

SUPREME COURT OF QUEENSLAND

CITATION: *R v Pesnak & Anor* [2000] QCA 245

PARTIES: **R**
v
PESNAK, Jim Vadim
(applicant)
PESNAK, Eugenia
(applicant)

FILE NO/S: CA No 411 of 1999
CA No 416 of 1999
SC No 75 of 1999

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 20 June 2000

DELIVERED AT: Brisbane

HEARING DATE: 9 May 2000

JUDGES: McMurdo P, Davies JA, Mackenzie J
Judgment of the Court

ORDER: **Applications for leave to appeal against sentence granted. Appeals allowed. Vacate the sentences imposed below. The male applicant is sentenced to four years imprisonment with a recommendation that he be considered eligible for release on parole after serving 18 months. The female applicant is sentenced to two years imprisonment with a recommendation that she be considered eligible for release on parole after serving nine months. In each case it is declared that seven days spent in pre-sentence custody between 19 November 1999 and 26 November 1999 be deemed time already served under the sentence.**

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 – conviction for manslaughter – criminal negligence – applicants adherents to Breatharianism – deceased in applicants’ care – deceased died after fast –

applicants failed to seek medical attention - whether sentence manifestly excessive – whether applicants’ remorse relevant where there has been a trial

R v Clissett CA (Vic) No 117 of 1997, 15 October 1997, distinguished

R v Hall [1999] NSWSC 738, considered

R v Hile [1999] QCA 17, CA No 341 of 1998, 5 February 1999, compared

R v Sogunro [1999] 2 Cr App R (S) 89, distinguished

R v Stone; R v Dobinson [1977] 1 QB 354, considered

R v Streatfield (1991) 53 ACrimR 320, compared

R v Vollmer & Ors Supreme Court of Victoria, CCA 95 of 1995, 7 September 1995, compared

COUNSEL: A J Glynn SC for the applicants
A J Rafter for the respondent

SOLICITORS: Robertson O’Gorman for the applicants
Director of Public Prosecutions (Queensland) for the respondent

- [1] **THE COURT:** The applicants, husband and wife, were convicted of manslaughter after a trial. The male applicant was sentenced to six years imprisonment; the female applicant was sentenced to three years imprisonment. They claim their sentences were manifestly excessive.
- [2] The case is most unusual. The applicants and the deceased, who were all tertiary educated, shared the spiritual beliefs of Breatharianism. Breatharians believe that the atmosphere contains an energy force, prana, which is scientifically undetectable but which replaces the need for normal minimal requirements of food and drink.
- [3] The deceased, a 53 year old woman, voluntarily commenced a 21 day spiritual cleansing program conducted by the male applicant, in which he was assisted by the female applicant. The male applicant claimed to have successfully completed a similar course and that he now requires only nominal amounts of food and liquid. The program involved a fast of 7 days without food or fluid followed by 14 days with some fluid. The deceased stayed in a caravan on the applicants' property.
- [4] The program commenced on Saturday, 13 June 1998. By the sixth day of the fast, Friday, 19 June, the deceased was forgetful to the point of leaving her clothes on to shower. At about 4 pm on that day she fell, was put back into bed, and went to sleep. She spent most of the next day asleep and was only able to mumble. She had her first fluid, diluted orange juice, on Saturday night; she was not using her right arm. By 8 am Sunday, 21 June she had consumed two litres of diluted orange juice. She had urinary incontinence and was vomiting, mumbling and hiccuping; she required assistance to use the toilet, and was largely bed-ridden. By Monday, 22 June she was unable to speak properly but used sign language; her hiccuping continued. She was not alert and was incapable of getting up from any fall. The

female applicant put a board along the deceased's bed to keep her in. The male applicant told police that she continued to drink diluted orange juice.

