SUPREME COURT OF QUEENSLAND

CITATION:	*R v Jones* [2008] QCA 181
PARTIES:	**R** **v** **JONES, Matthew Kenneth** (applicant/appellant)
FILE NO/S:	CA No 73 of 2008 DC No 58 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Southport
DELIVERED EX TEMPORE ON:	10 July 2008
DELIVERED AT:	Brisbane
HEARING DATE:	10 July 2008
JUDGES:	McMurdo P, Muir JA and Mackenzie AJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The indictment presented to the Southport District Court be amended by correcting the spelling of the applicant's name to "MATTHEW KENNETH JONES"** **2. Application for leave to appeal granted** **3. Appeal allowed** **4. Set aside the sentence imposed at first instance** **5. Instead, a sentence of 18 months imprisonment is substituted and a parole release date is fixed at 10 September 2008**
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 – applicant sentenced to three years imprisonment with a parole release date fixed after 15 months on a plea of guilty to one count of unlawful wounding – applicant smashed beer glass into face of complainant – applicant's conduct unprovoked and unpremeditated – complainant scarred, but not disfigured – applicant of otherwise good character and remorseful – whether sentence manifestly excessive

Lowe v The Queen (1984) 154 CLR 606, cited
R v Berryman [2005] QCA 471, distinguished
R v Hays; ex parte A-G [1999] QCA 443, considered
R v Jasser [2004] QCA 14, considered
R v Kimmins [2006] QCA 438, considered
R v Toohey [2001] QCA 149, considered
Wong v The Queen (2001) 207 CLR 584, cited

COUNSEL: A Vasta QC, with D Pratt, for the applicant/appellant
G P Cash for the respondent

SOLICITORS: McMillan Criminal Law for the applicant/appellant
Director of Public Prosecutions (Queensland) for the respondent

THE PRESIDENT: The Court orders: 1. That the indictment presented in the Southport District in this matter be amended by correcting the spelling of the applicant's name to M-A-T-T-H-E-W K-E-N-N-E-T-H Jones.

The applicant, Matthew Kenneth Jones, pleaded guilty on the 10th March 2008 in the District Court at Southport to one count of unlawful wounding. He was sentenced to three years imprisonment with a parole release date fixed at 10 June 2009, that is, after 15 months.

He applies for leave to appeal against that sentence, contending that it is manifestly excessive and that a sentence with a parole release date of, or suspended from, 10 September 2008, that is, after 6 months, should be substituted.

Mr Jones was 23 at the time of the offence and 24 at sentence. He had no previous convictions.

The circumstances surrounding the offence were as follows. On 16 June 2006, at about 9 pm, the complainant and a friend walked to the Varsity Tavern at the Gold Coast. They were talking to another friend in the bar. They noticed Mr Jones, whom the complainant knew from school days. Mr Jones walked from the dance floor towards the complainant

and his friends. He had an empty schooner glass in his right hand. He immediately and without rhyme or reason, hit the complainant in the face with the glass. Mr Jones then left the bar. One of the complainant's friends followed him out to the lounge area and punched him twice. Security officers separated them. Meanwhile, the complainant was sitting outside on a bench with his other friend. He was bleeding profusely from a significant laceration across the bridge of his nose. When Mr Jones was asked why he had struck the complainant, he appeared to be very drunk, did not comprehend, and he gave no answer. The complainant was taken to hospital where he received 22 stitches to his face. Photographs of his face shortly after the incident, and about three months later were tendered. The scars were at that time very noticeable but not disfiguring. No photographs were tendered to show the extent of the scarring at the time of sentence.

A victim impact statement recorded that the unprovoked attack and the injuries resulting from it have taken their toll on the complainant's confidence. He has been left with scarring to the face and occasional pain and nosebleeds. He had three days off work and could not return to his normal customer duties for two weeks.

Counsel for the prosecution at sentence submitted that the appropriate penalty was in the range of 18 months to two years imprisonment, and if, as the Judge had indicated, this was a serious example of the offence, a head sentence of at least two years imprisonment should be imposed, with Mr Jones serving at least one-third of that sentence.

Mr Jones' lawyer at sentence emphasised his youth and his prior good character. He tendered six references, which supported the latter submission and that the offence was completely out of character. His lawyer stated that Mr Jones was a married man with a two year old daughter and the family's primary income earner. The only explanation for the offence was extreme intoxication. The offence was not premeditated. The lawyer submitted that whilst a head sentence of 18 months imprisonment was appropriate because

of the need for specific and general deterrence, the mitigating factors in this case warranted Mr Jones' release after no more than six months imprisonment.

