R

SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lambert; ex parte A-G* [2000] QCA 141
PARTIES:	**R** **v** **LAMBERT, Jason Scott** (appellant/respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (respondent/appellant)
FILE NO/S:	CA No 419 of 1999 CA No 377 of 1999 DC No 568 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against conviction Sentence appeal by A-G (Qld)
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	28 April 2000
DELIVERED AT:	Brisbane
HEARING DATE:	12 April 2000
JUDGES:	McMurdo P, Thomas JA and Helman J Judgment of the Court
ORDER:	**Appeal against conviction dismissed. Attorney-General's appeal against sentence allowed; Sentence on count 1 varied by replacing that sentence with one of three years imprisonment; Balance of the order (concurrent sentences of six months and a declaration in relation to pre-sentence custody) to remain undisturbed.**
CATCHWORDS:	CRIMINAL LAW – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS – IDENTIFICATION EVIDENCE – MODES OF PROOF – IDENTIFICATION FROM PHOTOGRAPHS - assaults by security officer at nightclub – whether evidence of identification from photoboard unfair – allegation that photographs did not match any verbal descriptions given by witnesses CRIMINAL LAW – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS – IDENTIFICATION EVIDENCE – MODES OF PROOF – CIRCUMSTANTIAL EVIDENCE – whether evidence of

name addressed to offender during assault should have been excluded in exercise of discretion – whether insufficient directions on use of evidence – whether evidence incapable of satisfying a properly instructed jury

CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – OTHER OFFENCES AGAINST THE PERSON – ACTS INTENDED TO CAUSE OR CAUSING DANGER TO LIFE OR BODILY HARM – SENTENCING

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – PARITY – GENERALLY

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – MISCELLANEOUS MATTERS – OTHER - effect of delay between offences and sentencing

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – MISCELLANEOUS MATTERS – PLEA OF GUILTY, CONTRITION AND CO-OPERATION – GENERALLY – whether discount for plea of guilty in relation to some offences only

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – CONCURRENT, CUMULATIVE AND ADDITIONAL SENTENCES, SENTENCES ON ESCAPE AND COMMENCEMENT OF SENTENCE – SENTENCES OF TWO OR MORE COUNTS – whether cumulative sentences or increased head sentence on first count best reflect further offences - sentence manifestly inadequate

Penalties & Sentences Act 1992 (Qld) s 13

R v Amituanai (1995) 78 A Crim R 588 considered
R v Brookes CA No 317 of 1991, 13 May 1992 considered
R v Brooks CA No 109 of 1998, 19 September 1990 considered
R v Camm CA No 431 of 1998, 1 April 1999 considered
R v Pop CA No 549 of 1994, 15 March 1995 considered

COUNSEL: A Moynihan for the appellant/respondent
M J Byrne QC for the respondent/appellant

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

[1] **THE COURT:** The appellant (Mr Lambert) was convicted by a jury of grievous bodily harm and of two counts of unlawful assault occasioning bodily harm. The three offences were alleged to have occurred in a series of incidents at a nightclub in Townsville on 9 May 1995. Some time after those convictions he pleaded guilty to three further counts of assault occasioning bodily harm committed by him at the same nightclub, two of them having taken place on 13 May 1995 and the other on 19 May 1995.

[2] The appellant appeals against his convictions on the first three counts.

[3] There is also an appeal by the Attorney-General against the sentences that were imposed. The effective sentence was one of two and a half years imprisonment, suspended after eight months with an operative period of two and a half years.

