

SUPREME COURT OF QUEENSLAND

CITATION: *R v Tran; ex parte A-G* [2002] QCA 21

PARTIES: **R**
v
TRAN, Cuong Ba
(respondent)
EX PARTE ATTORNEY-GENERAL OF
QUEENSLAND
(appellant)

FILE NO/S: CA No 283 of 2001
DC No 254 of 2001

DIVISION: Court of Appeal

PROCEEDING: Sentence Appeal by A-G (Qld)

ORIGINATING COURT: District Court at Ipswich

DELIVERED ON: 12 February 2002

DELIVERED AT: Brisbane

HEARING DATE: 30 January 2002

JUDGES: McMurdo P, Thomas JA, Douglas J
Joint reasons for judgment of McMurdo P and Douglas J, separate reasons of Thomas JA, each concurring as to the order made.

ORDER: **Appeal dismissed**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY GENERAL OR OTHER CROWN LAW OFFICER – APPLICATIONS TO INCREASE SENTENCE – OFFENCES AGAINST THE PERSON – where 12 month intensive correction order and compensation order imposed –where complainant consulted in the determination of the sentencing outcome – where restorative justice approach discussed – where need to avoid risk that offenders "buy" justice discussed - whether sentence manifestly inadequate - whether sentencing discretion should be exercised afresh and custodial sentence imposed

Criminal Offence Victims Act 1995 (Qld), ss 6-18
Juvenile Justice Act 1992 (Qld), ss 18A-18J
Penalties and Sentences Act 1992 (Qld), s 111, s 114, s 126(4), s 127(1)

Attorney –General (Tasmania) v Saunders [2000] TASSC 22, considered

Everett v The Queen (1994) 181 CLR 295, considered

Griffiths v The Queen (1977) 137 CLR 293, considered

R v Bazley; ex parte Attorney General [1977] QCA 235, CA No 220 of 1997, 5 August 1997, considered

R v Anders CA No 571 of 1996, 25 July 1997, considered

R v Cuff [2001] QCA 351, CA No 151 of 2001, 22 August 2001, considered

R v Hoffman; ex parte Attorney General (1997) 98 ACrimR 177, considered

R v Melano; ex parte Attorney General [1995] 2 QdR 186, considered

R v Mickelberg (1984) 13 ACrimR 365, considered

R v Skinner; ex parte Attorney General [2001] 1 QdR 322, considered

COUNSEL: C W Heaton for the appellant
D R Kent for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Terry Fisher & Co for the respondent

- [1] **McMURDO P and DOUGLAS J:** The Attorney-General of Queensland appeals against the sentence imposed upon the respondent for the offence of armed robbery with personal violence. On 14 September 2001, the respondent was sentenced to a 12 month intensive correction order and was also ordered to pay \$15,000 compensation within one month, in default 12 months imprisonment.
- [2] On 3 May 2001, the complainant, a 67 year old pensioner, left the Treasury Casino at about 9 pm and drove to his home in Laidley. As he opened the door to his house, the respondent, who was unknown to him, tackled him to the ground. A struggle ensued during which the respondent put his fingers into the complainant's mouth and demanded money. The complainant bit down on the respondent's fingers and the respondent hit the complainant several times over the head with a nearby pot plant. The complainant felt dizzy, began to lose consciousness and felt his wallet being removed from his pocket. The respondent ran off. The complainant notified police who attended promptly. They discovered the respondent's red sedan crashed into a tree near a neighbouring residence. The respondent was quickly apprehended. The complainant's wallet and money were found inside the respondent's car. The respondent suffered some minor facial and head injuries in the motor vehicle accident. His \$9,000 car was written off and the respondent was not indemnified by his insurer.
- [3] The respondent cooperated with police and made full admissions. He said that he had lost \$7,000-\$8,000 gambling over the two preceding days. He thought the complainant had won a lot of money and decided to recoup his own losses by stealing the complainant's winnings. He followed the complainant from the Casino to the complainant's home at Laidley, about 70 kilometres away. The respondent expressed contrition to the police for his conduct.