The sentencing Judge made the following observations. The offence was extremely serious and prevalent so that a deterrent penalty was required. The victim was left with "reasonably disfiguring", and permanent, scarring. The attack was cowardly and unprovoked. It was however a spontaneous act with little or no premeditation committed when Mr Jones was extremely drunk. Mr Jones had no criminal history, there was an early guilty plea, he had shown remorse and the references provided on behalf of Mr Jones were favourable.

After noting the positive features referred to in those references, the Judge determined that a heavier sentence than that contended for by Mr Jones' solicitor was necessary, "to reflect the seriousness of this offence, committed, as it was, to the centre of the face of the complainant."

Mr Vasta QC, who appears for Mr Jones in this application, emphasises that the only photographs tendered at sentence were of the injuries received at the time and of the scarring as at September 2006, three months after the incident. There were no recent photographs to show the present state of the scarring to the complainant's face.

Mr Vasta does not contend that the offence was anything other than prevalent and that a deterrent sentence involving some period of actual custody was warranted. He submits, however, that the comparable sentences demonstrate that the three year head sentence was too high in the circumstances of this case. Such a sentence would have been reserved for the most serious example of what is colloquially referred to as a "pub glassing" and charged as unlawful wounding. He submits that the decisions of this Court in *R v Hays; ex parte A-G* [1999] QCA 443, *R v Toohey* [2001] QCA 149, *R v Jasser* [2004] QCA 14 and *R v Kimmins* [2006] QCA 438 demonstrate that in light of Mr Jones' many mitigating

circumstances, the sentence was so outside the appropriate range as to demonstrate inconsistency and unfairness: *Lowe v The Queen* (1984) 154 CLR 606, Mason J at 610-611 and *Wong v The Queen* (2001) 207 CLR 584, Gleeson CJ at 591. He submits the appeal should be allowed and a sentence substituted of 18 months imprisonment with a fixed parole date or suspension after about six months.

Counsel for the respondent, Mr G P Cash, made modest attempts to support the sentence imposed as demonstrating reasonable consistency with the range established by decisions of this Court. He contended, but not enthusiastically, that the sentence imposed was supported by *Jasser* and, in his written submissions that *Hays* was distinguishable because it was an Attorney-General's appeal against sentence.

In *Hays*, the respondent was 24 and with no relevant prior criminal history, when he grabbed two girls in a bar by the buttocks. The complainant took exception on their behalf. An altercation ensued. Hays struck him on the chin with a glass. Hays had had a conviction for possession of a dangerous drug, but had never before been to gaol. He pleaded guilty, was remorseful, had a good employment history and favourable character references. The complainant was left with noticeable, but not disfiguring, scarring. Hays was originally sentenced to 240 hours community service. On the Attorney-General's appeal, after noting a large number of comparable cases, this Court observed that for unlawful wounding involving the use of a beer glass or similar implement, a sentence of between one and three years imprisonment was appropriate, depending on the degree of criminality, prior criminal history and whether there was a plea of guilty. The Court then reviewed a number of those cases which it concluded showed that general deterrence is of such importance in cases of this kind as to require that a term of imprisonment be imposed even where, as in *Hays*, the conduct was unpremeditated, the offender was young, and had not previously been sent to gaol. The Court found that despite the mitigating factors, the sentence imposed in *Hays* at first instance was manifestly inadequate, a term of 18 months

imprisonment was required but because Hays had already performed 58 hours of community service, it was appropriate to wholly suspend the sentence.

In *R v Toohey*, the 24 year old Toohey applied for leave to appeal against his sentence of two years imprisonment for unlawfully wounding the complainant with a beer glass in a hotel. Toohey was intoxicated and an altercation ensued with the complainant publican who refused to serve him and asked him to leave. He was removed by police but returned half an hour later. The complainant again asked him to leave. Toohey smashed a 10 ounce beer glass which he swung at the complainant who had raised his arm to protect himself. The glass caused four deep cuts to his left arm, requiring numerous sutures, a finger was also broken in the fracas. Toohey had a criminal history with no prior offences of violence. The Court noted that sentences for "pub glassings" of 18 months to two years imprisonment were common and more serious sentences were imposed when further aggravating features existed. The Court considered that this offence was relatively serious because it was an attack on a publican endeavouring to run an orderly public house. The sentence of two years imprisonment was "on the high side" but was within the range because of the degree of premeditation and persistence.

