v Dillon; ex parte A-G (Qld)*, the court allowed an Attorney's appeal against a sentence of three years imprisonment suspended after 10 months with an operational period of three years imposed on one count of doing grievous bodily harm. The appeal was allowed only to the extent of deleting that part of the sentence suspending the term of imprisonment and instead recommending the respondent be eligible for post-prison community based release after serving 15 months of the sentence.

[22] Dillon punched and kicked the complainant once in the early hours of the morning after a verbal altercation earlier that night. He was intoxicated at the time of the attack. The attack took place in a public place. The complainant suffered fractures to the bones around the left eye and the nose and continuing loss of sensation to the left side of his face.

[23] Dillon pleaded guilty but it was a relatively late plea after a full committal. He was 22 and had a relatively minor criminal history. His history did, however, include one count of assault occasioning bodily harm. After the conviction the subject of the appeal he was convicted of further offending in breach of probation although not for further offences of violence. He had undertaken some rehabilitation, and had an excellent employment history.

[24] Another Attorney's appeal which is relevant to the sentence in this case is *R v Tupou; ex parte A-G (Qld)*. The respondent in that case was sentenced to a period of three years imprisonment suspended after nine months with an operational period of three years following his plea of guilty to unlawfully doing grievous bodily harm. His sentence was varied on appeal to provide for suspension of the head sentence after 15 months but was otherwise confirmed.

[25] In that case the 18 year old Tupou committed the offence on a 25 year old who was waiting in a taxi rank outside the Treasury Casino. As a taxi pulled up the complainant moved towards it, waving his arms about, although not threateningly. Tupou who was in the taxi with a friend said to the gesticulating complainant "What did you say fuck head?" The complainant returned to the queue.

[26] Tupou then got out of the taxi and moved quickly towards the complainant and without warning punched him severely enough to knock him to the ground. While Tupou weighed 90 kilograms, the complainant, a 25 year old man with cerebral palsy, weighed only 60 kilograms. Tupou then shaped up to the complainant who was on the ground and punched him a second time.

[27] Tupou ran off and he and his friend took their shirts off in the hope of reducing their prospect of being detected. When he was finally arrested by the police three weeks later he admitted that he had been the offender; that he had been intoxicated at the time and was a diabetic who had failed to take his insulin which had compounded the adverse affect upon him of alcohol. Tupou had a limited prior criminal history.

[28] 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 was left with numbness in his cheek and a loss of confidence. Tupou

pleaded guilty following a full hand up committal and co-operation with the police. The Chief Justice observed that a sentence of three to four years imprisonment was appropriate. This sentencing range was followed by the Court of Appeal in *R v Verheyen* [2008] QCA 150 at [33].

[29] *R v Craske* [2002] QCA 49, referred to by the applicant, was a quite different type of case. In *Craske* the complainant was the instigator of the altercation and the offender kicked him once only. The applicant had no criminal history, an excellent work history, and had undertaken counselling including anger management between arrest and sentencing. His plea of guilty to an ex officio indictment was described as an "extremely timely and early plea of guilty." Craske's application for leave to appeal against a sentence of 18 months imprisonment, suspended after serving four months with an operational period of two years, for an offence of occasioning grievous bodily harm on the ground that the sentence was manifestly excessive, was unsuccessful.

[30] Also quite different was the case of *R v Amituanai* (1995) 78 A Crim R 588 where the applicant and the complainant were each a member of groups of young men who had been arguing with one another in a taxi rank. The applicant had been seriously injured by a member of the complainant's group who punched him breaking his jaw and racially abused by another. He kicked the complainant once to the head. The complainant suffered a brain injury. The applicant was extremely remorseful, had no criminal history and had made a real contribution to society. In *Amituanai*, the wide range of sentences which may be imposed for the offence of grievous bodily harm was referred to, as were a number of cases supporting that contention. A sentence of three years imprisonment was held not to be manifestly excessive.