- [4] The sentencing court was not referred to any medical or hospital reports but the complainant in his victim impact statement, which was not disputed, described himself as a chronic asthmatic who had suffered heart attacks and was on daily medication. During the attack he thought the respondent was going to kill him; he lost a large quantity of blood and his glasses were broken. He was treated at Laidley Hospital overnight and was later admitted for further tests at both Laidley and Ipswich Hospitals. He has suffered severe headaches and has been prescribed pain killers and medication for stress and anxiety arising out of a diagnosed post traumatic stress disorder. The complainant was especially vulnerable to this disorder because in 1942, as a nine year old boy, he was imprisoned in a Japanese war camp in what is now Indonesia. He was brutally maltreated by his captors and witnessed them perpetrate many horrific violent acts on others. This attack upon him by an Asian male has revived the horrors of those years. He benefits from the weekly counselling he receives from the Victims of Crime organisation.
- [5] The respondent was 24 years of age at the time of the offence and sentence. He was born in Saigon into an industrious, law-abiding family. He was the youngest of nine children and his mother died when he was only eight years of age. He came with his father to Australia when he was aged 15 and attended secondary school and Griffith University where he completed a degree in Information Technology. Since graduating, he has worked for his current employer as a software developer and earns about \$40,000 per year. He would lose his employment were he imprisoned.
- [6] In the months preceding the offence the respondent developed a serious gambling problem. He was introduced to gambling through his girlfriend's mother, also a member of the Vietnamese community. In an all-too-familiar tale, after some beginner's luck he began to lose heavily but, always believing he could win the money back, he continued to gamble until he had lost his considerable savings. He then gambled money obtained on credit and borrowed from siblings. He began to take time off work to gamble at the Casino in an attempt to recoup his losses. Finally, he gambled away his month's salary and had no funds to pay his rent or living expenses. He felt ashamed and it was against this background that he committed this offence.
- [7] Psychologist Dr Grantham described the respondent's state of mind at this stage as mildly to moderately depressed and further affected by sleep deprivation. He felt constantly unhappy, saw life as not worth living and began to withdraw from others socially and at work. Having lost his mother at a young age he had learned to solve his own problems and did not turn to others for help; he was not communicating at all with his family or girlfriend in the days before the offence. Originally the respondent thought he may be able to steal the money from the complainant's home and only decided to use personal violence shortly before the commission of the offence. The offence was out of character. Since his apprehension the respondent has refrained from entering casinos and has attended a gamblers' support group; he has brought his gambling under control and no additional treatment is necessary. The respondent appears genuinely remorseful.
- [8] A number of references were tendered attesting to the respondent's otherwise good character and substantial academic and other achievements.
- [9] Defence counsel submitted at sentence that the respondent would not resist a compensation order which he would meet personally; compensation would not be a

burden on the taxpayer. After reading the victim impact statement, the learned sentencing judge noted that it may be better for the respondent's mental wellbeing to receive the compensation as soon as possible. The matter was stood down and the complainant indicated through the prosecutor that he had taken legal advice and would be content with \$15,000 compensation. The complainant told the judge that he would like to leave the matter of sentence to the court, adding that he was not a vindictive person. The respondent wrote a letter of apology to the complainant in September 2001. He repeated his remorse towards the complainant through his counsel at sentence and personally apologised to the complainant in court. The learned judge noted in her sentencing remarks that the complainant, in a gesture of impressive forgiveness, indicated that he had accepted the respondent's apology.

