

SUPREME COURT OF QUEENSLAND

CITATION: *R v Beer* [2000] QCA 193

PARTIES: **R**
v
BEER, Barry Joseph
(applicant)

FILE NO/S: CA No 404 of 1999
SC No 557 of 1998

DIVISION: Court of Appeal

PROCEEDING: Sentence application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 26 May 2000

DELIVERED AT: Brisbane

HEARING DATE: 12 April 2000

JUDGES: McMurdo P, Thomas JA, Helman J
Joint reasons for judgment of McMurdo P and Thomas JA;
separate reasons of Helman J dissenting

ORDER: **Application for leave to appeal against sentence granted. Appeal allowed. Sentence imposed on 11 November 1999 set aside and instead impose a sentence of 7 years imprisonment.**

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 GRANTED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – GENERALLY – application for leave to appeal against sentence – whether inconsistencies between complainant’s evidence and that of another witness, the position of blood stains and the bruise to the applicant’s eye precluded the learned sentencing judge from accepting the complainant’s evidence in full – whether sentence was manifestly excessive – comparable sentences considered – whether a serious violent offender declaration was necessary

R v Bojovic [1999] QCA 206; CA No 4 of 1999, 8 June 1999, applied
R v Brown CA No 155 of 1996, 26 July 1996, considered
R v Collins CA No 238 of 1998, 18 September 1998, applied

R v McCartney [1999] QCA 238; CA No 13 of 1999, 22 June 1999, followed

R v Morrison [1999] 1 QdR 397, applied

R v Newcombe and Middleton [1999] QCA 408; CA Nos 101 and 143 of 1999, 28 September 1999, followed

R v Olbrich (1999) 73 ALJR 1550, considered

R v Thompson CA No 575 of 1996, 16 April 1997, considered

COUNSEL: A Boe (*sol*) for the applicant
N Weston for the respondent

SOLICITORS: Boe and Callaghan for the applicant
Director of Public Prosecutions (Queensland) for the respondent

- [1] **McMURDO P AND THOMAS JA:** On 10 November 1999, after a three day trial, the applicant was acquitted of attempted murder but convicted of the alternative count of causing grievous bodily harm with intent. He applies for leave to appeal against his sentence of eight years imprisonment with a declaration that he was convicted of a serious violent offence as part of the sentence.

The fact-finding on sentence

- [2] Mr Boe, for the applicant, first submits that the learned sentencing judge, the Chief Justice, erred in finding beyond reasonable doubt that the applicant came into the room armed and committed the offence in the manner stated by the complainant. Mr Boe argues that the judge should have found, consistent with the jury's verdict, the applicant's evidence at trial and the submissions made on behalf of the applicant at sentence, that the applicant was assaulted by the complainant but over-reacted in self-defence, not having a reasonable apprehension of death or grievous bodily harm under s 271(2) of the *Criminal Code*.
- [3] The complainant, his step-daughter and the applicant gave evidence at the trial. The complainant's step-daughter gave evidence that she lived with the applicant's son in a downstairs flat under the applicant's home. She decided to end their relationship after an argument. She went to her parent's home and returned with her step-father, the complainant, to collect her possessions. She asked the applicant to let her into the flat but he said he did not have keys. She and the complainant obtained entry through an unlocked door and she placed some of her clothes into a bag. She heard a voice saying, "What are you doing down here?" She said she wanted to get some of her clothes. The applicant repeated the question and the complainant said, "She just wants to get some of her clothes." She continued packing her clothes. Less than 20 seconds later she heard a noise and saw the applicant poking the complainant in the stomach with what she thought was a finger. A struggle ensued and they both moved backwards to the wall. The ironing board was knocked over. At one point, the complainant had hold of the applicant's arm and said, "I can kill you if you want." The complainant walked away and she realised he had been stabbed and took him to hospital.