Appeal against conviction

[4] The only issue in the trial was identification. The assaults in question took place at the Bank nightclub, Townsville. They were committed by a security officer working at that nightclub who attacked a number of soldiers who were at the club. The four soldiers, Harding, Munn, Gerhardt and Scottney-Turbil had been drinking elsewhere during the afternoon and came to the nightclub at about 11.00 pm. While talking in the club, Scottney-Turbil slipped to the floor, cutting his face. He was approached by the security officer and was asked to leave. He and Harding thereupon left the premises. A short time later Munn and Gerhardt were removed by force from the club by the same security officer. The four men were then together at the bottom of the stairs at the front of the nightclub. After a short time three of them crossed the road to catch a taxi. Munn remained about 30 metres from the entrance. The security officer then approached Munn and after some conversation kicked him in the left thigh causing bruising. Munn's companions, on observing this, crossed the road and were confronted by the security officer who proceeded to kick Harding in the groin and Scottney-Turbil in the chest. The men were walking back across the road when the security officer again confronted Scottney-Turbil and kicked him in the left upper thigh. The kick to Harding's groin had caused him to double over and stagger backwards. Having kicked Scottney-Turbil in the thigh he then punched Harding, again in the area of the groin. It was described as an uppercut punch to that area.

[5] Harding, who was 18 years old suffered a ruptured left testicle which is now 80 per cent smaller than the right one and it has ceased to function. That injury was the grievous bodily harm that was alleged. Munn suffered bruising to the knee, Scottney-Turbil suffered bruising to the sternum and left upper thigh. After the incident the four men returned to barracks.

[6] During 1995 the appellant was employed as a security officer at the nightclub in question. There was however no evidence to prove that he was or was not on duty on the relevant night. The manager at the time recalled that the appellant had

worked at that club for him during 1995 but could not be specific as to the times. He explained that between seven and eight security staff would be on his books at any one time. On a Friday or Saturday night six would be working at the one time. However on a Monday night (such as the night of the relevant offences) probably only one or two would be employed.

[7] The evidence of identification consisted mainly of two separate identifications from photoboards. The first such identification was made by Scottney-Turbil on 18 September 1995, four months after the incident. The other identification was made by Munn on 28 September 1999 shortly before trial. Subject to the submissions soon to be mentioned, the relevant identification in each instance was verified as having proceeded appropriately either by a video tape recording or by other means.

[8] There was also evidence from Munn that at the time of the assaults he thought he heard the name "Jason" or "Justin" used by another security guard who came out of the nightclub and spoke to the offender.

[9] Counsel for the appellant submitted that the learned judge erred in admitting the photoboard evidence in each instance. With regard to both such identifications it was submitted that the photoboard was unfair and not properly representative of persons of similar appearance to the appellant. In the case of the later identification by Munn, the additional complaints were made that earlier statements by Munn had not offered a description, Munn had been intoxicated at the time, and that before making the identification he had read a statement of Harding which contained a description of the appellant. It was further submitted that Munn had spoken with Scottney-Turbil immediately prior to the purported identification. It should be immediately noted that the submission that Munn had read Harding's statement is challenged. Harding suggested he had done so, but Munn gave evidence specifically denying having done so.

[10] No such objections to admissibility of the photoboard identifications were made at trial. So far as the alleged unfairness of the first photoboard is concerned, we have perused the exhibit and do not consider it to be unfair in any relevant sense[1]. Reference was made to *R v Brookes*[2] for the proposition that most of the photographs in the collection must be of persons who meet the verbal descriptions given by the witness of the offender. This may be generally true, but it is not a dogmatic requirement and is not suggested to be so in *Brookes*. Verbal descriptions are often poor, and may be inconsistent with various features of a person who is properly identified in due course. Although a disconformity between the verbal description and the actual appearance of an offender subsequently selected from a line-up or photoboard is a matter for comment to the jury, it is not necessarily fatal to a valid identification. The point at issue in *Brookes* was whether there was an unfair disconformity between the appearance of the suspect and that of most other persons whose faces were provided on the photoboard. In the event the court decided that the collection of photographs was fair, observing that "it must include photographs of persons sufficiently similar to the suspect and there must be nothing which draws attention to him or her". Those requirements were properly met in the present case.

---

1 Cf. *R v Pearce* CA No 49 of 1992, 26 June 1992.
2 CA No 317 of 1991, 13 May 1992.

[11] The criticism advanced by counsel on behalf of the appellant in the present matter is that the description of the suspect previously given by the identifying witness (Scottney-Turbil) was in a number of respects different from the photograph of the appellant which he picked out. His description had been of a man with a fair complexion and mousy coloured hair. The appellant and many of the other persons on the photoboard appear to have reasonably dark hair, and arguably complexions that could be described as darker than "fair". However the collection is of a reasonably homogenous group of young men. There is nothing in the collection which would unfairly draw attention to the appellant or make it more likely that he would be picked out than any other person. In making his identification the witness said that he recognised the facial features.

