SUPREME COURT OF QUEENSLAND

CITATION:	*R v Stephens* [2017] QCA 173
PARTIES:	**R** **v** **STEPHENS, John Jesse** (applicant)
FILE NO/S:	CA No 57 of 2017 SC No 310 of 2017 SC No 421 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 10 March 2017
DELIVERED ON:	15 August 2017
DELIVERED AT:	Brisbane
HEARING DATE:	9 August 2017
JUDGES:	Holmes CJ and Gotterson JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The application for leave to appeal is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant was convicted of attempted murder of his estranged wife – where primary judge sentenced applicant to fifteen years' imprisonment – where primary judge made reference to a variety of factors in sentencing remarks – whether sentence was manifestly excessive – whether primary judge erred by not attributing sufficient weight to several factors, including applicant's history of substance abuse, alleged psychiatric and personal disorders, immediate post-offence surrender, plea of guilty to an alternative charge and admissions during trial – whether applicant's mental condition reduces his moral culpability *Channon v The Queen* (1978) 33 FLR 433; [1978] FCA 16, cited *R v Clark* [1998] QCA 477, cited *R v Forster* [2002] QCA 495, cited *R v Goodger* [2009] QCA 377, cited *R v Hammond* [1997] 2 Qd R 195; [1996] QCA 508, cited *R v Verdins* (2007) 16 VR 269; [2007] VSCA 102, cited *R v Williams* [2015] QCA 276, cited

R v Yarwood (2011) 220 A Crim R 497; [2011] QCA 367, cited

COUNSEL: A McDougall for the applicant
G J Cummings for the respondent

SOLICITORS: Guest Lawyers for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** I agree with the reasons of Douglas J and with the order he proposes.

[2] **GOTTERSON JA:** I agree with the order proposed by Douglas J and with the reasons given by his Honour.

[3] **DOUGLAS J:** The applicant was convicted of the offence of attempted murder of his estranged wife as a domestic violence offence on 10 March 2017, the eighth day of his trial. On the previous day, during the summing-up, he had been re-arraigned and pleaded guilty to a possible alternative charge of unlawfully doing grievous bodily harm which the prosecution did not accept in discharge of the indictment.

[4] The learned sentencing judge sentenced him to 15 years' imprisonment and ordered that the conviction be recorded as a domestic violence offence, declaring also that the time he had spent in pre-sentence custody, 937 days, be deemed time already served under the sentence. The applicant appeals against the sentence on the ground that it was manifestly excessive.

The evidence

[5] The applicant was born on 29 October 1970 making him 43 years old at the time of the offence on 16 August 2014 and 46 years old when he was sentenced. His criminal history revealed that he had committed several assaults between 2009 and 2013 including two offences of assaulting or obstructing a police officer and two of common assault as well as an offence of resisting an authorised person after being refused entry to premises. Those offences were not punished by imprisonment but by the imposition of fines.

[6] The applicant and the complainant separated on 9 May 2014. On 12 June 2014 she obtained a domestic violence order against him after he made repeated threats to her life in text messages and telephone calls from early June 2014. He nominated the location, a car park, and the manner in which he proposed to take her life. She altered her lifestyle to avoid him, changing her car and residence and moving their children away for a time.

[7] On the day of the offence the complainant had taken her three children with the applicant and her child with her new de facto partner to a shopping centre. The children were aged between four and eight. The applicant had been monitoring her movements that day having followed her or stalked her approximately six weeks earlier in order to identify the vehicle that she was driving. He armed himself with a .22 calibre self-loading rifle, loaded with 13 live rounds including one in the chamber. He had travelled a considerable distance from his residence with the purpose of killing the complainant.

[8] He donned a disguise, sunglasses and a hooded jumper/jacket, and parked his car in front of hers in such a position as to help him make a quick getaway. The complainant returned from shopping with the children to her car in the shopping centre car park. The applicant then got out of his car, opened the driver's side front door of the complainant's car and in the view of the four children also in the car aimed his rifle at her right temple and fired it by pulling the trigger at close range. The bullet struck her skull and ricocheted away after splintering the bone.

[9] He prepared for a further shot, this time aimed at her chest, but the gun jammed. After having dragged the bleeding complainant out of her car, in spite of her efforts to struggle against him, he proceeded to punch and strangle her until he was restrained by the combined force of three men who were bystanders who bravely interceded to protect the complainant. While they were restraining him he continued to struggle to get to the complainant and attempted to justify his position by yelling to onlookers that they did not know what she, the complainant, had done.