- [4] The complainant a 39 year old security officer. He was six foot one inch tall and weighed about 90 kilograms. The applicant, who is 60 years old, was about five foot six inches tall and wore spectacles.
- [5] The complainant's evidence differed slightly from that of his step-daughter. He said that after he explained to the applicant that she just wanted to get her clothes, the applicant kept walking towards him steadily and then swung his right fist and stabbed the complainant in the side of the neck below his jaw. He then pushed the complainant back against the wall of the flat and the applicant hit or stabbed him again. He did not punch the applicant. He was bleeding heavily, backed away and his step-daughter drove him to hospital.
- [6] The applicant said that he had been using the knife for handyman purposes during the day and left it at the kitchen sink under the house. He knew his son and the complainant's step-daughter had argued earlier; during the evening she requested the keys to the flat in order get her things. About 10 minutes later he heard a noise and went down to investigate, unarmed. He saw the complainant, who was unknown to him, in the flat and asked him what he was doing. The complainant answered, "I've come to get Kelly's gear." The applicant told him to come back later when his son was home. The complainant punched him with a closed right fist to the eye, pushing his glasses up and grabbing him by the throat with the left hand. The complainant pushed the applicant to the back wall of the flat and a struggle ensued with the complainant choking and punching him on the ground. In the course of the fracas an ironing board collapsed and the applicant hit his head on some bricks. He was finding it hard to breathe as the complainant was choking him. He feared for his life and reached out for the iron to defend himself. Instead he grabbed hold of the knife he had been using earlier in the day and struck out with it. He twice more hit out at the complainant's torso to defend himself.
- [7] Other evidence demonstrated that most blood was found in the area near the wall and the ironing board, not where the complainant claims his throat was cut. The wound to the complainant's throat was likely to have oozed quite considerably. After the incident, the applicant had a bruised eye which was consistent with being caused by reasonable force from a fist, blunt weapon or hitting a door or wall.
- [8] After hearing submissions as to the appropriate facts on which he should sentence, the learned judge found:
"The jury disbelieved [the applicant] when [he] claimed in [his] own evidence to have been acting in self-defence. ...
[he] intended to inflict this injury on [the complainant] ... that [the applicant] went downstairs already armed with the oyster knife. Seeing [the complainant] there, [the applicant] approached him with deliberation ... [the complainant] offered [the applicant] no provocation. [The applicant] then stabbed him with deliberation."
- [9] Mr Boe submits that the inconsistencies between the complainant's evidence and that of his step-daughter, the position of the blood stains and the bruise to the applicant's eye precluded the learned sentencing judge from accepting the complainant's evidence in full.

- [10] His Honour's sentencing comments show that he gave careful consideration to the factual contest raised by the applicant's lawyer at sentence. His Honour was conscious of the onus of proof as to fact finding on sentence required by *R v Morrison*.¹ His Honour noted that the case fought at trial was very much a question of credibility between the complainant and the applicant and involved two major conflicts, firstly whether the applicant was carrying a knife when he went downstairs and secondly, who delivered the first blow. His Honour directed the jury to focus attention on the conflict between these two versions. His Honour concluded that the jury simply rejected the applicant's account and that he "would be very surprised if the jury found ... that self-defence was excluded because of the particular extent of [the applicant's] response." His Honour correctly noted that the positioning of the blood and the applicant's abrasion below the eye were consistent with the complainant's account; his Honour found the complainant a credible witness and concluded "... beyond reasonable doubt that the incident occurred as he related in his evidence."
- [11] Although stating the obvious, it is significant that his Honour had the benefit of observing the witness' evidence during the three-day trial. The minor differences between the complainant's evidence and that of his step-daughter are common in such fracas where things happen very quickly and are observed from different perspectives; they did not compel rejection of the complainant's and acceptance of the applicant's evidence.
- [12] The learned sentencing judge was entitled to be satisfied beyond reasonable doubt that the jury accepted the complainant's version of events and rejected that given by the applicant.

Was the sentence manifestly excessive?

- [13] The applicant's second submission is that the sentence was manifestly excessive. The learned sentencing judge found the applicant's offending "was a piece of gratuitous serious violence and administered significantly with a knife and occasioning serious injury to an innocent person who had offered [the applicant] no harm. The Court must come down hard in these situations to send the right message."
- [14] The complainant was hospitalised for six days and required surgery. He suffered three wounds which left a 13 cm long scar to his throat and two scars of 16 cm and 7 cm to his abdomen. He has a residual hollow in the left side of his throat and a lump on the right side of his throat caused by damaged muscle. The scars are an embarrassing constant reminder of this traumatic incident. He took five weeks' sick leave and his wife took three weeks off work to care for him. He continues to experience some difficulty in swallowing but otherwise has physically recovered from his life threatening injuries. He and his family have undertaken counselling.
- [15] The applicant, who was 60 years old, had a criminal history which included convictions for dishonesty for which he was sentenced to terms of imprisonment in 1966, some street offences in 1971 and more significantly a conviction for assaulting police and assault occasioning bodily harm in 1975 for which he was sentenced to six months imprisonment. Apart from some traffic offences in 1980