[12] These matters were in our view jury questions, not matters such as to require a judge to rule that the evidence should be excluded. During argument in this court counsel for the appellant conceded that the evidence was prima facie admissible but submitted that it should have been excluded in the exercise of a discretion. The learned judge however was not asked to exercise such a discretion, and the circumstances were not such in our view as to have justified exclusion on such a ground, let alone unilateral intervention by his Honour to do so.

[13] So far as Munn's later identification is concerned, valid criticisms may be advanced and no doubt were advanced to the jury. These involved Munn's intoxication at the time, and the long delay (four years and four months) before identification. These criticisms again were essentially jury matters, and were not in our view of a kind that would render the identification inadmissible, or which would require the trial judge of his own motion to exclude such evidence. The alleged weaknesses in the identification were matters for cross-examination and directions from the trial judge. No challenge has been made to his Honour's directions in these respects. Munn's identification was unprompted, clear and unambiguous.

[14] There is no substance in these objections.

[15] The next ground complains about the admission of the evidence from Munn to the effect that the name "Jason" or "Justin" was used by another person in conversation with the offender. Counsel at trial applied to exclude this evidence on the grounds that it was a hearsay statement and was not made within the hearing of the accused. The learned trial judge ruled the evidence to be admissible as part of the res gestae and as relevant to identity.

[16] On appeal it was submitted that his Honour should have excluded the evidence, not because it was inadmissible but in the exercise of a discretion. Again, no application was made to his Honour to exercise such a discretion. The evidence was plainly admissible and was a circumstance to which the jury could properly have regard on the issue of whether the appellant was the offender. There was evidence that the appellant was an employee of the club in question, from time to time working as a security guard in uniform. There was further evidence that a security guard in uniform committed the assaults. The appellant's first name is Jason. The evidence to which objection is taken tends to prove that the christian name of the guard in question was Jason or Justin. Various attempts were made to weaken the potential force of such evidence by referring to the fact that one of the group of four soldiers (Gerhardt) also bore the name "Jason". However the

evidence in question does not suggest that Gerhardt was being addressed. He was not a nightclub employee and there was no evidence of his being known to any person such as the second security guard who made the statement. It was also contended that it was possible that the second security guard was the person whose name was Jason or Justin and that the person speaking the name may have been the appellant. On this point it may be noted that the appellant's employer could not recall whether or not he employed any security guards other than the appellant with the name Jason or Justin during 1995. Such a possibility seems very remote, as the evidence as a whole on this point makes it reasonably clear that it was the offender who was being addressed by that name. Such evidence is clearly admissible as capable of supporting a feature of identification, namely the offender's name or apparent name. The fact that it is possible that a wrong name was used might affect the weight of such evidence. Like many forms of circumstantial evidence, it is not necessary in order to be admissible that it be conclusive of the fact that it tends to prove[3].

[17] In our view there is no substance in this ground.

[18] It was further submitted that the learned trial judge failed to direct the jury as to the proper use that the jury could make of this evidence. It was contended that the evidence was capable only of confirming or supporting the photoboard identification, rather than as evidence of identification in itself. We do not agree with that submission. The ultimate issue was identification or proof that the appellant was the person who committed the assaults. Both the photoboard identification and the evidence of the name addressed to the offender at the time consisted of evidence supporting such a conclusion. Counsel submitted that his Honour erred by failing to give a direction along the lines – "Its only use can be in support of the other identification evidence; it would not be enough by itself to identify the accused as the offender". We do not consider that his Honour was obliged to give such a direction, particularly in the absence of any request for it. The directions of the learned trial judge dealing with this evidence were quite favourable to the appellant's case, and there was no legal error such as that suggested in the submission.

[19] It was finally submitted that the evidence as a whole was incapable of satisfying a properly instructed jury of the appellant's guilt. The evidence in our view however was quite sufficient, and it may be noted that there was no evidence from the appellant or from any witnesses on his behalf to contradict it. We would dismiss the appeal.