[31] The applicant raised a question in his written submissions regarding parity with his co-offenders. They were each sentenced to two years imprisonment with a parole release date of 4 February 2009, after serving one third of the sentence. But the reasons for the difference in sentence are readily understandable. Each of the co-offenders was convicted of the lesser offence of assault occasioning bodily harm in company. The attack was initiated by the applicant who hit the complainant from behind and then punched him until he fell to the ground. Only then did his co-offenders join in the attack. None of them had any relevant criminal history and all were young. One was employed at the time of sentencing and had no criminal history; one was heavily intoxicated but had since given up drinking, was in employment and had co-operated with police; and the third offered to plead guilty at committal and was remorseful. None of them was the ringleader. There can be no justifiable sense of grievance arising out of any disparity between the sentence imposed upon the applicant and his co-accused.

[32] There are a number of factors that suggest that the offending in question referred to in this application deserved punishment at the higher end of the scale referred to in *R v Verheyen*. The applicant was the principal offender, he assaulted the applicant 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.

[33] I conclude that the sentence imposed was within the applicable range for offences of this type and was not, therefore, manifestly excessive. The application for leave to appeal against sentence should be refused.

SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dillon; ex parte A-G (Qld)* [2006] QCA 521
PARTIES:	**R** **v** **DILLON, Blake Joseph** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 217 of 2006 DC No 3579 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Sentence by A-G (Qld)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	8 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	19 October 2006
JUDGES:	McMurdo P, Mackenzie and Fryberg JJ Separate reasons for judgment of each member of the Court, McMurdo P and Mackenzie J concurring as to the orders made, Fryberg J dissenting in part
ORDER:	**1. Appeal allowed** **2. Sentence imposed at first instance is varied by deleting that part of the sentence suspending the term of imprisonment and instead recommending the respondent be eligible for post-prison community-based release after serving 15 months of that sentence, on 6 October 2007**
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 one count of grievous bodily harm - where respondent hit and kicked complainant causing facial fractures and other significant injuries necessitating hospitalisation - where respondent has a criminal history for previous drug and street offences, assault and breaching probation orders - where respondent was sentenced to imprisonment for three years suspended after 10 months with

an operational period of three years - where respondent appears to be making genuine attempts at rehabilitation - where Attorney-General appeals against sentence claiming that it is manifestly inadequate - whether sentence is manifestly inadequate - whether this Court should impose a sentence with a parole recommendation rather than a suspended sentence so that respondent can benefit from support and supervision

Criminal Code 1899 (Qld), s 669A(1)
Penalties and Sentences Act 1992 (Qld), s 154, s 157, s 160B, s 213, s 214

Bond v The Queen (2000) 201 CLR 213, applied
Dinsdale v The Queen (2000) 202 CLR 321, applied
Everett v The Queen (1994) 181 CLR 295, applied
R v Dobinson [2006] QCA 357; CA No 178 of 2006, 15 September 2006, distinguished
R v Johnston [2004] QCA 12; CA No 263 of 2003, 6 February 2004, distinguished
R v Tupou; ex parte A-G (Qld) [2005] QCA 179; CA No 88 of 2005, 31 May 2005, applied
R v Wall [2002] NSWCCA 42, applied

COUNSEL: S G Bain for appellant
M O Anderson for respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for appellant
Adams Luca & Smith Lawyers for respondent

[1] **McMURDO P:** The respondent Blake Joseph Dillon pleaded guilty in the District Court at Brisbane on 7 July 2006 to one count of doing grievous bodily harm to Christopher Gregory Wilkins on 1 May 2004. He was sentenced to imprisonment for three years suspended after 10 months with an operational period of three years. The appellant, the Attorney-General of Queensland, appeals against that sentence contending that it is manifestly inadequate in that it does not reflect adequately the gravity of the offence or principles of general deterrence and gives too much weight to mitigating factors.

