[2018] QCA 248

COURT OF APPEAL

FRASER JA
GOTTERSON JA
MORRISON JA

CA No 117 of 2018
DC No 151 of 2017

THE QUEEN

v

EVERETT, Ross Linton **Applicant**

BRISBANE

FRIDAY, 28 SEPTEMBER 2018

JUDGMENT

FRASER JA: The applicant was convicted on his plea of guilty and sentenced to 80 hours community service with a conviction recorded for an unlawful assault. He has applied for leave to appeal on the ground that the recording of a conviction rendered the sentence manifestly excessive in all the circumstances.

The applicant's ex-wife and their children lived with her partner, the complainant. The applicant's 12 year old daughter telephoned the applicant after she had a confrontation with the complainant. The applicant arrived about 10 minutes later. Whilst the complainant was walking down the driveway to get in a taxi, he saw the applicant. The complainant said he was going and asked the applicant to leave him alone. The applicant struck the complainant in the face, causing him to fall to the ground into a gutter. Whilst the applicant was on top of

the complainant, the applicant repeatedly struck him in the face with a closed fist, and he put his knee on the complainant's chest. The applicant committed the offence in front of his children.

As a result of the offence, the complainant was too afraid of the applicant to return to the house where he had lived with his partner for about five years. He suffered emotionally, including by dwelling upon the events and becoming more anxious.

The applicant's counsel made submissions to the sentencing judge about the background to the offence. The applicant had not intended to confront the complainant, but did so on the spur of the moment. He attended the house after his daughter telephoned and said she was very upset and wanted to leave. On three earlier occasions in the weeks leading up to the offence, the applicant's daughter had contacted the applicant and said that the complainant was intoxicated and verbally abusive. On two of those occasions, the applicant had collected his daughter from the house. The applicant was aware that police had earlier attended the house when the complainant had been intoxicated and verbally abusive to a neighbour.

About five years earlier, the applicant had a disagreement with his ex-wife about aspects of the children's upbringing. At that time, the complainant had threatened the applicant with serious violence. The applicant had reported that to police, who rang the complainant's telephone number. The complainant answered the call and said that he was at the applicant's place. The complainant ultimately pleaded guilty to using a carriage service to make threats. The applicant's counsel submitted that as a result of those events, the applicant was very frightened of the complainant. The sentencing judge accepted that the applicant was motivated by a concern that his daughter had not been treated well by the complainant.

The applicant has a criminal record containing one entry. About 20 years earlier, the applicant was sentenced to imprisonment for four years with a recommendation for parole after 15 months for causing grievous bodily harm. The applicant had joined his two brothers in assaulting a man at a hotel after one of the brothers told the applicant the man might be aggressive. After one of the brothers hit and disabled the man, the applicant repeatedly

punched the man in the face, fracturing cheekbones and leaving the man with permanent numbness in parts of his face.

The sentencing judge referred to the circumstances of the offence and observed that the applicant's offence was a serious offence of its kind, but it was a common assault only. It was of some concern that the applicant was being dealt with by the Court again for an offence of violence, although the applicant had been offence-free during a relatively lengthy period after the previous offence.

The applicant's plea of guilty was treated as an early plea and taken into consideration in reduction of the sentence. After referring to other matters and stating that it was appropriate to order community service, the sentencing judge noted that he had been asked to exercise the sentencing discretion not to record a conviction. The sentencing judge concluded that given that the applicant had a criminal history, albeit dated, and having regard to the offence, a conviction would be recorded.

The applicant argues that it is not apparent that the sentencing judge turned his mind to what the applicant submitted in the outline of submissions was the "test for the relevance of previous convictions" in s 9(10) of the *Penalties and Sentences Act* 1992 (Qld). That is not the effect of that provision. It provides that:

> "In determining the appropriate sentence for an offender who has 1 or more previous convictions, the court must treat each previous conviction as an aggravating factor if the court considers that it can reasonably be treated as such having regard to-
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> (a) the nature of the previous conviction and its relevance to the current offence; and
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> (b) the time that has elapsed since the conviction."

The provision specifies circumstances in which a Court must treat a previous conviction as an aggravating factor. In a case of this kind, where the offence involves the use of violence against another person, s 9(3)(g) provides that "the past record of the offender, including any attempted rehabilitation and the number of previous offences of any type committed" is one of the factors to which the Court "must have regard primarily" in sentencing the offender. In

other cases, the effect of s 9(2)(r) is that if a Court determines that a prior conviction is relevant to the sentence, it will amount to a relevant circumstance to which a Court must have regard in sentencing the offender.

