

COURT OF APPEAL

McPHERSON JA
MUIR J
PHILIPPIDES J

CA No 364 of 2001

THE QUEEN

v.

WARWICK JAMES TURNER

Applicant

BRISBANE

..DATE 15/03/2002

JUDGMENT

PHILIPPIDES J: This is an application for leave to appeal against a sentence imposed upon the applicant on his plea of guilty to two offences presented by way of ex officio indictment, being one count of threatening violence at night by discharging a firearm with intent to alarm and a related count of wilful damage. In addition the applicant pleaded guilty to various related summary offences, being one count of discharging a firearm on private land, one count of discharging a firearm on public land, one count of possession of a firearm, one count of use of a weapon whilst under the influence of liquor and one count of breach of a domestic violence order.

The sentence imposed by the learned sentencing Judge was one of 21 months imprisonment in relation to the offences on indictment. In relation to each of the summary offences the applicant was sentenced to one month's imprisonment, except for the offence of using a weapon whilst intoxicated, for which he was convicted but not further punished. All sentences were ordered to be served concurrently.

The applicant is 37 years of age. The offences in question were triggered by a variation to an access order which had been made earlier on the day in question at a Family Court hearing. The order concerned access to a child from the applicant's relationship with the complainant who was the applicant's former de facto.

It appears that later on the day in question, after the Family Court decision, the applicant attended the Kuraby Hotel and drank a large quantity of alcohol. It appears that the applicant committed the offences whilst under the influence of alcohol. It appears that the applicant attended his workplace where he collected a rifle and some ammunition. He then attended at the complainant's address and fired several shots at the house intending to do no more than scare and annoy the complainant. It appears that the applicant fired shots at the house and then went into the yard and fired a shot into the garage door knowing that the complainant's vehicle would be behind it and that he would damage it.

The complainant complained to the police that she was terrified when she realised that the applicant was near her house, as she had a domestic violence order preventing him from coming near her house, and that when she realised he was firing a rifle she feared for her life and for the lives of those who were in the house with her at the time. Those others being two female friends and her baby son.

When initially approached by the police the applicant denied all of the allegations and provided a version including witnesses who would support his alibi that he did not attend the complainant's residence. However, his denial was short-lived and during his interview with the police he admitted the offences in full and cooperated with the police indicating the location of the firearm.

In sentencing, the learned sentencing Judge took into account the fact that the offences were serious and carried a real risk of harm to others and which have had an effect upon the intended victim. His Honour also took into account in the applicant's favour the applicant's early plea of guilty and of his cooperation with the authorities after the offences were committed.

His Honour also referred to the submissions on behalf of the applicant that he did not intend to injure any person and that most of the shots were fired upward towards the ceiling. His Honour also had a reference to the applicant's long criminal history and to the fact that the applicant had not committed any offence for some time in recent years. Further his Honour referred to the statement prepared by the applicant.

However, the transcript reveals that after imposing the sentence the learned sentencing Judge stated the following:

"In recognition of your plea of guilty which is by way of an ex officio indictment and the other circumstances of mitigation placed before the Court, it is recommended that you be eligible for release on parole."

His Honour then asked counsel whether it was possible for him to make that order under the new sentencing regime. His Honour was informed that because the sentence imposed was for a period less than two years, no parole recommendation could be made. His Honour was then asked by counsel for the applicant to consider instead a suspension of the sentence,

which his Honour rejected.

Counsel for the applicant submitted that the sentence imposed was manifestly excessive. Whilst there is no complaint in relation to the starting point or head sentence of 21 months, it was submitted that the sentence should have been discounted to reflect the matters of mitigation by either partially suspending the term after seven months or reducing the head sentence to 14 months.

It was also submitted that the learned sentencing Judge erred in law in failing to appreciate the application and effect of sections 74(1), 76(1) and 134(1) of the Corrective Services Act 2000 when exercising his discretion.

The effect of the provisions of the Corrective Services Act 2000, which I have mentioned, is that sentences of two years or less imposed for offences committed after 1 July 2001 can only be discounted to reflect matters of mitigation by reducing the head sentence or suspending the term of imprisonment.

It was also submitted on behalf of the applicant that his Honour erred in law by failing to recognise that it was permissible to reduce or discount the appropriate head sentence to reflect matters of mitigation. Counsel for the applicant also submitted that the sentencing discretion miscarried because the learned sentencing Judge failed to

discount the sentence to reflect the matters of mitigation.

Because the applicant was sentenced to a term of imprisonment of 21 months being less than two years, the Corrective Services Act 2000 provides that he is ineligible for remission pursuant to section 75(1) of the Act or for a post-prison community based release order pursuant to section 134(1) of the Act. The applicant can apply for conditional release only after serving two-thirds of the period of imprisonment, that is 14 months - see section 76(1) of the Act.

It was thus submitted that the sentencing discretion miscarried because the learned sentencing Judge failed to place sufficient weight on the matters of mitigation, particularly the applicant's cooperation with the authorities making full confession in a formal record of interview, his plea of guilty to an ex officio indictment, which it was submitted demonstrated an acceptance of responsibility and a willingness to facilitate the course of justice and the fact that the applicant was acting at a time of immense stress and had not intended to hurt anyone.

I consider that it has been demonstrated that the learned sentencing Judge proceeded on the basis of an erroneous understanding of the provisions of the Corrective Services Act 2000. In addition, this error affected his Honour's discretion. His Honour appears to have intended to give effect to matters of mitigation by intending to make a

recommendation for early parole. However, that was not permitted under the Act.

In those circumstances, this Court is entitled to exercise its discretion afresh. On behalf of the respondent it was submitted that an appropriate range for this case was one of 18 months to two years imprisonment and that the sentence imposed by the sentencing Judge was within range and was an appropriate one for this Court.

The only comparable referred to was one of R v. Reeves CA 296 of 1997, which I do not consider to be of any great significance or assistance, given the presence in that case of other charges.

In exercising the sentencing discretion afresh, consideration should be given to the fact that the offence committed was serious and involved use of a firearm in the context of the breach of a domestic violence order where, although the applicant intended not to harm anyone, there was clearly a risk of injury. Appropriate recognition should be given to the mitigating circumstances referred to by the applicant's counsel.

In the circumstances I consider that the appropriate sentence in this case is one of 18 months imprisonment. I would order that the application for leave to appeal against sentence be allowed. I would allow the appeal, set aside the sentence of

21 months imprisonment and in lieu thereof order that in respect of each of the offences on indictment the applicant be sentenced to imprisonment for a period of 18 months concurrently. In relation to the summary offences, orders made should stand.

McPHERSON JA: I agree. In the way in which matters fell out at the hearing, his Honour the sentencing Judge may have bound his discretion, or at least have given the impression of having done so. That means that we in this Court must undertake the sentencing process anew. I would do so with the result proposed by Justice Philippides in her reasons with which I agree.

MUIR J: I agree with both reasons and with the orders proposed.

McPHERSON JA: The order will be that propounded by her Honour in her reasons in this Court.