[2] The respondent was 22 at the time of the offence and 24 at sentence. He has a criminal history. In 2000 he was fined in the Holland Park Magistrates Court for possessing dangerous drugs. Between 2000 and 2002 in four court appearances in the Southport, Beenleigh and Inala Magistrates Courts he was convicted of and fined for various street offences. In July 2003 he was convicted of and fined in the Holland Park Magistrates Court for wilful destruction of property. In the Southport Magistrates Court on 9 October 2003 he was fined $600 without conviction for an assault occasioning bodily harm on 15 August 2003. The complainant in that offence was a 39 year old man who intervened in Cavill Avenue at the Gold Coast around midnight one evening in August 2003 in a fracas between people unknown to him. He tried to calm the situation. The respondent, who was intoxicated, approached him from behind and punched him in the forehead. The complainant told the respondent to calm down and began to walk away. The respondent again struck him in the forehead. The moderate penalty imposed suggests the

complainant's injuries were fortunately minor. The present offence occurred eight and a half months later on 1 May 2004. In August 2005 the respondent was convicted and fined $1,000, placed on probation for two years and disqualified from holding a driver's licence for 18 months for failing to stop a vehicle and for other traffic matters. The next month he was convicted and fined $1,200 for drug offences, receiving stolen property and possession of tainted property. At least the first of these offences breached the probation order imposed the previous month. On 25 January 2006 he was convicted and fined $240 for breaching that probation but the probation order continued. On 10 April 2006 he was convicted and sentenced to three months imprisonment wholly suspended for 18 months and convicted and fined $750 for possessing dangerous drugs, possessing property suspected of having been used in commission with the commission of a drug offence and committing a public nuisance. All these offences were committed on 2 October 2005 and so were further breaches of the probation order imposed in August 2005.

[3] The prosecutor at sentence tendered a report prepared for the court by Corrective Services officer Allen Pappas as to the respondent's response to supervision on probation. The report noted that the respondent had twice breached his probation order and breach proceedings were pending as at the date of the report on 29 May 2006. Mr Pappas considered the respondent's response to supervision was superficial. Despite many requests the respondent had paid only $400 of the $500 fees for the "Under the Limit Program" he was required to undertake. He had, however, completed nine of the 11 sessions of that programme and once he had paid the outstanding $100 he would have successfully completed it. (This amount was paid by the time of sentence.) Mr Pappas noted that the respondent appeared to minimize the amount of his consumption of alcohol relating to the offence the subject of the probation order. He had initially agreed to take part in a cognitive skills programme but had since expressed a reluctance to commit to it. The respondent had been referred to drug and alcohol counselling at Biala. (A later report from Ms Lyn Cobb tendered by the defence showed that Mr Pappas had not appreciated the extent of this counselling undertaken by the respondent.) The respondent had assured Mr Pappas that his drinking and drug habits were being managed by him following the September and October 2005 offences. Mr Pappas considered that the respondent overall did not appear to have taken the conditions of the probation order seriously, although he had reported as directed, maintained full time employment and not changed his residence. Mr Pappas concluded his report with cautious and considered optimism: "It is thought that, to the best of his efforts, he might finally be making an effort to conform within community requirements".

[4] The facts of the present offence are as follows. The complainant was a 36 year old man unknown to the respondent. On 1 May 2004 he was at the Runcorn Tavern drinking and watching football until about 12.30 am. During the evening he said to the respondent, who swore at a female staff member, words to the effect of "Don't swear like that out here, especially at a woman". The respondent told him to mind his own business. They had no further contact until about 12.30 am when the complainant was about 150 m from the tavern on his way home. He was sending an SMS message on his phone. The respondent stepped out in front of him from the shadows of a garden. He appeared angry and had his fists clenched. The complainant said "You're not worth it" and continued sending his message as he walked away. He next felt a hit to the back of his head which dazed him and caused him to stumble and fall down. He attempted to stand up but the respondent kicked

him in the face in the region of his left cheek bone. He lost consciousness. A female friend of the respondent threw herself on top of the complainant to protect him. The respondent walked away but remained in the general vicinity. A security guard stopped and called police. The respondent provided his name and details to police once they arrived. He seemed to deny assaulting the complainant stating there were no witnesses nor cameras and nothing could be proved.

[5] On 1 August 2004 CIB police officers interviewed him. He told them he had been in trouble before and there was alcohol involved; when he drinks rum he finds it harder to walk away; he had stopped drinking rum since this offence. He declined a formal police interview and was charged. Full committal proceedings followed. The matter was listed for trial in the week commencing 8 May 2006. His lawyers notified the prosecution of his plea of guilty on the Monday before the trial was due to commence so that it was a relatively late plea.

