[2002] QCA 34

COURT OF APPEAL

McMURDO P
THOMAS JA
BYRNE J

CA No 268 of 2001

THE QUEEN

v.

DAVID STEWART MARKS (Respondent)

and

ATTORNEY-GENERAL OF QUEENSLAND (Appellant)

BRISBANE

..DATE 18/02/2002

JUDGMENT

THE PRESIDENT: The respondent and his co-accused brother, Vincent, were charged with attempted murder, alternatively unlawful wounding with intent to do grievous bodily harm. Both were acquitted of attempted murder. The respondent was convicted of unlawful wounding with intent to do grievous bodily harm. Vincent Marks was found not guilty on that count, but convicted of the lesser alternative count of unlawful wounding simpliciter.

Vincent Marks was sentenced to 15 months' imprisonment. There is no appeal as to that sentence. Vincent Marks was convicted of a much lesser offence; he played a supporting role to the respondent, who was almost 10 years older than him, although Vincent Marks, like this respondent, had a significant criminal history.

The respondent was sentenced to five years' imprisonment with no declaration under part 9A, Penalties and Sentences Act 1992. The appellant, the Attorney-General of Queensland, contends that the respondent's sentence is manifestly inadequate.

The respondent learned that the complainant had engaged in a sexual relationship with the respondent's girlfriend about six weeks before the commission of this offence. At about 10.30 p.m. on 31 January 2001 the respondent and his brother raised the complainant by knocking at his front door. Vincent Marks

demanded that the complainant open the door.

The complainant refused, telling the protagonists to "fuck off". The complainant and the offenders were not known to each other. The complainant then heard the front glass door smash. He grabbed a steel bar. He saw a hand come through the broken glass and he swung at the door. This action broke more glass.

In his record of interview with police, the respondent said he did not smash the glass, but rather the complainant smashed the door from the inside, and that this act of violence from the complainant prompted him to shoot. Nothing at sentence turned on this factual dispute.

The complainant said he saw the hand entering through the sliding door as if someone was trying to open it. He then saw someone running behind a wall. He saw a gun pointed in his direction and he turned and ran. He was hit in the back by a bullet. He dropped the steel bar and dived onto the kitchen floor. He was hit by another bullet and heard further shots fired. He heard people laughing.

He sought assistance from neighbours. An ambulance was called and he was taken to hospital. He was treated for gunshot wound injuries to his chest and back. He sustained pneumothorax and haemothorax. He was admitted to intensive

care and underwent surgery. He was hospitalised for six days and gave evidence of suffering considerable pain.

After he was shot he thought he was dying. He still carries some shrapnel from the bullets which entered him. No victim impact statement was tendered. As grievous bodily harm was not alleged by the prosecution the respondent cannot be sentenced on that basis. The case, however, is a most serious example of wounding, coupled with intent to do grievous bodily harm.

The weapon was a sawn-off .22 calibre semi-automatic self-loading rifle with magazine attached. It had an empty cartridge jammed in the breech when it was located by police divers in the Fitzroy River. The evidence showed the gun had been discharged on at least seven occasions.

The learned Judge noted in his sentencing remarks that the respondent, although intending to do a serious injury to the complainant, did not have a premeditated intention to cause that injury until he went to the complainant's home.

His Honour noted that whilst the respondent was nearly 30 years of age and had some criminal history, he had only one offence directly of a violent nature which was committed in 1993 although the circumstances outlined by the Prosecutor suggested it was indeed a very serious offence.

The respondent was convicted in 1993 in the Melbourne County Court of offences of robbery and recklessly causing serious injury. He was sentenced to a total of two years' imprisonment suspended after 11 months for 21 months.

The facts of those offences outlined by the Prosecutor at sentence and not disputed by defence counsel were that three people, including the respondent, set upon an air hostess travelling from Tullamarine Airport to Melbourne City by train at about 8.30 p.m. and savagely attacked her. Later in 1993 the respondent was sentenced to six months' concurrent imprisonment for a further offence of intentionally or recklessly causing injury, assault by kicking, assault with an instrument and unlawful assault. The respondent had other convictions for possession of drugs, possession or carrying a dangerous article or weapon, and some minor convictions of dishonesty and driving offences.

The respondent was 28 at the time of the commission of this offence and 29 at sentence.

The respondent's counsel at sentence submitted the appropriate range was five to eight years' imprisonment and that a serious violent offence declaration was not warranted in the circumstances. The Prosecutor at sentence submitted the range was seven to 10 years and that a serious violent offence

declaration was warranted.

The facts of this offence as outlined demonstrate that it is undoubtedly most serious. The respondent whilst angry and in company with his brother went armed to the complainant's home late at night with a loaded semi-automatic firearm to seek revenge. He then discharged that firearm on at least seven occasions with an intent to do grievous bodily harm to the complainant. It is only good fortune that saved the complainant from death.

The respondent has shown no remorse and does not have the mitigating benefit of a plea of guilty. Conduct of this sort demands a salutary deterrent sentence both to this offender and to others who would consider acting in such a lawless and seriously anti-social manner.

The appellant now contends that comparable sentences demonstrate that the range within which the sentence should have been imposed was six to nine years' imprisonment, whilst the respondent contends that these same sentences support a range of five to seven years' imprisonment.

The respondent receives the benefit in sentencing of the fact that, through no fault of his, the complainant was not apparently injured sufficiently to charge grievous bodily harm. Comparable sentences for the offence of grievous bodily

harm with intent to do grievous bodily harm are not directly apposite and are of limited assistance in determining the appropriate sentence here.

The cases of R v. Ambrose, CA 5 of 1995, 21 March 1995, R v. Lynch, 132 of 1995, 16 May 1995, 2 June 1995, and R v. Ainsworth, CA 26 of 2000, 5 May 2000, although not closely comparable to the facts of this case support the appellant's contention that this sentence is manifestly inadequate.

The respondent has not been able to refer us to any case of this seriousness involving a wounding through the discharge of a loaded weapon with intent to do grievous bodily harm where a sentence as low as five years' imprisonment with no declaration under part 9A, Penalties and Sentences Act 1992, was imposed.

The sentence imposed here in the absence of a declaration under part 9A was manifestly inadequate. I am conscious that the learned sentencing Judge who heard all the evidence in this trial apparently took a rather sympathetic view of the respondent in the sentence he imposed and that this is an Attorney's appeal. Those factors cannot however take away from the fact that this sentence involved dangerous and reprehensible conduct in going to the complainant's home at night with a loaded semi-automatic weapon and then discharging it on a number of occasions, on at least one of which there

was an intent to do grievous bodily harm. I emphasise that the respondent did not have the mitigating factor of a plea of guilty.

In all the circumstances a sentence of at least seven years' imprisonment was appropriate in this case in the absence of a declaration under part 9A, Penalties and Sentences Act 1992.

I would allow the appeal and, instead of the sentence of five years' imprisonment, substitute a sentence of seven years' imprisonment. I would otherwise confirm the sentence imposed at first instance.

THOMAS JA: I agree.

BYRNE J: I agree.

THE PRESIDENT: The order is as I have outlined.