- [5] The male applicant, who had completed a first-aid course some years earlier, phoned former Breatharian and medical practitioner, Dr Moulton, on 20, 21 and 22 June. Dr Moulton understood he was being contacted not as a doctor, but as someone who had been through the 21 day program, and who had helped 10 people, including the male applicant, complete the program. Dr Moulton was not asked to and did not visit or examine the deceased. The male applicant and Dr Moulton agreed that the disturbing symptoms were signs of an internal spiritual struggle causing the expulsion of toxins.
- [6] By Tuesday, 23 June the deceased's right leg was weak; her loss of bladder control continued and she began to vomit black flakes. She was unable to write with her right hand and could only scribble with her left hand. The male applicant told police he gave her milk diluted with warm water. At 7am on Wednesday, 24 June the applicants noticed a black substance coming from her mouth, staining her face and bedding; by 11am she was hyperventilating and by noon she had difficulty breathing; her mouth was full of the black substance. The applicants kept her jaws apart with fingers to enable her to breathe properly; and inserted a tube into her airway. The male applicant told police that she refused liquids. They became seriously concerned for her health.
- [7] The male applicant phoned Dr Moulton at 2.16pm. Dr Moulton was not home but the male applicant left a message on the answering machine expressing concern that the deceased was unable to breathe and that she had stopped breathing and only recommenced breathing after he pressed her chest. He said, "Can you help me? Well, what can I do or – or would it be possible for you to come over after work and have a look at her, or, I don't know, for some advice or should I call the ambulance and what do I tell them?"
- [8] Shortly afterwards, the male applicant called 000 and an ambulance took the deceased to hospital. She was unconscious and severely dehydrated and was placed on a respirator and life support system. A chest x-ray revealed pneumonitis in her lungs which suggested that she had aspirated gastric content. This resulted in widespread damage and a collapsed lung making normal breathing difficult. She received medical treatment until her death on 1 July.
- [9] Evidence was given at trial that severe dehydration can cause cerebral infarction (stroke) and ischaemia because the blood becomes more viscous and blood flow is reduced; it can also cause renal failure.
- [10] Pathologist Dr Naylor determined that the cause of death was pneumonia with the underlying causes of cerebral infarction (stroke); acute renal (kidney) failure and ischaemia of the right foot.
- [11] Dr Tannenburg, a neuropathologist, examined the deceased's brain on 2 July 1998. In his opinion, had medical attention been obtained for her on Saturday, 20 June, the stroke may not have progressed and her life could have been saved. Up until Tuesday, 23 June she would have had a reasonably good chance of survival, albeit with some paralysis and loss of speech, but after that time it was likely she would

have died regardless of treatment. Effectively then, by the time the deceased's most extreme symptoms became obvious on Tuesday, 23 June, medical treatment could not have prevented her death.

- [12] The parties agreed that the jury verdict was consistent with findings that the male applicant's criminal negligence was his failure to seek medical help for the deceased, a person in his care; that the female applicant aided and encouraged the male applicant and that they rejected any defence based on s 24 *Criminal Code* (that the male applicant was acting under an honest and reasonable but mistaken belief that the deceased was able to voluntarily withdraw from the 21 day process and release herself from his charge).
- [13] The learned sentencing judge noted:
"Your counsel told the Court that you have both been devastated by what happened to [the deceased]. However remorse is not a mitigating factor of great weight where a sentence is being imposed after a jury verdict."
- [14] Mr Glynn SC, who appears for the applicants, submits that the learned trial judge erred in concluding that remorse was not a mitigating factor of great weight because a trial had taken place. He submits that this was a case where a judgment had to be made about the quality of the conduct engaged in by the applicants to determine whether or not it was criminally negligent and that exercising the right to a trial in those circumstances does not detract from the genuine remorse expressed at sentence. Whilst there is merit in that submission, the fact remains that the applicants cannot obtain the mitigating benefit of an early plea of guilty in this case.
- [15] In determining whether a sentence for manslaughter is manifestly excessive, it is often difficult to find comparable sentences as the facts of each case vary so greatly; this extraordinary case has unique features. Nevertheless, in order to ascertain the appropriate sentencing range, it remains helpful to refer to other cases.
- [16] In *R v Vollmer & Ors*,¹ Mrs Vollmer died during the attempts of the applicants to perform an exorcism upon her. She had a psychiatric illness which the applicants honestly believed was caused by demons. The exorcism extended over a one week period. The applicants did not intend to cause her serious injury or death and were of prior good character. The cause of death was cardiac arrest brought about by compression of the neck which fractured the thyroid cartilage of the larynx. This occurred at the end of the exorcism period when the applicants attempted to physically remove the demons by squeezing and massaging the deceased's abdomen, chest and throat and by holding her tongue down. One applicant forced the deceased's mouth open to allow the demons to escape and during this process the deceased suffered cardiac arrest and died. The applicants attempted resuscitation and awaited her resurrection. The following day the police were called. Two applicants were convicted of manslaughter and false imprisonment; one was sentenced to 18 months and the other to 2 years imprisonment. Southwell J noted that the conduct which led to death took place over a short period and was totally unforeseen and that "people must be discouraged from believing that in the name of religion, they can behave in the outrageous manner of the applicants."