[6] The complainant was taken to the emergency department at Princess Alexandra Hospital after transfer from QEII Hospital. He had a swollen left eye, left cheek pain, reduced sensation in the left cheek and upper lip and malalignment of teeth. Radiology showed fractures to the bones around the left eye and the nose. The left orbital wall, left maxillary sinus, left ethmoid sinus, nose and dorsum sella were all fractured. He was hospitalized until 5 May 2004 and released after conservative management. The dorsum sella fracture was likely to have resulted in a pituitary gland injury which would have endangered his life. At sentence he was still suffering a loss of sensation on the left side of his face between his nose and the top of his lips and now wears reading glasses. Clearly a great deal of force had been inflicted to cause these significant injuries.

[7] The prosecutor submitted that the offence was a cowardly unprovoked attack in a public area involving the kicking of the complainant whilst he was on the ground. The respondent had a previous conviction for an offence of violence in public whilst intoxicated. His conduct warranted a deterrent sentence in the order of three to four years imprisonment. The prosecutor in making this submission relied on this Court's decision in *R v Tupou; ex parte A-G (Qld)*.[1] The prosecutor conceded that because the respondent had made efforts at rehabilitation the sentence imposed should be suspended after 15 months, as in *Tupou*.

[8] The respondent's counsel at sentence tendered a report from Ms Lyn Cobb, a social worker at Queensland Health's Alcohol and Drug Service. Ms Cobb recorded that the respondent first reported to the service on 25 October 2005 because he was concerned that his substance use and related legal problems needed to be addressed. He attended the arranged six appointments over five months from 25 October 2005 to 8 March 2006. The treatment encouraged his responsible use of alcohol and abstinence from other substances under a relapse, prevention and management model. He was attempting to make the changes necessary to remove drug use from his life and to increase his knowledge about binge drinking and risky drinking behaviours. He reported cycles of several weeks abstinence from drugs and then relapsing. He expressed a determination to make positive changes in this respect so that Ms Cobb considered he would now benefit from a structured relapse prevention programme such as that offered by the Department of Community Corrections, a cognitive behaviour therapy approach to counselling (privately or within

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[1] [2005] QCA 179; CA No 88 of 2005, 31 May 2005.

Queensland Health's Alcohol and Drug Service) and random drug screening. The respondent acknowledged that ecstasy and alcohol were substances which he took regularly and that his substance use, especially alcohol, had resulted in his various convictions. He participated regularly in kick-boxing and was serious about his training commitments to this sport so that this benefited his health and fitness and encouraged him to curtail his use of drugs and alcohol. He described his father as a violent alcoholic who left the family home when the respondent was about 14 years old. The respondent had been punctual in attending appointments and responsive in counselling sessions and had made steady progress.

[9] The respondent's counsel submitted that the respondent had completed an apprenticeship as a floor sander and had an excellent employment history. He tendered a number of references. His employer considered him to be a hard worker and a good-hearted young man. Personal referees supported the submission that the respondent, in spite of his dysfunctional background, was when sober a good citizen who was now making genuine efforts to rehabilitate and to curb the substance abuse which was at the heart of his offending.

[10] The respondent's counsel at sentence sought to distinguish *Tupou* because it was a completely unprovoked attack whereas here there had been a minor dispute between the respondent and the complainant earlier in the evening. The complainant took offence at some banter between the respondent and a staff member known to the respondent. The respondent and his girlfriend were later "canoodling" in the bushes near the hotel when unfortunately he saw the complainant. Because the respondent was intoxicated he formed an unreasonable perception that the complainant was looking for him and attacked him. Defence counsel referred the judge to two District Court decisions and urged the judge to place greater emphasis on rehabilitation rather than deterrence and to impose a wholly suspended three year term of imprisonment.

[11] The sentencing judge referred to the facts that the offence occurred in a public place and that the respondent kicked the complainant; consistent with *Tupou*, deterrence was important. His Honour noted the respondent's criminal history and his previous conviction for assault. The judge referred to and was impressed by the respondent's rehabilitation. His Honour considered that the appropriate sentencing range was as suggested by the prosecutor but that suspension a little earlier than the prosecutor submitted was appropriate in this case because of the plea of guilty, the respondent's good employment record and promising rehabilitative prospects and efforts. The judge warned the respondent that if he committed a further offence during the operational period he would be in jeopardy of having to serve all of the remaining sentence of imprisonment.