[10] The four children in the car saw and recalled every detail of what had occurred, their versions having been recorded on video by police within hours of the incident. As the learned sentencing judge pointed out, the children saw the applicant point his gun at their mother and saw him pull the trigger and then saw her covered in blood. They also saw the applicant drag the complainant out of the car when she was bleeding and proceed to punch and try to strangle her. Her Honour commented on the trauma that the children must have experienced.

[11] The applicant was eventually subdued and drove from the scene straight to the local police station where he surrendered himself. Initially he told police at the station that he thought he had tried to shoot his wife but then backed away from that statement and accused her of fraud, of not letting him see the children and alleged that she wanted to see him kill himself.

[12] The complainant suffered life-threatening injuries, has had a metal plate inserted in her head and surgery requiring the use of 20 staples. The injuries have long-term consequences for her. She can no longer drive. She, the children and the complainant's parents have suffered significantly from the attack.

[13] There was medical and psychiatric evidence about the applicant from two psychiatrists, Dr Aboud and Dr Voita, tendered in the form of written reports at the sentencing hearing. The trial had not been conducted on the basis that he had any defence available to him of insanity.

[14] He reported a history of mental health instability before his imprisonment to Dr Aboud, saying that he had been previously diagnosed with Bipolar Affective Disorder but had not properly and consistently engaged in treatment. He also disclosed a history of alcohol, cannabis, amphetamine and benzodiazepine misuse and a history of misusing steroids in respect of body building and gymnasium attendance. He reported a history of mood instability and suicidal intention during the weeks leading to his incarceration, together with an escalation in substance abuse.

[15] When first assessed in prison by another psychiatrist, Dr Wilson, in September 2014, he was thought to be suffering symptoms of an adjustment disorder in addition to bipolar disorder and polysubstance abuse. He was prescribed psychotropic medication to which he appeared to have responded. He was under Dr Aboud's care

from December 2014 in custody and remained engaged and compliant with treatment. When reviewed by Dr Aboud on 14 June 2016 he presented as mentally stable and with no active symptoms of mood instability. Dr Aboud had commenced a gradual process of rationalising his medication. By the time of his report on 16 June 2016 he said that the applicant, when released from prison, would be linked into ongoing follow-up care with his local area mental health service and his general practitioner combined with a referral to a private psychologist so he could work to improve his adaptive coping skills.

[16] Dr Voita, in her report of 31 October 2016, related a history given her by the applicant of misuse of alcohol and drugs since his teenage years, coupled with apparent success in business but uncontrolled use of prostitutes during both of his marriages. He said of his drug and alcohol abuse that in the six years before his arrest he was using cannabis and alcohol daily, drinking up to 20 to 25 standards drinks per day including beer, spirits and wine and, until 2012, using amphetamines seven days per week.

[17] She expressed the opinion that the applicant had been suffering from a Bipolar Affective Disorder throughout his adult life with clear evidence he suffered from episodes of depression and of hypomania. She said it was difficult to be clear if he had suffered from clearly manic episodes because of his abuse of substances and benzodiazepines. Significantly she also said that he fulfilled the criteria for a narcissistic personality disorder.

[18] She expressed the view that, at the time of the offence on 16 August 2014, he was intoxicated with PVP found in his urine and blood and was also under the influence of benzodiazepines which he was taking on prescription but was also abusing. She described PVP as a synthetic cathinone with similar effects to amphetamines which can cause elevated mood, agitation, hallucinations and other psychotic symptoms. She said that he did not report psychotic symptoms at the time of the incident but appeared to have been agitated. He gave an account to her that he wished to kill himself in front of the complainant but her Honour, the learned sentencing judge, regarded that as fanciful and not in accord with the objective evidence. Dr Voita also said that his claim was contrary to the other witness statements.

[19] There was evidence during the trial that the applicant had been admitted to hospitals on three occasions for two to four days at a time with suicidal ideation in the two months leading to the offending. He had also written letters to his five children before the event, leaving them with his sister to pass on to them. One doctor who conducted a mini mental state examination of him in respect of his admissions to hospital before the offence asked him to write a sentence on a piece of paper. He said that he wrote "I want to die" on the paper.