- [10] The ordered compensation has been paid by the respondent through a five year bank loan which he will not be able to service if he is imprisoned.
- [11] This case features a restorative justice approach¹ in that the complainant was consulted in the determination of the sentencing outcome. This is consistent with the Declaration of Fundamental Principles in the *Criminal Offence Victims Act* 1995.² Restorative justice principles are now commonly invoked in sentencing juvenile offenders: see *Juvenile Justice Act* 1992, Division 2.³ Some commentators suggest a restorative justice approach is suitable primarily for youthful offenders guilty of less serious offences.⁴ This is clearly not such a case. Others argue that such an approach, managed properly under judicial scrutiny, is suitable for an offence such as robbery.⁵ Whilst restorative justice principles are not directly referred to in the sentencing guidelines set out in the *Penalties and Sentences Act* 1992, they can be invoked consistently with those guidelines.
- [12] As the prosecutor at sentence correctly pointed out and the learned sentencing judge accepted, ordinarily a sentence of 2-3 years imprisonment would be imposed for an offence of this seriousness, even upon a youthful first offender. Of particular concern is the degree of premeditation exhibited by the respondent in following an elderly citizen 70 kilometres to steal from him in or near his home; the offence was finally committed with considerable actual violence and has had detrimental consequences on the complainant.
- [13] The appellant submits that the sentence imposed does not reflect the serious nature of the offence, the need for general deterrence and that the sentencing judge gave too much weight to the respondent's offer to pay compensation.
- [14] There is no doubt that the courts in enforcing the rule of law must not allow wealthy offenders to buy themselves non-custodial sentences. The judicial oath requires the delivery of equal justice to rich and poor. The fact that a complainant forgives an offender, is satisfactorily compensated by the offender and does not demand a

¹ "Restorative justice" is said to give the offender a chance to accept responsibility for the harm done by the crime, encouraging rehabilitation and enables victims to have a direct role in dealing with the crime committed against them. See "Restorative Justice – A Quiet Revolution in Criminal Justice", J M Robertson DCJ, Paper delivered at the Children's Legal Issues Forum Queensland, 4 October 2001.

² Sections 6-18.

³ ss 18A-18J.

⁴ Davies and Raymond, *Do Current Sentencing Practices Work?*, 2000 Criminal Law Journal, Vol 24, 236, 244-245.

⁵ Pollard, *Victims and the Criminal Justice System: A New Vision*, 2000 CrimLR 5, 9.

custodial sentence will not result in a non-custodial sentence if the relevant factors require the imposition of a custodial sentence. In some instances, the complainant may be weaker than or dominated by the offender, for example, in domestic violence cases, but this is not such a case. In other instances, the sheer gravity of the offence committed will require a custodial sentence despite the wishes of the complainant. The payment of compensation accompanied by remorse remains a relevant mitigating factor: see *R v Cuff*.⁶

- [15] The \$15,000 compensation order, coupled with a 12 month intensive correction order, is a substantial penalty for this young man. An intensive correction order under the *Penalties and Sentences Act 1992* is regarded as a period of imprisonment⁷ and involves the mandatory recording of a conviction.⁸ In practical terms it is the final option before the imposition of an actual custodial sentence. It involves strict compliance with the onerous conditions set out in the *Penalties and Sentences Act 1992*⁹ and is a very substantial curtailment on the respondent's freedom. It requires reporting at least twice weekly and participation in counselling and other programs for up to 12 hours a week for 12 months. It also requires that the respondent satisfactorily perform community service for up to 12 hours per week during the 12 month period of the order. Breach of the intensive correction order may result in re-sentence to a term of imprisonment for the original offence¹⁰ or an order to serve the remainder of the period of the intensive correction order in custody.¹¹ Mr Kent, who appeared for the respondent at sentence and on this appeal, informed the court that the respondent is completing his intensive correction order in a most satisfactory manner.
- [16] The sentencing discretion is not lightly interfered with on an Attorney's appeal: *R v Melano; ex parte Attorney-General*;¹² *Everett v The Queen*¹³ and *Griffiths v The Queen*.¹⁴ In circumstances where the offender has not been sentenced to a period of actual custody, the courts are especially hesitant to allow an Attorney's appeal against sentence where this would result in a term of imprisonment and will do so only in very clear cases: *R v Hoffman; ex parte Attorney-General*¹⁵ and *R v Bazley; ex parte Attorney-General*.¹⁶
- [17] In the unique circumstances of this case, we are finally persuaded that whilst a custodial sentence could have been imposed, the sentence was within the sound exercise of the judicial sentencing discretion. The combination of circumstances which justify the leniency granted by the learned sentencing judge were these: the respondent's relative youth and lack of prior convictions; his excellent prospects of and efforts at rehabilitation; the offence was a bizarre single episode which was completely out of character and arose in the context of a gambling addiction when the respondent was suffering from depression; this addiction has now been addressed so that reoffending is unlikely and neither the complainant nor other

⁶ [2001] QCA 351, CA No 151 of 2001, 22 August 2001.