Attorney-General's appeal against sentence

[20] In this appeal Mr Lambert will be referred to as the respondent.

[21] The learned sentencing judge imposed two and a half years' imprisonment suspended after eight months with an operational period of two and a half years on count 1. On the remaining five counts he imposed six months' imprisonment concurrent. His Honour also made a declaration in relation to 35 days pre-sentence custody.

---

3 Cf. *R v Bon* CA No 209 of 1990, 26 March 1991.

[22] The further assaults to which the respondent pleaded guilty show a continuing pattern of reprehensible violence and abuse of his position as a security officer over a ten day period in May 1995. The circumstances of the harm done to the soldiers on 9 May 1995 have already been recounted. The respondent held a second degree black belt in martial arts. The damage done to the soldiers suggests that the respondent was a proficient fighter prepared to use kicking and that in Harding's case he targeted the groin.

[23] On 13 May 1995 a police liaison officer attended the nightclub with two females. At the entrance he showed his VIP card to the applicant. He was thereupon punched in the eye by the respondent "for being a smart ass". The complainant was admitted into the club by another person. Later, when leaving the club he spoke to the respondent about the earlier assault. The respondent responded by punching him in the jaw causing him to lose balance and fall down some stairs. He was unconscious for about half an hour. He suffered bruising to the right eye and swelling to the right cheek and lower left lip.

[24] On 19 May 1995 a patron returned to the nightclub having left earlier. The respondent asked him if he had threatened a girl in the club to which the patron responded "Fuck off you idiot". The respondent then headbutted the complainant before punching him to the ground. As the complainant tried to get up he was kicked in the face by the respondent.

[25] This series of assaults suggests considerable brutality and a thirst for violence.

[26] The respondent was 23 years old at the time. A year before these incidents he had been convicted of assault occasioning bodily harm and had been fined $600. The learned sentencing judge considered that the respondent showed no remorse and correctly observed that the respondent had used his skills as a kickboxer in a brutal way.

[27] His Honour seems to have given considerable weight to the fact that the sentence was being imposed some five and a half years after the events in question (although this would seem to be an error as the time was four and a half years). The police were unable to find the respondent who left town after these events, but it is not suggested that the respondent was in hiding or that he should be regarded as responsible for the delay. While the delay is relevant, it should not be of overwhelming influence in the fixing of an appropriate penalty for conduct as serious as this. The particular relevance of the delay is that the respondent had not re-offended in the meantime and had apparently put himself away from situations that might tempt him to re-offend. Also he had formed a relationship and had two young dependents. He also is a person who has demonstrated a solid work history.

[28] It was submitted that having pleaded guilty to counts 4, 5 and 6 the respondent is entitled to a discount under s 13 of the *Penalties and Sentences Act*. That would seem to be so with respect to those offences, but the same consideration does not apply in relation to counts 1, 2 and 3 on which he went to trial. We reject the submission that he is in the present circumstances entitled to a discount on those counts also. In a mixed situation like the present, where the overall operative sentence is likely to be imposed on count 1, and where the sentence to be imposed for it is likely to be increased to take account of the subsequent offences, the

amount of the increase should be abated to give appropriate credit for his pleas on those later counts.

[29] In the present case no victim impact statements were presented to the court. The precise effect upon Harding's life is not known, but he has been left with an unpleasant and serious permanent injury. The bruising to the other soldiers was not suggested to be serious. The injuries to the other victims on 13 and 19 May 1995 (including knocking a man unconscious for half an hour) are not suggested to have had any particular aftermath. That is fortunate for the respondent, as the assaults themselves were serious enough to have produced more significant consequences.

[30] Mr Byrne QC for the Attorney-General submitted that the offence of grievous bodily harm in this matter may fairly be compared with that in the case of *Brooks*[4] where a young man who went to trial was sentenced to three years imprisonment without any recommendation. He contends that the overall sentence in this case of two and a half years with a recommendation for parole after eight months is immediately inappropriate even before one considers the additional increments that should be imposed because of his repeat offending. He submitted that the further assaults justify cumulative sentences or alternatively increasing the head sentence on count 1. The latter seems a preferable alternative in our view. Count 1 should carry the effective operative sentence while the other matters should carry shorter concurrent sentences.