¹ [1999] 1 QdR 397 at 421. See also *R v Olbrich* (1999) 73 ALJR 1550 at 1555.

he had no other criminal convictions. He therefore had committed no like offences for almost 25 years. The applicant does not have the mitigating benefit of a timely plea of guilty.

- [16] A consideration of comparable sentences is useful in determining the appropriate sentencing range. In *R v Brown*,² Brown was convicted after a trial of doing grievous bodily harm with intent to the former boyfriend of Brown's girlfriend. He attacked the complainant with a spanner hitting him on numerous occasions, including to the head. Whilst the complainant was defenceless on the ground, Brown forcefully hit his leg with the spanner causing a compound fracture. He continued to kick the disabled complainant with steel capped workboots. Brown did not have prior convictions although he had a subsequent minor conviction for dishonesty for which he was fined \$50. Brown was sentenced to six years imprisonment.
- [17] In *R v Thompson*,³ Thompson was acquitted of attempted murder but convicted after a trial of grievous bodily harm with intent. Unlike this applicant, he had earlier indicated his willingness to plead guilty to the latter charge. Thompson assaulted his former wife who had obtained two domestic violence orders against him. In 1994, he was convicted of breach of a domestic violence order, assault and deprivation of liberty and sentenced to a six month intensive correction order having spent 13 months in pre-trial custody. His conviction constituted a breach of that intensive correction order. A dispute had arisen with the complainant over access to their daughters. He was travelling with the complainant in her car when she picked up the girls from school. An argument ensued. Thompson became angry and punched the complainant before stabbing her with a screwdriver a number of times, causing three puncture wounds to her head and a puncture wound below her left breast. The assault was terminated by the intervention of bystanders. Psychological reports indicated the applicant had an uncontrollable temper and constituted a continuing threat to the complainant. Thompson was sentenced to seven years imprisonment.
- [18] These comparable sentences do not support the submission made on behalf of the prosecution at sentence that "the starting point for the sentence at the low end of the range is eight years and it goes up from there".
- [19] The offence of which the applicant was convicted was very serious, punishable by a maximum of life imprisonment. The applicant was in his own home. On the other hand, the complainant was peacefully assisting his step-daughter to remove her own property from her former home. The applicant was 60 years old and was a smaller, shorter man than the complainant. The deliberate use of the knife is a serious aggravating factor. The applicant had some prior convictions for violence almost 25 years ago. The comparable sentences of *Brown* and *Thompson* suggest the appropriate range of sentence in this case was six to eight years.
- [20] As has been noted, the applicant was sentenced to eight years imprisonment with a declaration that he was convicted of a serious violent offence as part of the

² CA No 155 of 1996, 26 July 1996.

³ CA No 575 of 1996, 16 April 1997.

sentence, the effect of which is that he will be ineligible for parole until he has served about six years and four months of that sentence.

- [21] In *R v Bojovic*⁴ the Court considered the exercise of discretion under s 161B(3) of the *Penalties & Sentences Act 1992* as to whether to declare an offender to be convicted of a serious violent offence where the conviction is for a schedule offence and the sentence is between five and less than 10 years. The Court, approving McPherson JA's comments in *R v Collins*,⁵ stated:

"The question that the court will be considering will not be whether the offender should be sentenced to imprisonment as protection to the community, but whether, having been so sentenced, he is to be deprived of eligibility for parole after serving half his sentence and further penalised by deferring it until 80 per cent of that sentence has been served.'

[31] It should not however be thought that the Court's sentencing discretion is compartmentalised into separate exercises of first determining the quantum of the imprisonment and then, having decided on that, considering the further question whether a declaration should be made under section 161B. The sentencing process is a single integrated one in which the combination of all available options needs to be considered. ...