Submissions for the applicant

[20] The applicant did not argue that the learned sentencing judge made any specific error but submitted that her Honour acted on an error of principle in that she could not have attributed sufficient weight to a combination of factors, in particular the applicant's mental health at the time of the offence, his surrendering immediately after the offending and his alcohol and drug use. In particular, the applicant contended that her Honour did not attribute sufficient weight to the following combined factors:

(a) his history of drug and alcohol addiction;

(b) his suffering from an adjustment disorder, bipolar disorder and polysubstance abuse where the bipolar disorder was responding to treatment in custody;

(c) his plea of guilty to the alternative charge of doing grievous bodily harm to the complainant;

(d) significant admissions made by him at the trial;

(e) his handing himself into police immediately after the offence; and

(f) the consideration that there were low levels of alpha-PVP in his blood later the same day, supporting the proposition of drug use.

[21] Counsel for the applicant relied on the reasons in the Victorian Court of Appeal decision in *R v Verdins*[1] adopted by White JA in *R v Yarwood*[2] to this effect:

> "Impaired mental functioning, whether temporary or permanent ('the condition'), is relevant to sentencing in at least the following six ways:
>
> 1. The condition may reduce the moral culpability of the offending conduct, as distinct from the offender's legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.
>
> 2. The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.
>
> 3. Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.
>
> 4. Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.
>
> 5. The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.
>
> 6. Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment."

---

1 (2007) 16 VR 269, 276; [2007] VSCA 102 at [32].

2 [2011] QCA 367 at [24].

[22] In *Yarwood*[3] her Honour also referred to the decision of Keane JA in *R v Goodger*[4] where his Honour said that: "This Court has accepted the proposition that, generally speaking, a mental disorder short of insanity may lessen the moral culpability of an offender and so reduce the claims of general or personal deterrence upon the sentencing discretion."

[23] He also submitted, in reliance on *R v Clark*,[5] that the mental condition of an offender, even though it falls short of amounting to an excuse or justification under the *Criminal Code*, is ordinarily relevant to the question of sentence or its size and not only to the deterrent aspect of the matter but also to the element of moral culpability for the commission of the offence.

[24] Consequently it was submitted that insufficient weight was placed by her Honour on the defendant's mental health in two ways, first, it should have been treated as reducing his moral culpability and, secondly, it should have been treated as relevant as moderating the need to address specific deterrence.

[25] Similar reliance was placed upon a passage from the decision in *R v Hammond*[6] to the effect that the relevance of drug addiction is not as an excuse but as a factor that may tell the court that the real weakness of character is that of a drug addict rather than that of a robber. The court went on to say:[7] "That may be by no means inconsequential. It is however a two-edged factor; it may also tell the court that rehabilitation is going to be difficult."

[26] The submission was, therefore, that significant weight should have been placed on the applicant's prospects of rehabilitation, given that he had been abstinent from drugs and alcohol throughout the 937 days he had been incarcerated and medicated. That situation was likely to continue with, it was submitted, better prospects of rehabilitation likely to be a consequence of his serving a lengthy term of imprisonment.

[27] It was also submitted that, while her Honour correctly took into account the applicant's criminal history given that it included assault related offences, she did not refer to the consideration that all the criminal history was alcohol related.

[28] The admissions made at the trial covered a significant number of items of evidence to be led by the prosecution. The applicant also gave instructions not to cross-examine any of the special witnesses. Nor did the applicant oppose or seek to limit the calling of evidence of prior domestic violence.

[29] Given the strength of the Crown case, however, it was quite clear that the significant issue for the jury related to the applicant's intention to kill and, although the admissions may have shortened the trial significantly, the relevant evidence going to his intention would always have been required.

[30] Counsel for the applicant submitted that two of the decisions relied on by her Honour, *R v Forster*[8] and *R v Williams*[9] should have resulted in a lower sentence of

---

3 [2011] QCA 367 at [26].
4 [2009] QCA 377 at [21].
5 [1998] QCA 477 per McPherson JA.
6 [1997] 2 Qd R 195, 199-200.
7 [1997] 2 Qd R 195, 200.
8 [2002] QCA 495.
9 [2015] QCA 276.

13 years' imprisonment rather than the 15 imposed by her Honour. The argument was that *Forster* was a case which bore striking similarities to the present case in that he had shot his former wife once in the chest and then pointed the rifle at her, evidently intending to fire a second shot. He was also charged with doing grievous bodily harm to a stranger who came to his former wife's assistance and prevented the firing of a second shot at her. Forster's actions were described as calculated and premeditated. He was later diagnosed with anxiety and depression to a clinical degree, was 62 years old at the time and had shown remorse through an early plea. He too had expressed suicidal thoughts and had consumed liquor before the offending. His sentence of 12 years' imprisonment with a concurrent term for the offence of causing grievous bodily harm was not upset on appeal. It seems significant to me, however, that that sentence was one imposed on an early plea of guilty.

