

SUPREME COURT OF QUEENSLAND

CITATION: *R v LAN* [2019] QCA 76

PARTIES: **R**
v
LAN
(applicant)

FILE NO/S: CA No 261 of 2018
SC No 1345 of 2017

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: Supreme Court at Brisbane – Date of Sentence: 14 September 2018 (Boddice J)

DELIVERED ON: 7 May 2019

DELIVERED AT: Brisbane

HEARING DATE: 1 May 2019

JUDGES: Philippides and McMurdo JJA and Mullins J

ORDER: **The application for leave to appeal against sentence be refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was convicted of the attempted murder (domestic violence offence) of his former partner – where the applicant was sentenced to nine years imprisonment with no further order on the basis of an agreed statement of facts – where the applicant strangled and threatened to kill the complainant and had to be physically restrained by police – where the applicant was 37 years old at the time of the offending and 40 at the time of sentence – where the applicant endured a dreadful childhood, being kidnapped and forced to be a child soldier – where the applicant submits that his sentence is manifestly excessive – whether the applicant should be granted leave to appeal against his sentence

Barbaro v The Queen (2014) 253 CLR 58; [2014] HCA 2, applied
Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, applied
House v The King (1936) 55 CLR 499; [1936] HCA 40, applied
Kentwell v The Queen (2014) 252 CLR 601; [2014] HCA 37, applied
R v Ali [2018] QCA 212, considered
R v Goodwin; Ex parte Attorney-General (Qld) (2014)

247 A Crim R 582; [\[2014\] QCA 345](#), applied
R v Kerwin [\[2005\] QCA 259](#), considered
R v MCT [\[2018\] QCA 189](#), applied
R v Sauvao [\[2006\] QCA 331](#), considered
R v Seijbel-Chocmingkwan [\[2014\] QCA 119](#), considered

COUNSEL: The applicant appeared on his own behalf
 C N Marco for the respondent

SOLICITORS: The applicant appeared on his own behalf
 Director of Public Prosecutions (Queensland) for the
 respondent

- [1] **PHILIPPIDES JA:** The applicant was convicted on his plea of guilty of attempted murder (domestic violence offence) and sentenced on 14 September 2018 to nine years imprisonment with no further order. Presentence custody of 849 days was declared as time served under the sentence.
- [2] The applicant seeks leave to appeal against his sentence on the basis that it was manifestly excessive.

Background

- [3] The applicant was 37 years of age at the time of the offending and 40 years of age at sentence.
- [4] The applicant was sentenced on the basis of an agreed statement of facts. The complainant and applicant met about two and a half years before the offence in question. They were involved in a relationship for about a year prior to separating, but remained friends. Prior to the offence, they had recently caught up with each other and had seen each other socially on about four occasions. The most recent was on 15 May 2016, two days prior to the offence.
- [5] On the evening of 17 May 2016, the applicant went to the complainant's unit at her invitation. They listened to music before leaving to meet friends at a nearby hotel. They returned to the unit about an hour later just after 11.00 pm where they continued drinking alcohol. The complainant was feeling "quite tipsy but not heavily drunk".
- [6] The applicant made advances towards the complainant, touching her and trying to kiss and hug her. The complainant asked the applicant to leave which he refused to do. She told him that if he did not leave she would call for help and call the police. The applicant then grabbed the complainant's mobile telephone from off the coffee table and put it in his pants pocket. The complainant attempted to retrieve her phone and the applicant grabbed the complainant's arm, pushing her in the chest with both hands, causing her to fall back into the wall. The complainant tried to leave but the applicant blocked her path and pushed her in the chest again, causing her to fall to the ground.
- [7] The applicant then kneeled on the complainant's chest and punched her to the right side of her head a number of times. She screamed for help. The applicant then covered the complainant's nose and mouth squeezing them so hard that she was

unable to breathe. At the same time, he placed his other hand around her throat and strangled her. The complainant was resisting and screaming for help.

- [8] Each time the applicant moved his hand, the applicant threatened to kill the complainant. The complainant lost consciousness for a period. When she regained consciousness, she saw that the applicant was still standing over her. His pants and underwear were down.
- [9] The applicant proceeded to wrap his t-shirt around the complainant's head, covering her eyes, nose and mouth. He knelt on the complainant's chest and covered her nose and mouth with one hand, whilst strangling her again with the other. The complainant was unable to breathe. The applicant whispered, "Sssh it will all be over soon". The complainant tried to fight back but the applicant was too strong.
- [10] Neighbours called the police soon after the incident began. When the police arrived, they heard the complainant gasping for air and muffled sounds of her calling out. When they entered the unit, they saw it in disarray. The applicant was on top of the complainant and was pinning her to the floor and had his right hand around her throat strangling her. His left arm was raised and his fist clenched.
- [11] The applicant ignored the police direction to get off the complainant and had to be forcibly restrained.
- [12] The applicant then provided a self-serving version of events to police, which sought to blame the complainant for violent behaviour towards him, and which was not accepted.
- [13] The complainant presented to the Emergency Department of the Princess Alexandra Hospital at 2.36 am. The complainant sustained a haematoma to her scalp, swelling to her upper lip and a probable small fracture of the fifth cervical spine vertebra. She subsequently discharged herself against medical advice.