⁷ See *R v Skinner; ex parte Attorney-General* [2001] 1 QdR 322.

⁸ Section 111.

⁹ Section 114.

¹⁰ Sub-s 126(4).

¹¹ Sub-s 127(1).

¹² [1995] 2 QdR 186, 189-190.

¹³ (1994) 181 CLR 295, 299-300.

¹⁴ (1977) 137 CLR 293, 310, 327, 329-330.

¹⁵ (1997) 98 ACrimR 177.

¹⁶ [1997] QCA 235, CA No 220 of 1997, 5 August 1997.

members of the community appear to be at future risk from him; the respondent fully cooperated with the authorities and entered an early plea of guilty to an ex officio indictment; the respondent indicated his early and repeated remorse to the complainant for his conduct and the complainant accepted that apology; and the respondent's early offer of acceptable compensation to the complainant.

- [18] The sentence imposed does not reflect judicial error and we would dismiss the appeal.

ORDER:

The appeal is dismissed.

- [19] **THOMAS JA:** My initial view of this matter was that the criminal conduct of the respondent was so protracted, resolute and outrageous that the only appropriate sentence must include a custodial sentence with real time to be served. However when all the details concerning this case are read including the manner in which the complainant and respondent came together during the hearing, the unusual antecedents and the disadvantages of reversing what has already occurred, I am prepared to agree with the joint proposal that this appeal be dismissed. It seems to me that if the orders below were now to be set aside, the basis upon which the compensation has been ordered and paid would be falsified. A custodial term would tend to jeopardise the currently good prospects of rehabilitation of the respondent. Moreover the complainant-victim would seem to be best served by the order that was made at first instance.
- [20] This is a rare example of a case where criminal conduct of this level of seriousness could be met with anything less than an actual term of custody. It has some points of comparison with *R v Cuff ex parte Attorney-General* [2001] QCA 351, though I find the respondent's conduct in the present matter to be more serious and disturbing.
- [21] It is to be emphasised that an offender cannot avoid imprisonment merely because he is in a position to pay a sum of money by way of restitution or compensation (*R v Mickelberg* (1984) 13 A Crim R 365, 370). It has been observed that "where desert is the primary aim and yet the system has declared a commitment to justice for victims, there is also the potential for conflict"¹⁷. There is certainly a tension between the aim of deterrence on the one hand and the desire to provide compensation for victims on the other. As I see it current sentencing principles require primacy to be given to the former over the latter, but there is room for some interaction. I repeat the observation in *R v Anders*¹⁸ that it would be wrong to give the impression that offenders could buy their way out of the imposition of what would otherwise be an appropriate penalty. I do not see the present case in this light, or as one in which a pecunious offender has obtained an undue advantage. The compensation represents a considerable personal burden to the respondent who has borrowed the money from a bank and must repay it from future earnings. Along

¹⁷ A Ashworth, *Sentencing and Criminal Justice*, 1992, 71.

¹⁸ CA No 571 of 1996, 25 July 1997 per Macrossan CJ and Byrne J.

with the respondent's apology, remorse and willingness to make the commitment, the payment also represents a considerable solace to the complainant¹⁹.

- [22] With considerable reservation, and recognising that a crime such as this would ordinarily require a substantial custodial term, I am prepared to acquiesce in the dismissal of the present appeal.

¹⁹ “Restitution brought about by remorse may also attract greater consideration than restitution made merely for the purpose of ameliorating the severity of punishment”. *Attorney-General (Tas) v Saunders*, [2000] TASSC 22.