[12] The submissions now made by counsel for the appellant are consistent with those made by the prosecutor at sentence. She contends that a sentence of three to four years imprisonment should be imposed, suspended after 15 or 18 months. She places great emphasis on the need for deterrence in the commission of an offence such as this, perpetrated as it was on an innocent victim and causing him life-threatening injuries, especially where the respondent has a previous conviction for an offence of street violence whilst intoxicated. She submits that as the respondent committed a serious act of alcohol-fuelled street violence only eight and a half months after he had been dealt with for a similar unprovoked attack the primary judge should not have sentenced him to a lesser penalty than that imposed

in *Tupou*. In doing so, his Honour gave too much weight to rehabilitation. She contends that the sentence substituted by this Court in *Tupou* of three years suspended after 15 months was the lightest sentence that could have been fairly imposed in this case, especially as the respondent was older than Tupou and had a more serious criminal history.

[13] *Tupou* involved an attack on a 25 year old who had recently left a city restaurant and was waiting in a taxi rank outside the Treasury Casino. As a taxi pulled up the complainant moved towards it, waving his arms about, although not threateningly. Tupou, who was in the taxi with a friend, said to the gesticulating complainant "What did you say, fuckhead?". The complainant returned to the queue. Tupou alighted from the taxi and moved quickly towards the complainant, punching him without warning and knocking him to the ground. He then went to kick him although it is not clear whether the kick made contact. Tupou was 18 years old and was more heavily built than the complainant who had cerebral palsy. Tupou's friend pulled him away and they ran off. They removed their shirts, apparently in the hope of avoiding detection. Later that evening Tupou was involved in a disturbance at a nightclub and police were called. He again decamped and was pursued by police before being detained. Police recognized him as the antagonist in this offence. When interviewed by police about three weeks later he admitted committing the offence and said that he was intoxicated. He was a diabetic whose failure to take insulin that night compounded the adverse effects on him of the alcohol. The complainant suffered a depressed fracture of the right cheek, fractures to the left cheek, nose and jaw and the loosening of three teeth. He spent one night in hospital. He was unable to eat solid foods for two months and lost seven kilograms. He suffered severe headaches and had difficulty sleeping for some months. He was off work for three months and lost self-confidence. He redeveloped a stutter. His work suffered and his income was diminished. At sentence he was still suffering from numbness in the cheek, his teeth were loose and he may lose them. He was in need of ongoing dental and perhaps maxillofacial treatment to restore his appearance and his ability to chew. Tupou had previous street offences for which he had been fined. He was on a good behaviour bond in respect of one street offence when he attacked the complainant. He pleaded guilty at an early stage following a full hand up committal and co-operation with the police. This Court emphasized the importance of deterrence in imposing sentences for such violent offences and considered that a head sentence of three to four years imprisonment was appropriate, taking into account the plea of guilty. A sentence requiring him to serve only nine months of that term in actual custody was manifestly inadequate. The Court, making appropriate allowance for the moderate approach adopted when allowing an Attorney's appeal, varied the sentence by leaving the term of imprisonment at three years but suspending it after 15 months rather than nine months.

[14] The respondent in supporting the sentence imposed refers us to two authorities *R v Dobinson*[2] and *R v Johnston*.[3] *Johnston* is of no real relevance because its facts are quite different. A sentence of six years imprisonment was imposed there after a trial in respect of an offence of grievous bodily harm involving a knife. It was not an Attorney's appeal. This Court did not consider the sentence was manifestly excessive.

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2 [2006] QCA 357; CA No 178 of 2006, 15 September 2006.
3 [2004] QCA 12; CA No 263 of 2003, 6 February 2004.