Sentencing remarks

- [14] At sentence, the prosecution contended that a sentence in the vicinity of nine years was appropriate. No submission was made for a serious violent offence declaration but it was submitted that no order as to parole eligibility should be made. That submission was supported by the applicant's counsel.
- [15] In his sentencing remarks, the sentencing judge described the offending as involving "a sustained and brutal act of violence" towards a former partner. His Honour observed that while the victim, fortunately, did not suffer significant physical injuries, she had endured significant psychological injuries as a result of the event.
- [16] The applicant had a criminal history in Queensland and Victoria. He had not previously been convicted of an offence of violence. The sentencing judge referred to the applicant's history as "relatively irrelevant".
- [17] In imposing sentence, the sentencing judge took into account the applicant's plea of guilty as evidence of his cooperation with the administration of justice. His Honour also had regard to the applicant's personal circumstances. The applicant, who was born in 1978, had endured a dreadful childhood that included being kidnapped and forced to be a child soldier. His Honour also referred to the report of Dr Butler, a psychiatrist. It outlined that as a consequence of the trauma the applicant

experienced as a child, the applicant has posttraumatic stress disorder, persistent depressive disorder and alcohol use disorder.

- [18] Whilst his Honour took those conditions into account, his Honour stated that he did not consider that there was a causal connection between those conditions and the applicant's offending. His Honour noted that Dr Butler's report indicated that the applicant's conditions meant he did not respond well to what he perceived as a threat, but observed that "there was no threat at all" on the occasion of the offending by the applicant and that there was "good reason for the community to be protected from [the applicant] in the future".
- [19] The sentencing judge took into account that the applicant's mental health conditions would make his time in custody harder. His Honour also had regard to the fact that one of the consequences of the sentence was that there was a real likelihood that the applicant would be deported upon his release from custody, a matter that would cause the applicant great stress because of the report by the applicant that his father had been killed by people in that country.

The application

- [20] The applicant asserts that the sentence imposed was manifestly excessive. Such a contention requires an applicant to demonstrate that the sentence imposed was "unreasonable or plainly unjust" such that it can be inferred that there has been a failure to properly exercise the sentencing discretion.¹
- [21] Sentencing concerns a discretionary judgment in respect of which there is no single correct result. Rather, given that a discretion is involved, a range of sentences may in a given case be said to be "warranted in law".² It follows that it is not sufficient to show that the sentence imposed is markedly different from sentences in other cases, unless the difference is such that there must have been a misapplication of principle or the sentence is unreasonable or plainly unjust.³ Comparable cases assist in understanding how factors should be treated but they are not determinative of the outcome and do not set a "range" of permissible sentences or the outer bounds of permissible sentencing discretion with numerical precision.⁴ Whether or not a sentence is manifestly excessive is to be decided by reference to all of the factors relevant to sentence.

The submissions

- [22] The applicant made written submissions in support of his application. In those submissions, the applicant maintained that he went to the complainant's address because he had been asked to help clean her house and that she was in a "depressed state", and finding a large amount of rubbish scattered throughout the house, he did his best to clean up. He also claimed that the complainant asked the applicant to approach her neighbours, who he was told were intimidating her, to ask them to leave the complainant alone but he decided against doing so. The applicant maintained that the complainant was also upset because the police had attended her

¹ *House v The King* (1936) 55 CLR 499 at 505.

² *Kentwell v The Queen* (2014) 252 CLR 601 at 617-618.

³ *Hili v The Queen* (2010) 242 CLR 520 at [58], [59].

⁴ *R v Goodwin; Ex parte Attorney-General (Qld)* (2014) 247 A Crim R 582 at 584-585; *Barbaro v The Queen* (2014) 253 CLR 58 at [41]; *R v MCT* [2018] QCA 189 at [239].

address earlier in the day in response to her calling them and telling them that she was going to harm herself.