¹ Supreme Court of Victoria, CCA 95 of 1995, 7 September 1995.

- [17] The maximum penalty for the offence of manslaughter in Victoria was then 15 years,² whilst in Queensland it is life imprisonment. In this case, concerning symptoms commenced on day six of the fast, the Friday, and the deceased's health demonstrably declined over the following five days, although by day 10, the Tuesday, she probably would have died even with medical assistance.
- [18] In *R v Clissett*,³ Clissett and his de facto wife (White), who was intellectually disabled, had twins, a son and daughter. Both children were well cared for but White accidentally scalded her 11 month old son in a hot bath. When Clissett returned home he found the boy "howling in pain". White told him what had happened and Clissett applied antiseptic cream to the burns on several occasions over the next few days but did not seek medical assistance. He told his foreman at work about the incident but untruthfully said a doctor had visited and a nurse was to return to care for the boy. These remarks suggested that he was aware of the seriousness of the burns. He returned home early from work to care for the boy. He consulted a pharmacist about an appropriate cream. On the fourth day after the accident occurred, White ran to Clissett holding the child in her arms calling for help as the child had turned blue and was not breathing. Clissett took the child by taxi to hospital where the child was pronounced dead. The boy had suffered third degree burns to 10-15 per cent of his body. Although Clissett's treatment had stopped infection, the burns required hospitalisation, intravenous fluid replacement and careful monitoring. The child was severely dehydrated. Had the child received proper medical attention soon after the scalding he would have lived. Clissett did not seek medical assistance because he feared that the boy would be taken from them. Clissett and White were convicted after a trial. Clissett had an extensive criminal history although none which was considered relevant. White, who was intellectually disabled, was placed on a good behaviour bond. Clissett's sentence was reduced on appeal from 24 months imprisonment suspended after 12 months for 2 years to 12 months imprisonment with a non-parole period of six months. As has been noted, the appropriate maximum term of imprisonment for manslaughter in Victoria was, it seems, 15 years, although it was increased to 20 years at about this time.⁴
- [19] Where offenders are intellectually disabled and that has been a relevant factor in their departure from reasonable community standards constituting criminal negligence, the courts have imposed short custodial sentences or non-custodial sentences. See, for example, *R v Stone*; *R v Dobinson*,⁵ *R v Hall*⁶ and note the sentence imposed on the co-accused, White in *Clissett*. That factor is not present in this case.
- [20] In *R v Sogunro*,⁷ Sogunro was convicted after a trial of manslaughter and false imprisonment. He was of Nigerian origin and believed his fiancée was possessed by the devil. He shut her in a room where she was detained against her will and kept her without food and drink so that she died from starvation and neglect. Her

² See *Crimes Act 1958* (Vic), s 5; amended *Sentencing and Other Acts Amendment Act 1997* (Vic), s 60 and Sch 1 Item 3 (opn 1.9.97) increasing the maximum penalty to 20 years imprisonment.

³ CA (Vic) No 117 of 1997, 15 October 1997.

⁴ *Ibid.*

⁵ [1977] 1 QB 354.

⁶ (1999) NSWSC 738.

⁷ [1999] 2 Cr App R (S) 89.

body was not found until almost ten months later. He was sentenced to six years imprisonment for manslaughter and three years concurrent imprisonment for false imprisonment. Sogunro was 28 years of age and had no prior convictions. The Court saw the case as one of "gross neglect" and "a course of cruel and inhuman conduct and false imprisonment as well over a lengthy period." The sentence of six years imprisonment was not interfered with on appeal.

[21] Sogunro is more serious than this case because the neglect continued over a much lengthier period; Sogunro sought no assistance for the deceased and the charge of manslaughter was coupled with false imprisonment. In this case the deceased was, at least while she was able to reason, a willing participant in the fast, the male applicant sought limited advice from Dr Moulton and called an ambulance, albeit far too belatedly.