[15] *Dobinson* pleaded guilty to one offence of grievous bodily harm, two offences of performing negligent acts causing harm and to a summary offence of drink driving. He was sentenced to three years imprisonment suspended after 12 months on the offence of grievous bodily harm and to lesser concurrent sentences on the remaining offences. He had previous convictions for two assaults occasioning bodily harm in 2003 and whilst on bail for the pertinent offences was convicted of common assault. He applied for leave to appeal to this Court contending the sentence was excessive. Dobinson was not the main protagonist in the attack which involved two other offenders. The complainant suffered serious injuries to his spleen and was hospitalized for five weeks although he recovered sufficiently to enable him to continue to serve as a soldier in East Timor. Counsel for the respondent submitted in *Dobinson* that, if anything, the sentence imposed was too low but agreed that there was no appeal by the Attorney-General against sentence. This Court noted that the sentence was "clearly appropriate" for the serious criminal conduct committed. Unsurprisingly, Dobinson's application was dismissed. *Dobinson* does not provide support for the sentence imposed on the respondent below as it was not an Attorney-General's appeal.

[16] I had initial concerns that, if a three year term of imprisonment suspended after 15 months was an appropriate penalty as the appellant's counsel concedes, a three year sentence suspended after 10 months may not be manifestly inadequate. After careful consideration I am, however, persuaded that the sentence imposed is inadequate and that this Court should allow the Attorney's appeal and increase the sentence under s 669A(1) *Criminal Code*. The respondent attacked the complainant, who was completely innocent, in a violent and unjustified manner in a public place, causing him serious, life-threatening and perhaps permanent injury. The respondent was 22 years old at the time and eight and a half months earlier had been dealt with leniently for an offence of violence committed in public whilst intoxicated. As the sentencing judge does not seem to have fully appreciated, the respondent did not immediately rehabilitate after committing this second and very serious offence of violence but went on to commit further offences associated with his substance abuse and to then twice reoffend whilst on probation. Fortunately, by the time of his sentence more than two years after committing the present offence, he was at last making genuine efforts at rehabilitation, and apparently with some success, because he had not reoffended since October 2005 and was able to place positive references and reports before the court from his employer and others. This Court has often stated the need for deterrence when imposing sentences for vicious examples of serious street violence fuelled by substance abuse. This was such an example. The attack was in its own way as serious as that in *Tupou*. Tupou, a much younger offender than this respondent, with a lesser criminal history, an earlier plea of guilty and greater co-operation with the administration of justice, had his sentence of three years imprisonment suspended after nine months increased on appeal so that it was suspended after 15 months, with the Court noting its moderate approach because the sentence was being increased on a Crown appeal. On the present facts, the sentence imposed in *Tupou* was, contrary to the primary judge's view, at the most lenient end of the appropriate sentencing range. To suspend the three year sentence after 10 months in the present case was to impose a manifestly inadequate sentence.

[17] Because the sentencing discretion has miscarried this Court must allow the appeal, set aside the sentence imposed and exercise its discretion afresh. A Crown appeal against the inadequacy of a sentence is traditionally considered to put an offender in

jeopardy a second time so that the jurisdiction is considered exceptional: *Everett v The Queen*;[4] *Bond v The Queen*.[5] That is why it is conventional for an appellate court in allowing a Crown appeal against sentence and substituting its own sentence to impose a sentence towards the lower end of the appropriate sentencing range: *Dinsdale v The Queen*;[6] *R v Wall*.[7] Like Tupou, and adopting the moderate approach apposite in a Crown appeal, the respondent should be sentenced to three years imprisonment and spend 15 months of that in custody before his release into the community. The material before the sentencing court suggests that if the respondent is to succeed in his commendable efforts at rehabilitation he will benefit, as Ms Cobb stated in her report, from a structured relapse prevention programme such as that offered by the Department of Community Corrections, cognitive behavioural therapy counselling and random drug screening. He will not necessarily have the advantage of that support and supervision if his sentence is suspended. Release on parole rather than under a suspended sentence is the preferable order here.