- [23] The applicant maintained that the complainant had burned the applicant to the face with a lighter, an allegation that had been previously made but was not part of the agreed statement of facts. He claimed it was he who was the victim of abuse and threats on numerous occasions and that he has visible, physical marks from the complainant “burning [him]” in multiple different ways. The applicant made other allegations of violence by the complainant which were not part of the agreed facts on which the sentence proceeded, including that on the night before the offence the complainant assaulted him with a knife when he refused her request for money.
- [24] The applicant asserted that the complainant suffered from a mental illness. Certainly the victim impact statement refers to the complainant suffering greatly from the aftermath of the offence, including having lost a great deal of weight and being afraid to leave her house and suffering from self-neglect. But these are all attributed to the consequences of the offending and that was the uncontested basis on which the sentence proceeded.
- [25] The applicant sought to play down the seriousness of his conduct by referring in his submissions to medical reports, including radiology results, from the PA Hospital of 18 May 2016 that found “no obvious trauma to [the] neck” of the complainant. The applicant also challenged the ambulance report as contradictory in its reference to “him punching in the head sitting on top of [the complainant] placing a piece of cloth over her mouth and nose so that she couldn’t breathe, strangling her with his hands around her throat”. The applicant questioned, “How could I have been covering her mouth with a cloth and strangling her at the same time”. These statements do not reveal any remorse or insight and in that regard I note that the sentencing judge did not make a finding that the applicant’s plea was reflective of remorse. Rather, the approach his Honour took was to have regard to the plea as demonstrating cooperation which saved the complainant the trauma of having to give evidence.
- [26] In short, the assertions made by the applicant in his written outline do not form part of the agreed statement of facts and are therefore irrelevant to the disposition of this application. Indeed, the assertions conflict with the agreed facts and in part reiterate the self-serving statements made by the applicant to police that the statement of facts expressly record was not the basis on which the sentence proceeded.
- [27] I agree with the submission made by the respondent that the sentence imposed was within the sentencing discretion and supported by authorities, including *R v Sauvao*,⁵ *R v Ali*,⁶ *R v Seijbel-Chocmingkwan*⁷ and *R v Kerwin*.⁸
- [28] In *Sauvao*, the applicant was convicted on his plea of the attempted murder of his de facto wife and the breach of a domestic violence order. The applicant had attempted to stab the victim in the heart with a knife that broke, which had been in the offender’s lunch bag. He then proceeded to punch, kick and hit her head. He remained at the scene and handed himself into custody. The sentence of nine years

⁵ [2006] QCA 331.

⁶ [2018] QCA 212.

⁷ [2014] QCA 119.

⁸ [2005] QCA 259.

imprisonment with a serious violent offence declaration was interfered with on appeal to the extent of setting aside the declaration. The applicant, who was 43 at the time of sentence, had a criminal history which included breach of a domestic violence offence. The offender was found to be remorseful, and in addition to his plea, he had made fulsome admissions, giving a full record of interview that was described as “remarkable both in its consistency with that of other witnesses including the complainant and in its addition of other details to his own disadvantage”. The offender provided details that the police would otherwise not have known.

- [29] In *Ali*, the applicant was convicted after trial of attempted murder and sentenced to 10 years imprisonment with a serious violent offence declaration, with the effect of requiring 80 per cent of the sentence to be served. The offender rammed the victim’s car with his own, head-on and then pursued the victim on foot, wielding a machete, and hacking her five to seven times to the head and shoulders with it. The offender was 51 years old at the time of offending and 53 at sentence, with no criminal history, and had fled the Somalian civil war after experiencing significant hardship there. He also suffered from a mental health disorder which, at the time of the offending, impaired to some extent his capacity to control his behaviour.
- [30] In *Seijbel-Chocmingkwan*, a sentence of 10 years imprisonment, also with a declaration of a serious violent offence, on a plea of guilty to attempted murder, was not interfered with. The applicant, who had separated from her husband after a 12 year marriage, drove her car into the back of his car while he was retrieving groceries from the boot. She then reversed and did this a second time. The offender then exited the car, wielding a knife, and stabbed the complainant (who was in a relationship with the applicant’s former husband) and attempted to strangle her. A psychiatric assessment of the offender considered that she was suffering from a “major depressive episode”. She was almost 41 at the time of offending and had been involved in an acrimonious dispute over custody of the children, who were removed from her. She was convicted, on her pleas, of assaults on her daughter described as “excessive discipline” and was on parole for those offences when the offence of attempted murder occurred.
- [31] In *Kerwin*, the applicant, who was 46 at the time of offending and 48 at sentence, was sentenced to 12 years imprisonment on a plea of guilty to attempted murder. He had broken into his estranged wife’s house at night and strangled her in front of their eight year old daughter. The offender did not desist when the police arrived and had to be physically restrained to stop him from strangling her. The 12 year sentence was imposed in circumstances where the applicant had a prior criminal history consisting of assaults against the complainant and breaches of domestic violence orders obtained by her and a domestic violence order was in effect at the time of the offence.
- [32] These authorities clearly demonstrate that the nine year sentence imposed in the circumstances of the present case was within the sound exercise of the sentencing discretion.

Order

- [33] The application for leave to appeal against sentence be refused.

[34] **McMURDO JA:** I agree with Philippides JA.

[35] **MULLINS J:** I agree with Philippides JA.