[31] *Williams* had also gone to trial, made some admissions and pleaded guilty to doing grievous bodily harm with intent to commit grievous bodily harm. He was in breach of a domestic violence order when he stabbed his estranged wife once in the chest in bed with her two year old sleeping next to her. He had broken into the house while she slept and had a history of alcohol abuse and depression. He was sentenced to 15 years' imprisonment for the attempted murder. Counsel for the applicant sought to distinguish *Williams* on the basis that Williams devised a devious plan to avoid criminal responsibility, including lying to police and then some days later confessing, advancing a false proposition that he was hearing voices in an effort to avoid culpability. This was said to be in particular contrast to this matter where the applicant immediately attended on the nearest police station. By the same token, however, the applicant's behaviour here was carried out in full view of the children in circumstances where he had taken a loaded rifle into a public place, causing potential danger to a significant number of people. He discharged the rifle once and tried to fire it a second time.

Submissions for the respondent

[32] Mr Cummings for the prosecution pointed out that neither psychiatrist gave the opinion that there was any connection between any disorder the applicant may have been suffering from and the commission of the offences, something not challenged by defence counsel at the trial. The prosecutor also submitted at the hearing that the fact that the applicant suffered from a narcissistic personality disorder had the consequence that there were real concerns about his ability to rehabilitate.[10] That was something that clearly was a matter of concern for her Honour and acknowledged by the applicant's counsel to be an operative factor.[11]

[33] Her Honour said in her reasons, for example:[12]

> "[The complainant] was required to give evidence and was cross-examined and you made a persistent effort to blacken her name. Your tears in this trial were, in my view, totally self-indulgent and manipulative and were an expression of your narcissistic personality disorder, as diagnosed by Dr Voita."

---

10 AR28 ll 36-45.
11 See, eg, AR30 ll 7-14.
12 AR41 ll 15-18.

[34] Shortly after that passage her Honour said:[13]

> "When the time comes for the parole board to assess your application, I could ask the parole board to notice these sentencing remarks in particular, and also to note your narcissistic personality disorder."

[35] The submission was also made below that the applicant lacked insight, was remorseless and fell within the category of cases noted in *Channon v The Queen*[14] where an offender's psychiatric abnormality, falling short of insanity, marked the offender as a more intractable subject for reform so that his disorder was not a mitigating factor.

[36] Mr Cummings also pointed out that the sentencing judge observed and defence counsel accepted that it was not clear that the applicant suffered manic episodes before the abuse of substances such that there was no clear link between the two. The applicant's PVP consumption had not caused psychotic symptoms at the time of the offending but had an agitating effect and the applicant's claim that he was trying to kill himself at the time of the attempted murder should also be dismissed on the objective evidence from others at the scene.

[37] Her Honour had also accepted that a factor in favour of the applicant's rehabilitation was his lack of access to alcohol and drugs while in pre-sentence custody.[15] Defence counsel had also submitted an appropriate head sentence was 13 to 14 years which the applicant did not dissent from when her Honour gave him a separate chance to be heard.[16]

[38] Other matters that the learned sentencing judge took into account which were relied on by counsel for the respondent in this application included the following:

(a) the recording of one of the calls to the complainant in which the applicant threatened her life was chilling;

(b) the applicant had a concerning history involving assaults;

(c) the attempted murder offence was committed against a background of abusive threats and breaches of a domestic violence order;

(d) a significant deterrent penalty was required given the aggravating features, particularly because it was a domestic violence offence;

(e) the complainant had been a working mother but had to leave her job after the offence;

(f) the children had recurrent nightmares focussed on words used by the applicant at the time he shot the complainant, including the term "gotcha";

(g) the children continue to live in fear to the point of barricading themselves within their rooms;

(h) the applicant's threats to the complainant's parents included that they should be around to take care of their children as the complainant would not be;

---

13 AR41 ll 41-44.
14 (1978) 33 FLR 433, 436-437.
15 AR31 ll 5-10.
16 AR33 ll 39-42.

(i) his Bipolar Affective Disorder was responding to treatment;[17]

(j) her Honour discounted the claims that the applicant had been trying to kill himself, relying on the evidence of Dr Voita who said that it was contrary to the witness statements that she had read;

(k) the applicant had a good educational background and had been successful in business;

(l) there was no operative mental illness at the time of the offending;

(m) after the applicant shot the complainant he persisted in his efforts to kill her in a number of different ways and had to be vigorously restrained;

(n) the applicant did not accept responsibility for his actions on the day which her Honour regarded as a persisting feature of his behaviour;[18]

(o) the applicant's mental health disorder did not prevent him from forming a murderous intention and there were no signs of mental health or drug effect or psychosis on the day of the offence;

(p) a term of 10 years' imprisonment would require the applicant to serve 80% of that term.