[22] In Queensland, one recent case of some relevance is *R v Hile*.⁸ Hile had a long history of substance abuse and met the deceased whilst they were both psychiatric patients; Hile suffered from bipolar affective disorder. He knew the deceased was not a regular user of heroin although she was an abuser of alcohol, prescribed drugs and cannabis. After some discussion and at the insistence of the deceased, the applicant injected the deceased with heroin through her foot. Although he knew the heroin was concentrated, he did not believe it would seriously harm her. The deceased began to convulse and the applicant, who held a St John's Ambulance First Aid Certificate, administered CPR (cardio-pulmonary resuscitation) whilst another woman called the ambulance. The deceased was taken to hospital, became comatose and died six days later. Hile initially denied responsibility for the injection but when confronted with a statement by another admitted his involvement and pleaded guilty. He had one prior conviction for assault and a number of convictions for drug related offences; he had committed further property offences whilst on bail for manslaughter. Hile's sentence of six years imprisonment with a recommendation for parole after two and a half years was not considered manifestly excessive. As in this case, there was no intention to harm the deceased who had voluntarily taken part in the conduct ultimately leading to death. Hile did not have the applicants' good character and the offence involved the injection of a dangerous and illegal drug.

[23] In *R v Streatfield*,⁹ Streatfield was convicted after a trial of the killing of his wife through criminal negligence by discharging a gun whilst pointing it at her, mistakenly believing it to be unloaded. Mr Glynn places considerable emphasis on the following comments by Thomas J (as he then was):

"The essential fact is that he had no intention to harm; he should have but did not know that the gun was loaded; and that he engaged in some sort of theatrical or arrogant show with the gun, with this disastrous consequence."¹⁰

...

The absence of intention to harm must be a very significant factor, and is probably the primary factor in assessing the quality of the offender's act that amounts to manslaughter. In the present case

⁸ [1999] QCA 17; CA No 341 of 1998, 5 February 1999.

⁹ (1991) 53 ACrimR 320.

¹⁰ At 321.

stupidity is revealed rather than wickedness. Malice is nowhere to be found. In this respect the case must be less seriously regarded than the ordinary domestic killings where there is a distinct intention to harm, albeit a fleeting one which may have been provoked by the injured party".¹¹

- [24] These comments were made by his Honour in the context of reviewing sentences imposed in cases of domestic killing. Whilst intention is relevant to sentence, a major factor in criminal negligence manslaughter cases is the extent of the departure from reasonable community standards which constitutes the criminal negligence. The applicants did not intend to harm the deceased through their failure to obtain medical assistance for her; they believed her serious symptoms were caused by a spiritual struggle. Nevertheless their failure to respond to her obvious and increasingly serious symptoms constituted an extremely grave departure from reasonable community standards. It should be noted that by the time of the most alarming symptoms on the Tuesday, her death was probably inevitable.
- [25] The sentencing judge accepted the applicants were unlikely to reoffend. It is nevertheless important to impose a substantial term of imprisonment in the hope of deterring others from engaging in such objectively dangerous and unacceptable conduct whilst pursuing personal religious or spiritual beliefs. The deceased was in the applicants' care; she was plainly unable to look after herself or to make a free and informed decision whether or not to obtain medical attention and they failed to seek the required medical attention.
- [26] The applicants are aged 61 and 63 years. They have no prior convictions and expressed remorse. Until this tragedy occurred, they were considered exemplary members of the community, both obtaining tertiary qualifications; they completed a working life in paid employment; successfully raised a family and looked after their own aged parents who migrated with them from Europe. It seems they were genuinely remorseful, although they did not have the mitigating benefit of an early guilty plea. The female applicant's culpability is substantially less than the male applicant.
- [27] We are finally convinced that the head sentences imposed in each case were manifestly excessive. The cases of *Vollmer* and *Clissett* are persuasive in reaching this conclusion, although we are conscious of the lesser maximum penalty for the offence of manslaughter in Victoria. A substantial custodial sentence is warranted as a deterrent to those who would engage in such irrational and dangerous conduct in the name of spirituality or religion. The various competing interests can best be met by a sentence in the male applicant's case of four years imprisonment and in the female applicant's case of two years imprisonment. The applicants' prior good records, their age and their remorse should be additionally recognised in a recommendation for parole slightly earlier than would otherwise be the case. We would recommend that in the male applicant's case he be considered eligible for parole after serving 18 months and in the female applicant's case, after serving nine months.

¹¹ At 326-327.

- [28] We would grant the applications for leave to appeal against sentence, allow the appeals and vacate the sentences imposed below. In the male applicant's case, we would sentence him to four years imprisonment with a recommendation that he be considered eligible for release on parole after serving 18 months. In the female applicant's case, we would sentence her to two years imprisonment with a recommendation that she be considered eligible for release on parole after serving nine months. In each case we would declare that seven days spent in pre-sentence custody between 19 November 1999 and 26 November 1999 be deemed time already served under the sentence.