[18] The making of such an order is not entirely straightforward because of recent amendments to the *Penalties and Sentences Act* 1992 (Qld) ("the Act"). Under the recently added s 160B of the Act, a court in imposing a term of imprisonment of three years can no longer, as it could at the date of the imposition of the original sentence on 7 July 2006, recommend release on parole (or post-prison community-based release) but rather is required to fix the date the offender is to be released on parole. When this Court allows an appeal against sentence and passes another sentence in substitution for the original sentence under s 668E(3) *Criminal Code* or, as is apposite here, under s 669A(1) *Criminal Code* varies the sentence or imposes another sentence, the sentence imposed by this Court ordinarily runs from the date of the original sentence, here 7 July 2006: s 154 of the Act. The sentence date preceded the coming into operation of s 160B. Should this Court fix a date for the respondent to be released on parole under s 160B or make a recommendation to that effect as was possible on the original sentencing date (7 July 2006) under the now repealed s 157 of the Act? The relevant transitional provisions of the Act are contained in s 213 and s 214. If under s 669A(1) this Court varies the sentence imposed at first instance it seems to me the Court should make a recommendation under the now repealed s 157 of the Act; s 213(1) would then apply so that the date for recommendation for post-prison community-based release eligibility is taken to be the parole eligibility date fixed under s 160B. If on the other hand the Court under s 669A(1) allowed the appeal, set aside the sentence imposed at first instance and imposed another sentence, s 214 of the Act would make s 160B applicable and this Court would be required to fix a parole eligibility date. I propose under s 669A(1) to allow the appeal and to vary rather than set aside the sentence imposed at first instance by deleting that part of the sentence suspending the term of imprisonment and instead recommending that the respondent be eligible for post-prison community-based release after serving 15 months of that sentence. Under s 213(1) the date for recommendation for post-prison community-based release eligibility is taken to be the parole eligibility date fixed under s 160B. This Court can therefore confidently expect that the respondent will be released on parole

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4 (1994) 181 CLR 295, 299.
5 (2000) 201 CLR 213, 222 - 223.
6 (2000) 202 CLR 321, 340 - 341.
7 [2002] NSWCCA 42, [70].

on the date of this Court's recommendation for post-prison community-based release eligibility.

Order

[19] 1. Allow the appeal.
2. Vary the sentence imposed at first instance by deleting that part of the sentence suspending the term of imprisonment and instead recommending that the respondent be eligible for post-prison community-based release after serving 15 months of that sentence, that is, on 6 October 2007.

[20] **MACKENZIE J:** I agree with the orders proposed by the President for the reasons she gives. I wish only to add the following remarks.

[21] In the written submissions, the appellant submits that a sentence of three to four years imprisonment suspended after fifteen to eighteen months could be imposed. In oral submissions the appellant's counsel's "ultimate submission" was that a sentence not less than that imposed in *R v Tupou; ex parte Attorney-General (Qld)* [2005] QCA 179 should be imposed. It was submitted that a head sentence of up to four years imprisonment could have been imposed, given the respondent's previous conviction for another assault in a public place. That was consistent with the submission of the Crown Prosecutor at sentence that the appropriate sentencing range was three to four years and that suspension after fifteen months was appropriate.

[22] In *Tupou*, the three to four year range of head sentence was, according to the Chief Justice, to be taken as taking into account the plea of guilty. Later, he said "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. ... 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."

[23] It is implicit in that approach that the sentencing judge at first instance would have been entitled to impose a head sentence at a higher level than three to four years in *Tupou*. If such a sentence had been imposed, and the usual kind of allowance for mitigating factors present in *Tupou* had been made, the period to be served in custody before eligibility for release would ordinarily have been longer than that imposed by the Court of Appeal. Conversely the period to be spent in custody pursuant to the Court's order in *Tupou* was longer than it would ordinarily have been if the usual kind of allowance for plea of guilty and other mitigating circumstances had been made. The unusual structure of the sentence was accounted for by the factors mentioned by the Chief Justice.

[24] In the present case, therefore, if the three year head sentence was the objectively appropriate sentence, the respondent should have been entitled to eligibility for release earlier than fifteen months into his sentence. While exact comparison of facts of cases and mitigating circumstances is rarely possible, there was general equivalence between those in *Tupou* and those in the present case. The effect of the order proposed by the President is that the time to be spent in custody, as in *Tupou*, is indicative of a notionally higher head sentence than three years.