[31] A number of previous decisions were referred to by counsel for the respondent in argument including *Camm*[5]; *Pop*[6] and *Amituanai*[7]. In the first two mentioned cases lower sentences were imposed. In *Camm* the court described the incident as one of an altercation between two parties which led to a spontaneous act of violence causing the complainant to fall and fracture his hip. A sentence of two years, suspended after five and a half months was imposed. *Pop* is in our view difficult to reconcile with the level of sentencing in other cases. The court, on an Attorney's appeal described it as "an extraordinarily serious offence" by an armed vigilante group in which Pop struck the complainant with a lump of wood, severing the large muscle in her forearm. There had been a plea of guilty but no remorse. The court allowed an appeal against a wholly suspended sentence and substituted two years imprisonment. Mr Byrne submitted that the court may have been influenced by considerations applicable to an Attorney-General's appeal such as disturbing the status quo in a manner adverse to the prisoner. Whatever the explanation the sentence in *Pop* seems lower than would normally be expected in such circumstances.

[32] *Amituanai* is of some use to the respondent in that upon a reasonably extensive review of grievous bodily harm cases, it was noted that a common sentence in such cases is two and a half years imprisonment with a recommendation for parole after a little over 12 months. It is unnecessary to mention the facts in *Amituanai* other than to note that some very special factors operated in that appellant's favour, and that notwithstanding this, the terrible consequences that resulted to the victim

---

4 CA No 108 of 1990, 19 September 1990.
5 CA No 431 of 1998, 1 April 1999.
6 CA No 549 of 1994, 15 March 1995.
7 (1995) 78 A Crim R 588.

required a genuine custodial sentence. In the result this court held that in the circumstances a sentence of three years with a recommendation for parole after nine months should not be disturbed.

[33] The cases which point towards a mean or common level of sentence in such cases in the vicinity of two and a half years are nearly all single reprehensible incidents of violence, some with and some without provocation, and often reflect the product of a momentary loss of self-control. None of them have the worrying dimensions that exist in the present case where an offender has committed six assaults on five different people over three nights, on each occasion in circumstances where the victims were either completely or virtually innocent of wrongdoing.

[34] Some insight into the respondent's character and motivation may be gleaned from a psychiatric report from Professor Basil James. He found no evidence of memory or other cognitive impairment suggestive of organic brain disorder or of any psychotic illness. The respondent however, having been significantly obese as a child had developed the strong feeling that "everyone hates me" and this has remained a dominant theme in his life. He has low self-esteem and can become disorganised by anxiety. Although he fulfils criteria for a social anxiety disorder (DSMIV) Professor James thought that the respondent's symptoms were largely confined to "those of self image and affect dysregulation rather than the broad spectrum instabilities described under the personality disorder syndrome". In the end the picture is of a person who quickly suffers frustration and rage. He has reasonable insight into his difficulties. The report assists in understanding what might otherwise seem inexplicable, but shows a person who is a danger to others unless he exercises strict self-control.

[35] In our view both the head sentence and the limited part of it he was required to serve (eight months) were manifestly inadequate in relation to these continued acts of reprehensible violence. The need for deterrence of such conduct hardly needs emphasis. In all the circumstances we would substitute a sentence of three years imprisonment on count 1. We record our view that in the circumstances this substituted sentence is on the conservative side, but is appropriate because of the delay of four and a half years during which the appellant has not re-offended.

[36] The appeal should be allowed. The sentence on count 1 should be varied by replacing that sentence with one of three years imprisonment. The balance of the order (concurrent sentences of six months and a declaration in relation to pre-sentence custody) will remain undisturbed.