[39] Her Honour also concluded, while recognising that previous sentences do not mark the outer bounds of a sentencing judges' discretion, that the comparable decisions demonstrated that sentences between 10 and 17 years' imprisonment were often imposed in cases of attempted murder, depending on the circumstances. The prosecution in this case submitted that the sentence should be towards the upper end of between 15 and 17 years.

[40] Mr Cummings submitted that there was no indication that the learned sentencing judge gave little or no weight to the applicant's suicidal ideation. She was entitled to disregard his claim that he was trying to kill himself at the time of committing the indictable offence based on the evidence she had seen. Mr Cummings also submitted that it was difficult to see how the appellant's suicidal ideation could figure prominently in his favour having regard to some of the behaviour said to constitute his suicide attempts. That lead him to submit that, deep down, the applicant did not want to kill himself.

[41] Accordingly, he submitted that the applicant's mental health, alcohol and drug abuse issues did not reduce his moral culpability, did not make it inappropriate to fashion a generally deterrent sentence and was otherwise of minimal relevance.

Discussion

[42] Nothing said on behalf of the applicant cast any significant doubt on the approach taken by the learned sentencing judge to the task of sentencing the applicant. Her concern that the diagnosis of narcissistic personality disorder reflected poorly on the applicant's prospects of rehabilitation was conceded to be a relevant factor. This is

---

17 AR39 ll 20-30. In this context her Honour appeared to note that he had not been compliant with his medication but, in context, that seemed to me to be a reference to the situation before he went into custody.

18 AR41 ll 12-13.

consistent with the well-known remarks of Brennan J, as his Honour then was, in *Channon v The Queen*[19] to this effect:

> "Psychiatric abnormality falling short of insanity is frequently found to be a cause of, or a factor contributing to, criminal conduct. The sentencing of an offender in cases of that kind is inevitably difficult. The difficulty arises in part because the factors which affect the sentence give differing significance to an offender's psychiatric abnormality. An abnormality may reduce the moral culpability of the offender and the deliberation which attended his criminal conduct; yet it may mark him as a more intractable subject for reform than one who is not so affected or even as one who is so likely to offend again that he should be removed from society for a lengthy or indeterminate period. The abnormality may seem on one view to lead towards a lenient sentence, and on another to a sentence which is severe. That is not an unusual phenomenon in sentencing, where the court must fashion a sentence which either reconciles or balances the various objectives of sentencing, sometimes giving emphasis to one of the objectives of sentencing, sometimes giving emphasis to another. Although the court necessarily adopts a pragmatic approach, the judicial discretion is not at large, without guidance from principle. That guidance is found in the basic purpose which is to be served by the exercise of the sentencing power."

[43] And, as the sentencing judge observed, there were no assessments of the applicant which indicated that mental illness was operating on him at the critical time. No expert opinion suggested that his psychiatric illness played any part in the actions which constituted the offences. It would be remarkable if there were such opinion, given the high degree of organisation involved in his conduct. Nothing pointed, then, to the applicant's psychiatric disorders having any bearing on his moral culpability for the crimes.

[44] This was an horrific example of the crime of attempted murder with devastating consequences not only for the complainant but also for the children who observed the applicant's conduct at close hand. It can only have been chance that the complainant survived the attack. She continues to suffer severely from the consequences. Her Honour also remarked specifically on the effect of the victim impact statements and the fact that the applicant put a number of lives at risk by going into a car park with a weapon loaded with 13 rounds of ammunition. The protective and deterrent aspects of the sentencing discretion were significant here, including specific deterrence directed to the applicant given the nature of his narcissistic personality disorder and the potential difficulty of treating it.

[45] I am not persuaded that her Honour failed to take the applicant's mental health, alcohol and drug abuse issues appropriately into account in framing the sentence. She discussed those issues explicitly throughout her reasons.

[46] The decisions in *Williams* and *Forster* were consistent with the approach adopted by her Honour. On any view of the submissions made to her, the offence called for a penalty of between 13 years' imprisonment and 17 years' imprisonment. Nothing in the

---

19 (1978) 33 FLR 433, 436-437.

exercise of her discretion in fixing the sentence at 15 years can be said to have erred.

Order

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