In *Jasser*, the applicant was convicted after a three day trial of unlawfully wounding the complainant in a Gold Coast night club. He appealed against his conviction, and applied for leave to appeal against his sentence. The appeal against conviction was dismissed. Jasser was a 33 year old refugee from war torn Ethiopia. He had some minor and irrelevant convictions. He was sentenced on the basis that he deliberately smashed a glass into the cheek area of the complainant's face during an altercation. This Court found that the sentence imposed of 21 months imprisonment was at the lower end of the range and was not manifestly excessive.

In *Kimmins*, the applicant was convicted after a trial and sentenced to 18 months imprisonment suspended after six months with an operational period of two years. He

struck the complainant with a broken beer glass to the back in the course of an altercation outside a surf lifesaving club. The jury rejected his defences of self defence and sudden or extraordinary emergency. Kimmins was 20 at the time of the offence and 22 at sentence. He had no prior criminal history, was remorseful and was of good character. He was a professional surfer and the publicised shame and impact of his conviction would be a significant punishment. There had been a delay of more than two years from offence to conviction. The trial judge found the offence was committed in the course of excessive self-defence. This Court noted that "[a]bsent a plea of guilty, it is unremarkable that a custodial sentence was imposed. The sentence was not manifestly excessive…".

Mr Cash has also referred us to the case of *R v Berryman* [2005] QCA 471. That case was not strictly comparable because it involved the more serious charge of doing grievous bodily harm which carries a maximum penalty of 14 years imprisonment rather than the seven year maximum term of imprisonment for the present offence of unlawful wounding. The sentence imposed on Berryman, where the scarring was badly disfiguring, was three years imprisonment suspended after 12 months. This Court considered that that sentence was not manifestly excessive.

The maximum penalty for the offence committed by Mr Jones of unlawful wounding was seven years imprisonment. It is rightly common ground that a deterrent sentence was warranted and that a period of actual imprisonment had to be imposed for his inexcusable, largely unexplained and completely unprovoked attack. On the other hand, Mr Jones had no prior criminal history, he had promising prospects of rehabilitation, the offence was entirely out of character and was not premeditated. He had a good employment record and was supporting his young family.

The comparable sentences of *Hays*, *Toohey*, *Jasser* and *Kimmins* demonstrate that the present offence warranted a head sentence of between 18 months and two years imprisonment. Mr Jones' early plea of guilty and remorse should have been further

recognised by a fixed parole release date earlier than the normal statutory halfway point. Such a sentence would stand as a deterrent to those who might resort to violence with beer glasses in public bars. It makes clear that even young men with prior good character and solid employment, supporting a young family, but who behave in such an antisocial, way can ordinarily expect to serve a significant period of actual imprisonment.

The sentence imposed at first instance was manifestly excessive. I would grant the application for leave to appeal, allow the appeal, set aside the sentence imposed at first instance and instead impose a sentence of 18 months imprisonment with a parole release date fixed at 10 September 2008.

MUIR J: I agree.

MACKENZIE AJA: I agree with the President's reasons. I simply wish to make some additional minor comments for the purpose of emphasis.

The offence is essentially a king hit with a glass. However on the material before the Court, the offence is inexplicable. Unlike many of the glassing cases, there was no preceding incident which led to its occurrence. The applicant had no previous convictions and is otherwise considered by his referees as a person whose general background and disposition is such that the commission of the offence was out of character.

While gross intoxication is no excuse, it is the only apparent explanation on the material available to the Court of what he did. Additional to the good character of the applicant, it is a further mitigating circumstance that has to be given due recognition, that he pleaded guilty in a timely fashion.

It is beyond argument that offences involving the use of glasses as weapons must ordinarily attract a sentence of actual imprisonment. Those minded to engage in disturbances at or near licensed premises should be aware of that.

The present sentence, while reduced for the reasons given by the President, should demonstrate to such people that even a person with a most favourable background must expect to go to prison.

It is probably obvious from what I have said that, speaking for myself, I would emphasise that the sentence being imposed on this applicant should not be regarded as the norm for cases of glassing, especially where unlike the applicant, the offender has a history of relevant antisocial behaviour.

I agree with the orders proposed.

THE PRESIDENT: The orders are:

2. The application is granted.
3. The appeal is allowed.
4. The sentence imposed at first instance is set aside.
5. Instead, a sentence of 18 months imprisonment is substituted with a parole release date fixed at 10 September 2008.