R

SUPREME COURT OF QUEENSLAND

CITATION:	*R v Anderson* [2012] QCA 264
PARTIES:	**R** **v** **ANDERSON, Christopher James** (applicant)
FILE NO/S:	CA No 54 of 2012 DC No 464 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	28 September 2012
DELIVERED AT:	Brisbane
HEARING DATE:	17 September 2012
JUDGES:	Holmes and Gotterson JJA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted after a trial of one count of grievous bodily harm – where the applicant was sentenced to two years and six months imprisonment with parole release fixed after fifteen months – where the applicant was an experienced security guard in his mid-thirties working at a hotel – where the applicant struck a female patron, breaking her jaw – where the assault was an over-reaction to a minor, brief and unthreatening physical contact – where the applicant had previous convictions for public nuisance offences but none for offences of violence – where the applicant had shown no remorse – whether the sentence was manifestly excessive *R v Grimley* [2000] QCA 64, considered *R v Harvey* [2003] QCA 286, considered *R v Katsidis* [2003] QCA 82, considered *R v Lambert; ex parte A-G* (2000) 111 A Crim R 564, [2000] QCA 141, considered *R v Taputoro* [2007] QCA 29, considered

COUNSEL: J J Allen for the applicant
B J Merrin for the respondent

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

[1] **HOLMES JA:** The applicant was convicted, after a trial, of grievous bodily harm. He applies for leave to appeal against the sentence imposed, two years and six months imprisonment with parole release fixed after fifteen months, on the ground that it is manifestly excessive.

The factual basis of the sentence

[2] The applicant was a security officer at a hotel in Ayr. The complainant, Ms Beteridge, was one of a group of six people who were standing, late at night, on the footpath outside the hotel. One of the group, Mr Liebrecht, was engaged in an argument with the manager, with whom he had previously had altercations, about whether he was entitled to be on the footpath. The applicant's account was that he received a call to go to the front of the hotel where he saw the manager arguing with Mr Liebrecht. Following the manager's instructions to get the group off the footpath, he repeatedly told Mr Liebrecht to move. Eventually, Mr Liebrecht did move onto the road, and the applicant took up a position on the edge of the footpath to ensure that he could not step back onto it. He was focussing on Mr Liebrecht when Ms Beteridge hit him on the side of his face, pushing him back. Believing the group was setting on him, he struck out, hitting Ms Beteridge.

[3] The applicant relied on that account of being struck by Ms Beteridge as a foundation for self-defence, but it was plainly rejected by the jury, not surprisingly because CCTV footage of the events showed no such incident. Ms Beteridge had little recollection of what happened: the applicant's blow knocked her to the ground and broke her jaw. The trial judge accepted the evidence of a friend who was with her, to the effect that she had moved in front of Mr Liebrecht in an endeavour to protect him and delivered what his Honour said might have been some sort of minor push to the applicant's chest. Ms Beteridge was not, the friend said, very big. Any contact must, the learned judge observed, have been transient (it could not be seen on the CCTV footage) and could not have put the applicant in fear.

[4] His Honour described the blow visible on the footage: it lifted Ms Beteridge off her feet and deposited her in the roadway. Witnesses, he said, had described hearing the crack of her jaw breaking. He accepted, however that the applicant may not have realised that he was hitting a woman. He noted that the applicant had not shown any sign of remorse during the trial. His Honour expressed the view that an appropriate sentence for what he described as "thuggery in the street" would have been three years imprisonment, but he acknowledged that the applicant had received some direction from the hotel manager to behave in the way he did, reducing his criminality to some extent. The applicant must have known, however, that he had no authority to order Mr Liebrecht off the footpath.

[5] The learned judge noted the applicant's background and current circumstances. At the time of the offence he was 34 years old, and he was 36 at sentence. He had, in the past, suffered from bi-polar disorder but had been adequately treated and

medicated for some years. Two weeks prior to sentence, his partner had had a baby. The applicant had spent most of his working life in the security industry but had not worked as a security guard since the incident and had taken up an apprenticeship as a carpenter. He had performed some volunteer work and had completed an arts degree.

[6] The applicant had a history of summary offences, although none involved violence. He had appeared in the Magistrates Court on eight occasions, most frequently for public nuisance offences; his last conviction in November 2009 was on six charges of committing a public nuisance and one of obstructing a police officer. Notwithstanding his criminal history, he had held a security licence for 14 years. His counsel said that all of his offending was alcohol related.