[25] **FRYBERG J:** For the reasons given by the President this appeal should be allowed. The sentence imposed in the District Court was manifestly inadequate. I need not repeat the facts, which are set out by the President.

[26] In *R v Tupou*, the Chief Justice, with whom Mullins J agreed, said:

> "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.'"[8]

In my judgment the majority decision in *Tupou* contained a deliberate indication to trial judges of the need for increased severity in sentencing for offences such as that the subject of the present appeal.

[27] Judges imposing sentence look to decisions of this Court for guidance in the exercise of their discretion. Both they and members of the legal profession use such decisions to establish the range (or their estimate of the range) of sentences open in particular circumstances. It is most important that this Court not send mixed messages. That does not mean that sentencing is a process governed by some notion of binding precedent. It does mean that subsequent sentences should be able to be reconciled with sentences imposed or upheld by this Court on rational grounds.

[28] With the utmost respect to my colleagues, I cannot accept that the head sentence which they propose in this appeal can be so reconciled. Moreover I do not agree that the attack in the present case was equally as serious as that in *Tupou*. The respondent's conduct was worse because he attacked his victim from behind; because he kicked his victim and did so in the face; because he knocked his victim out; and because he inflicted permanent injury (damage to eyesight requiring reading glasses and an apparently permanent loss of sensation in the face) on his victim. For those reasons alone he merited a more severe head sentence than was imposed on Tupou. Paradoxically, the head sentence proposed by my colleagues is, when the reasons for judgment in *Tupou* are analysed, demonstrably more lenient than that imposed on Tupou.

[29] Tupou was originally sentenced to three years' imprisonment suspended after nine months for an operational period of three years. On appeal the head sentence was not varied, but the suspension was ordered after 15 months rather than nine months. That course was taken because of the form of the penalty imposed at first instance and because of the need for moderation in an Attorney's appeal. The Court adopted the approach of allowing for mitigating factors by reducing the head sentence. That is an unusual course to adopt except where the sentence is 10 years or more. The Chief Justice said:

> "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

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8 [2005] QCA 179 at p 11.

> 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.
>
> ...
>
> 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. ... I make it clear that the suspension after 15 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."[9]

[30] The mitigating factors that existed in *Tupou* were of greater force than those in the present case. Tupou readily admitted that he was the offender when first interviewed by police. The present respondent effectively denied assaulting the complainant when first interviewed by police. Tupou was a diabetic and his failure to take his insulin on the night of the offence compounded the adverse affect upon him of the alcohol which he had drunk. His criminal history comprised street offences, none of which was a crime of substantial violence. The respondent had no such disability and his criminal history, which was more lengthy than that of Tupou, included convictions for assault occasioning bodily harm and (on a separate occasion) wilful destruction of property. The President has described the blows which constituted the assault in the present case.[10] I add that the respondent had regular involvement in kick-boxing. Tupou had the benefit of an early plea of guilty following of full handup committal. The respondent required a full committal with cross-examination and pleaded guilty only a few days before his trial was due to take place. The only significant respect in which Tupou was in a worse position than the respondent was that his offence was committed while he was subject to a good behaviour bond. Had Tupou been in the same position as the respondent in respect of mitigating factors, the head sentence would (on the approach taken in the case) doubtless have been higher; perhaps 3½ to 4½ years.

[31] When one has regard to the more serious nature of the respondent's conduct,[11] the range appropriate for consideration in this case is four to five years' imprisonment.

[32] Having regard to the moderation which is appropriate in an Attorney's appeal, I would quash the sentence of the District Court and impose a head sentence of imprisonment for four years.

[33] No consideration appears to have been given by the sentencing judge to recommending post-prison community based release rather than a suspended sentence. That appears to have resulted from a too-close adherence to what was done in *Tupou*. It is unnecessary to consider whether that constituted an error in principle sufficient for this Court to intervene. The Court is varying the sentence imposed below and I agree with the President that a recommendation is the preferable course. This being an Attorney's appeal, I am also content to concur in a recommendation effective after 15 months.

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9 *Ibid.* at pp 11, 14.
10 Paragraph [2].
11 Paragraph [28].