The sentencing judge was entitled to regard the previous conviction as being relevant to the determination of the sentence. Contrary to a submission by the applicant, its relevance is not confined to the fact that it, like the current conviction, was for an offence of violence. It is true, as the applicant emphasised, that the offences are different in nature in that the current offence involved a spontaneous lack of control in a moment of high drama where no physical harm was alleged, whereas the previous offence involved an unprovoked and premeditated attack in company, with serious physical consequences for the victim. But as the respondent submitted, the offences have some concerning features in common: the applicant acted primarily on information given to him by another source; the applicant was a mature man, having been 31 years old at the time of the previous offence, and 50 years old at the time of the current offence; he was the aggressor; he punched his victims in the face; the applicant assaulted his victims when they were unable to protect themselves. Furthermore, as the prosecutor submitted to the sentencing judge, in both offences the applicant failed to keep his sense of protection in check. In the previous offence, the applicant was recruited by a brother who believed that the victim might be aggressive, and in the current offence, the respondent's violence was apparently informed by a sense of protectiveness of his daughter.

In particular, the applicant's prior conviction was a relevant consideration in the exercise of the discretion under s 12 of the Act to record or not record a conviction. Section 12(2) provides that the court must have regard to all the circumstances of the case. The provision expresses some of the factors which must be taken into account: the nature of the offence, the offender's character and age, and the impact that recording a conviction will have on the offender's economic or social wellbeing, or chances of finding employment.

It was held in *R v Briese; Ex parte the Attorney-General (Qld)* (1997) 92 A Crim R 75, that the reference in s 12(2) to the nature of the offence includes reference to the effects on the

community of not recording a conviction, in respect of which relevant considerations include whether any, and if so, what violence was used; whether there was exploitation or abuse of trust; the extent of the economic loss to victims; and the extent to which the circumstances of the offence suggest a propensity to offend or a risk of reoffending if given an opportunity.

The concerning violence in the applicant's current offence was a factor supporting the recording of a conviction. The common features in the previous offence and the current offence entitled the sentencing judge to harbour some concern that if the applicant found himself in a similar situation, there would be a risk that he might reoffend. That factor also supported the recording of a conviction. There was no demonstrated economic loss to the complainant, but the fact that the complainant predictably suffered significant emotional impacts also supported the recording of a conviction.

The applicant's character is affected by his offences and their concerning nature. His age does not assist him, particularly where he offended as a mature man in both cases. The fact that the previous conviction for a much more serious offence will remain recorded on the applicant's criminal history very substantially reduced the weight that otherwise might be attributed to the effect upon the applicant's chances of finding employment of recording a conviction for the current offence.

As the respondent submitted, the circumstance mentioned in submissions to the sentencing judge by the applicant's counsel that he had not been employed for a lengthy period of time also makes it difficult to determine what impact recording this conviction would have. In these circumstances, if, as the applicant submitted, the cumulative effect of the current conviction being recorded would have an adverse effect on the applicant's chances of finding employment, that is not a strong factor in favour of not recording a conviction.

The applicant also submitted that the recording of a conviction in addition to the applicant being shameful because of his behaviour in the presence of his daughters amounted to an impact on the applicant's social wellbeing. It is to the applicant's credit that he is ashamed of

his conduct in front of the children, but it does not overcome the weight of the factors favouring the recording of a conviction.

Contrary to the applicant's submission, the sentencing remarks do not indicate that the sentencing judge confined the wide discretion conferred by s 12 or recorded a conviction merely because the applicant committed an offence of common assault. The applicant referred to the absence of any express reference at the end of the sentencing remarks to the offender's good behaviour after the previous conviction, the background that the applicant was a father upset about how his daughter was being treated, and the circumstance that the applicant had offered to plead to common assault at an earlier point in the proceedings when the charge included doing bodily harm. But the sentencing judge referred to each of those circumstances earlier in the sentencing remarks and undoubtedly had them in mind when adverting to the applicant's "history, albeit dated" and "the offence" as reasons for recording a conviction.

The applicant relied upon the provision in s 12(6) to the effect that any subsequent resentencing upon a breach of a community based order would result in an automatic recording of a conviction. This was submitted to be relevant because it provided a powerful incentive to the applicant to be of good behaviour, just as he had maintained his good behaviour in the period of some 15 months after the current offence until he was sentenced, and before his previous offence. The applicant's good behaviour may be a relevant consideration, although a relatively weak factor in the present context, but s 12(6) does not supply a positive ground for not recording a conviction.

The parties referred to *R v Marsden* [2003] QCA 473 in which an appeal was allowed against an order, including the recording of a conviction, and the offender was resentenced to community service with no conviction being recorded. It should be noted in that case that the court did not conclude that the recording of a conviction was outside the sentencing discretion. The appeal was allowed because the original sentencing judge had referred to an

irrelevant consideration in deciding the penalty. In that case, the offender had no prior convictions. It is not a precedent which supplies material guidance in this case.

In all of the circumstances, the sentence of 80 hours of community service with an order recording a conviction was well within the sentencing discretion. The sentence is by no means a severe one. There is no basis for concluding that, contrary to the principle expressed in *Veen v The Queen (No 2)* (1998) 164 CLR 465 and in s 9(11) of the *Penalties and Sentences Act*, to which the applicant referred, the sentencing judge gave such weight to the previous conviction as an aggravating factor as to impose a sentence that is disproportionate to the gravity of the current offence.

I would refuse the application.

GOTTERSON JA: I agree.

MORRISON JA: I also agree.

FRASER JA: The application is refused.