[7] In the course of submissions on sentence, the applicant's counsel said this:

> "...he expresses his sympathy for the pain and suffering of the complainant, however reiterates that he believed she was a man and that he reacted in a necessity of having defended himself."

He accepted, however, that the jury had not accepted that defence.

Decisions relied on

[8] Counsel for the applicant here, in arguing the sentence was manifestly excessive, relied on four authorities: *R v Lambert; ex parte A-G*;[1] *R v Harvey*;[2] *R v Katsidis*;[3] and *R v Grimley*.[4] All involved individuals convicted of grievous bodily harm after trials. (The learned sentencing judge was referred to *Lambert* and *Harvey*.) *Lambert* was an Attorney-General's appeal against a sentence of two and a half years imprisonment, suspended after eight months. The respondent, who had martial arts training, was convicted not only of grievous bodily harm but also two counts of assault occasioning bodily harm, and pleaded guilty to another three counts of assault, all of which he had committed while working as a security officer at a nightclub. The offences involved various incidents of kicking, punching and head-butting patrons. The grievous bodily harm had involved the infliction of a ruptured testicle. Lambert was 23 years old and had one previous conviction for assault occasioning bodily harm. He had a solid work history, had formed a relationship and had two young dependents.

[9] Significantly, for present purposes, the court in *Lambert* made this observation:

> "The cases which point towards a mean or common level of sentence in [grievous bodily harm] cases in the vicinity of two and a half years are nearly all single reprehensible incidents of violence, some with and some without provocation, and often reflect the product of a momentary loss of self-control."[5]

Lambert's offending, however was in a different category; over three nights he had assaulted five different people who had done little or nothing to attract his aggression. For his original sentence, a sentence of three years imprisonment was substituted, without suspension or parole declaration. It was, the court said, "on the

---

1 [2000] QCA 141.
2 [2003] QCA 286.
3 [2003] QCA 82.
4 [2000] QCA 64.
5 [2000] QCA 141 at [33].

conservative side" because of the long period, four and a half years, between offending and sentencing, during which the respondent had not re-offended.

[10] In *R v Harvey*, the applicant for leave to appeal against sentence injured an intoxicated patron who was trying to re-enter a bar where the former was working as a barman. The applicant hit him with force, and he fell unconscious to the pavement, suffering a broken jaw and tooth. He faced the prospect of a mildly affected bite, altered sensation to the left lower lip and a fixation plate in his jaw. The applicant was 28 years old and had no prior convictions. He was sentenced to two years imprisonment, but as the *Corrective Services Act* 2000 then stood, would be eligible only for release on remissions after he had served two thirds of his sentence, something of which the sentencing judge had not been informed. Consequently, the court allowed the appeal by ordering the suspension of the sentence after 12 months.

[11] In *R v Katsidis*, the applicant was sentenced to two years imprisonment, suspended after eight months. He was a professional boxer employed at a club, but there was no suggestion that he was a security officer. He was 21 years old and had only one prior conviction for assault, in respect of which no conviction had been recorded. He confronted a man who had urinated on his friend's car. The culprit, who was very intoxicated, threw a punch at him, but clearly was incapable of landing a blow. The applicant, however, responded with a number of severe blows, fracturing his jaw and leaving him disfigured. This court concluded that the sentence imposed was not manifestly excessive.

[12] In both *Harvey* and *Katsidis*, reference was made to the earlier decision of *Grimley*. The applicant there was sentenced to two years and six months imprisonment for hitting another man in the jaw, breaking it in two places. The facts of the case are not given in any detail in the judgment (which dealt principally with whether a defence of accident should have been left). It appears that the incident occurred in a caravan park; that the victim was intoxicated and was said not to have provoked the assault; and that he took some time to recover from the injury. The applicant was 46 years old and had been dealt with some years previously for assault occasioning bodily harm, for which no conviction had been recorded. Davies and Pincus JJA in the majority (McPherson JA dissenting) regarded the sentence as excessive, and substituted a sentence of one year and eight months, without any suspension or recommendation for parole.