[32] In the absence of positive guidance in the legislation, the Court should act according to principles which they have traditionally followed in imposing sentences. Sentencing is a practical exercise. Courts have traditionally fashioned sentences to meet circumstances of a particular offence, having regard to the needs of punishment, rehabilitation, deterrence, community vindication and community protection. They did so before legislative expression was given to such factors in section 9.

[33] The power given by s 161B(3) is simply another option that has been placed in the Court's armoury.

...

[35] In our view it is not appropriate that a declaration be made unless the overall sentence will be seen to be reasonably consistent with attaining the normal objectives of punishment. One of the purposes for which sentences are imposed is to protect the community from an offender when it is appropriate to do so."⁶

- [22] The court in *Bojovic* considered that in the circumstances the addition of a serious violent offender declaration over and above an adequate sentence was not requisite. Relevant factors in coming to that conclusion included whether there was a need to protect the community from the offender and whether the danger of repetition was remote.

⁴ [1999] QCA 206; CA No 4 of 1999, 8 June 1999.

⁵ CA No 238 of 1998, 18 September 1998.

⁶ [1999] QCA 206; CA No 4 of 1999; 8 June 1999.

- [23] That approach was followed in *R v McCartney*⁷ and in *R v Newcombe and Middleton*.⁸
- [24] The learned sentencing judge correctly identified the serious aspects of this offence on the facts as he found them. Men and women must be entitled to end relationships without the fear of violence either from their prior partner or that partner's relatives or supporters. The offence was rightly described as grave. The learned sentencing judge described the assault as having been "committed with cold steely deliberation". Certainly the evidence accepted by his Honour (and in particular the complainant's evidence) shows the assault to have been sudden, unexpected, unjustified and deliberate. But a close examination of the complainant's evidence, and of the evidence as a whole, does not readily reveal any additional dimension of "cold steely deliberation". Whilst a serious view of the applicant's conduct was rightly taken, the incident was essentially an unjustified attack by an elderly man following his disturbing an intruder within his son's premises, who was assisting his son's estranged girlfriend to remove her property. The sentence of eight years imprisonment with the added punishment of a declaration under s 161B(3) requiring the applicant to serve 80 per cent of that sentence before becoming eligible for parole is manifestly excessive in the circumstances. The sentence should be set aside and this Court must re-sentence the applicant. On the facts of this case, a sentence of seven years imprisonment without a declaration is appropriate.
- [25] We would grant the application for leave to appeal against sentence, allow the appeal, set aside the sentence imposed on 11 November 1999 and instead impose a sentence of seven years imprisonment.
- [26] **HELMAN J:** I have had the advantage of reading the reasons for judgment of the President and Thomas J.A., in which the issues relevant to this application are elaborated.
- [27] The learned trial judge reached a view of the facts of the case which was clearly open to him: he found the complainant a credible witness, and was satisfied beyond reasonable doubt that the incident occurred as the complainant had sworn it had. His Honour therefore accepted that the applicant had, without warning, stabbed the complainant with a knife after the complainant had explained why he and his stepdaughter were in the flat in which the offence was committed. There followed a scuffle in which the applicant again stabbed the complainant. As his Honour observed, the complainant had offered no provocation to the applicant. The complainant's account allows no scope for the explanation that the applicant had acted in self-defence.
- [28] In those circumstances, I am not persuaded that the sentence imposed on the applicant was manifestly excessive. As the President and Thomas J.A. have demonstrated, two partly comparable cases suggest that a sentence of imprisonment for eight years is within the range of sentences appropriate to a case of this kind. Whether it is at the top of that range may be regarded as a matter for debate. I do not think it has been demonstrated that the addition of the declaration that the

⁷ [1999] QCA 238; CA No 13 of 1999, 22 June 1999.

⁸ [1999] QCA 408; CA Nos 101 and 143 of 1999, 28 September 1999.

applicant had been convicted of a serious violent offence places the sentence outside the bounds of a sound sentencing discretion. The applicant on the complainant's account did not act in the heat of the moment, but with what his Honour described as 'cold steely deliberation'. That circumstance removes this case from the category of cases in which a natural human response has become excessive and led to the commission of a criminal offence. This was an offence committed in cold blood by a man who had previously committed serious criminal offences, among which was an unlawful assault occasioning bodily harm for which he had been sent to prison for six months with hard labour.

[29] For those reasons I respectfully disagree with the other members of the Court as to the outcome of the application, which I should refuse.