[2019] QCA 217

COURT OF APPEAL

FRASER JA
BUSS, AJA
HENRY J

CA No 193 of 2019
DC No 2755 of 2017

THE QUEEN

v

PBF **Applicant**

BRISBANE

THURSDAY, 17 OCTOBER 2019

JUDGMENT

HENRY J: On 13 February 2019, the applicant pleaded guilty to a charge of grievous bodily harm. He was sentenced to four years imprisonment with parole eligibility fixed after 15 months. The learned sentencing judge stated that sentence was reduced pursuant to s 13A, *Penalties and Sentences Act* 1992. His Honour stated the sentence he would otherwise have imposed – the "but for" sentence – was four and a half years imprisonment with parole eligibility fixed after 20 months.

On 23 July 2019, the applicant filed an application for an extension of time within which to apply for leave to appeal his sentence on the ground of manifest excess. The application for extension of time is necessary because the applicant's filing was over four months beyond the time within which an application for leave to appeal sentence should be filed.

In such an application, the proper approach is to consider whether the applicant has shown good reason to account for the delay and whether it is in the interests of justice to grant the extension, having regard, inter alia, to the perspective strength of the proposed appeal – see *R v Tait* [1999] 2 Qd R 667 at 668.

The applicant's written submission asserts that immediately upon the conclusion of the sentence he instructed his solicitor to lodge an appeal. He has repeated that assertion from the bar table today. It is unsupported by evidence. It is also impliedly inconsistent with the evidence of his then solicitor who deposes that on the conclusion of the sentence the applicant was told the sentence was within range. That evidence is consistent with the recollection of defence counsel and the content of the solicitor's subsequent letter to the applicant, albeit that that letter may not have been received by him. Good reason has not been shown to account for the applicant's delay.

Furthermore, as the following overview demonstrates, the prospective application for leave to appeal is without merit.

The complainant man was residing at the applicant's home for some days while performing mechanical work on the applicant's motor vehicle. On the night in question, the complainant had fallen asleep on a couch. While the complainant slept, the applicant violently assaulted him without a weapon. As much became apparent to the complainant when he awoke to water being thrown over him. He felt massive pain to his face and left eye and opened his eyes to see the applicant leaning over him. The complainant asked the applicant what had happened, to which the applicant responded, "I've only given you a touch up, it's only a black eye."

The complainant was taken to hospital suffering left-sided facial tenderness, comminuted fracture of the left orbital floor, a left cheekbone fracture and infraorbital nerve injury. His ensuing surgery involved open reduction and internal fixation of the cheekbone fracture using titanium plates and screws, and the removal of a tooth. His victim impact statement indicated he has

suffered emotionally and physically, including a degree of hearing loss as a result of the offence.

The applicant denied assaulting the complainant when questioned by police.

The applicant pleaded guilty at a late stage in the week preceding his listed trial. His subsequent sentence was further delayed by a failure to appear.

The applicant's counsel informed the court below the applicant's offence had been motivated by a perception that insufficient work had been done on his vehicle and a belief the complainant was using drugs at the applicant's home. The learned sentencing judge correctly observed those reasons were trivial and provided no justification whatsoever for such a brutal and violent attack upon a sleeping man.

The applicant, who is 36 years old, has schizophrenia for which he has long known he must take medication.

He has a bad criminal history and has previously been sentenced to imprisonment. His New South Wales criminal history includes convictions for armed robbery in 2001, the sentence for which included a condition that he "remain compliant with prescribed medication", assault occasioning bodily harm in 2002, and maliciously inflicting grievous bodily harm in 2004. His Queensland criminal history includes convictions in 2008 for entering a dwelling with intent and armed robbery in company with actual violence in 2005, and entering a dwelling with intent, grievous bodily harm and armed robbery in company with violence in 2006. It also includes convictions for repeated contraventions of a domestic violence order in 2016 and 2018, and three offences of common assault on an occasion in 2018.

At his sentence in 2008, which was the subject of an unsuccessful application to this Court to extend time to appeal, an exhibited psychologist's report indicated the applicant had not been taking medication needed to prevent the return of psychotic symptoms.

This background was echoed in the applicant's present matter. The learned sentencing judge was informed the applicant had not been taking his prescribed medication for schizophrenia. His Honour noted there was no medical evidence and observed:

> "Although I accept you suffer schizophrenia, it is difficult to attach significant weight to that factor because there is no evidence linking your medical condition to the offence. In any event, your schizophrenia would tend to indicate that you present a risk to the community, particularly, if you are not medicated."

That was a reasonable assessment of the need for community protection from the applicant, which is one of the purposes of sentencing pursuant to s 9(1)(e) *Penalties and Sentences Act*.

The applicant was serving out a term of imprisonment at the time of his sentence for the present matter, consequent upon breaching his parole. The learned sentencing judge fairly elected not to impose a cumulative sentence and the applicant commenced serving the present sentence from the date of sentence.

The learned sentencing judge set the actual and "but for" parole eligibility periods at slightly above the one-third mark of the respective actual and "but for" head sentences but materially below the one-half mark. No sensible complaint could be made about that in light of the applicant's background and untimely guilty plea.

This would leave the actual and "but for" head sentences as the prospective target of complaint. The "but for" head sentence of four and a half years imprisonment is a substantial sentence for the offence of grievous bodily harm simpliciter. However, while lesser head sentences have been imposed for the offence of grievous bodily harm, it does not follow a lesser sentence was apt here, particularly given the appalling circumstances in which the offence was committed and the applicant's criminal history.

It was an especially concerning circumstance that the attack was administered upon a sleeping victim, and thus an unaware and defenceless victim, who had not provoked the attack. The injuries were so serious that even invasive surgical intervention could not prevent permanent physical deficit. Further, the applicant has a material history of criminal violence, including two other convictions for doing grievous bodily harm.

In light of those circumstances, a higher than ordinary head sentence was obviously called for. Similarly significant head sentences have been imposed in other grievous bodily harm cases involving particularly serious circumstances – see for example, *R v Henriott* [2004] QCA 346, *R v Fisher* [2008] QCA 307 and *R v Castle; Ex parte Attorney-General (Qld)* [2014] QCA 276. There is no prospect of successfully arguing that a head sentence of four and a half years was manifestly excessive in the concerning circumstances of this case.

This leaves for consideration the adequacy of the reduction of the "but for" sentence because of the s 13A undertaking. Its effect was to reduce the "but for" head sentence by six months, and the "but for" parole eligibility by five months. This was a material discount, though not as generous as may sometimes be encountered where the evidence a defendant undertakes to give involves significant value.

The applicant undertook to give evidence against a juvenile charged, in a different case, with acts intended to cause grievous bodily harm. This has resulted in the applicant needing to be in protective custody, which the learned sentencing judge expressly took into account. However, the value of the applicant's testimony is moderate at best. The prosecution already had evidence of a confession. The applicant's evidence would be of an implied admission. The credibility of that evidence is hampered by features including the applicant's conduct in connection with that case. The learned sentencing judge was correct in characterising the applicant's assistance as being of "limited utility".

The upshot is that there is no prospect of the applicant successfully contending the s 13A discount on sentence was so modest as to bespeak error.

It is not in the interests of justice to grant the extension. I would order: application for extension of time within which to apply for leave to appeal sentence refused.

FRASER JA: I agree.

BUSS AJA: I also agree with Justice Henry.

FRASER JA: The order of the Court is that the application for an extension of time within which to apply for leave to appeal against sentence is refused.