The applicant's submissions

[13] The applicant here argued that the sentencing judge had wrongly regarded the applicant as not showing remorse, notwithstanding what was described as an apology (the passage I have set out at [7] above). It was also said that the judge had arrived at an excessive sentence by wrongly starting from three years imprisonment as the appropriate penalty. His approach to sentence, as exemplified by his reference to the applicant's conduct as "thuggery", was coloured by a view that the applicant should not have been forcing the people standing outside the hotel off the footpath. That was unfair given the manager's evidence, which was that he believed he was entitled to instruct anyone evicted from or not permitted to enter his hotel to move away from the premises.

[14] The applicant, it was submitted, was to be sentenced for a momentary lack of judgment in a context of heightened emotions and assertive behaviour by the group

with Ms Beteridge. She had recovered from her injuries (although I note her evidence was that she had three metal plates in her jaw). Insufficient weight had been given to a number of other matters in mitigation: the absence of any conviction for violence, the applicant's otherwise good background, the fact that he had recently had a child and the fact that he had lost his employment as a security officer. The head sentence, it was submitted, should not have exceeded two years imprisonment with suspension after eight to 12 months.

Conclusions

[15] The question of how the hotel manager had come to a view that people could be told to move away from the vicinity of the hotel, in the absence of any specific banning order in relation to those individuals under the *Liquor Act* 1992, was not explored at the applicant's trial. But there was, in any event, no evidence that the applicant had any belief to that effect, or knew of the manager's; he said that he was told to get the group off the footpath and complied without question. The learned judge's observation that the applicant could not have believed he had authority to order Mr Liebrecht off the footpath seems a reasonable inference.

[16] His Honour was certainly correct in saying that there was no sign of remorse during the trial. All that the applicant subsequently offered was an expression of sympathy, while maintaining his position that he was entitled to act as he did. There was no hint of an acknowledgement of responsibility for Ms Beteridge's plight. In those circumstances, there was little in the way of remorse or co-operation with the administration of justice which could have warranted a reduction in the head sentence, or, as is more commonly the practice, in the non-parole period. And had the case been one where the applicant had intentionally and of his own volition sought out the group for confrontation (as opposed to following the manager's direction), a three year sentence might well have been appropriate.

[17] The learned judge plainly took such mitigating circumstances as there were into account. But the applicant, while having no history of offences of violence, was not in the position of a first time offender and had not the particular claim to lenience that might have given him. Unlike the applicants in *Lambert* and *Katsidis,* who were in their early twenties, he could not plead that his conduct was the product of youthful immaturity. And, significantly, he was in a different position from all of the applicants in the cases referred to, other than *Lambert*, because he was exercising his powers as a security guard. In *R v Taputoro*[6] Keane JA noted, in reference to an assault by a security officer, that considerations

> "...of general and personal deterrence, bearing in mind the applicant's occupation and the opportunity which security staff have to use personal violence on their fellow citizens in and around nightclubs"[7]

were highly relevant in the exercise of the sentencing discretion.

[18] The present applicant was a man in his thirties, with several years of experience as a security officer. With that background, the argument that he reacted impulsively in a highly charged atmosphere is unconvincing. At the highest, he was the subject of a minor, brief and unthreatening physical contact; his brutal response, fairly

---

6 [2007] QCA 29.
7 At page 5.

described as thuggery, caused a serious injury to his unlucky victim. The fact that he behaved in that way while carrying out his role as a security officer squarely raised the particular considerations of deterrence to which Keane JA referred.

[19] Had a sentence of two years imprisonment been imposed, I do not think it would have been inadequate; but that does not mean that a sentence of two and a half years was excessive. *Lambert* makes it clear, in the passage quoted earlier in these reasons, that a sentence of the proportions imposed was unremarkable.

Order

[20] I would refuse the application for leave to appeal.

[21] **GOTTERSON JA:** I agree with the order proposed by Holmes JA and with the reasons given by her Honour.

[22] **McMEEKIN J:** I have read the reasons of Holmes JA and I agree with those reasons and the order proposed by her Honour.