[2002] QCA 103

COURT OF APPEAL

McPHERSON JA
WHITE J
HOLMES J

CA No 250 of 2001

THE QUEEN

v.

KEVIN NORMAN JAMES BROWN Appellant

BRISBANE

..DATE 20/03/2002

JUDGMENT

McPHERSON JA: I will ask Justice White to give the first reasons in this case.

WHITE J: The appellant was convicted after a trial in Townsville on 13 September 2001 of common assault on Adele Therese Edwards, entering a dwelling with intent in the night with company and of assault occasioning bodily harm on Shane Matthew Harrison in company. On 14 September he was sentenced to six months' imprisonment for the common assault, two years on each of the convictions for entering a dwelling and the second assault; all of them to be served concurrently.

The appellant caused an appeal against conviction to be lodged on the 13th of September following conviction but before sentence. There is only one ground mentioned, namely that the verdict was unreasonable and against the weight of evidence in all the circumstances.

Mr Paul Richards, who now appears for the appellant, has raised a number of other grounds in his written submissions. No application for leave to appeal against sentence was filed within time. There is now an application for an extension of time within which to apply for leave to appeal against sentence, dated 14 February 2002 and it will be convenient to deal with that matter when considering the sentence.

On Saturday, the 13th of May 2000, the complainants, Adele Edwards and Renyee Annette Preston - a girl of about 15 who

was staying with Edwards and her de facto husband, Harrison - were in their house at about 20 to 10 watching television when there was a knock at the door. The front porch door was wide open and it may be inferred from the evidence of Edwards that the porch light was on.

The women looked up and saw two Aboriginal men standing at the front door, who asked if Harrison was at home. They told him that he was not, as was the case, and when told that he would be about an hour, said that they would return later. When asked their names they said they were Steve and John and then left.

Shane Harrison returned home at about 11.30 p.m. and when told of the visitors, said he did not know who they were. The porch door was shut and about 15 minutes later there was a knock at the front door and when asked the visitors said that they were Steve and John.

Shane Harrison had told Edwards to deny that he was at home and she did so. The men outside indicated that they would come back the next day. Edwards asked them what they wanted and one of the men said to her that they had been told that they could attend at Harrison's residence and obtain drugs.

Shortly after midnight Harrison and Edwards retired to bed and, it would appear, Preston also, and about 20 minutes later there was a banging on the front door. Alarmed about her two-

month-old daughter who might be woken, Edwards looked out of the curtains and saw one of the men walk past. She noted at this time there were three men in all.

She went to the door and, after asking, was told that it was Steve and John again so she opened the door. She denied that Shane was at home, as she had been instructed, but they accused her of lying. She turned on the porch light. She denied the men entry but the appellant said that she could not stop him. The other man then said that Harrison had wronged the family and they were going to get him for it and bash him.

Edwards then noticed the appellant's co-accused, Mark Preston, the father of Renyee Preston who was staying with them, standing behind them. The men pushed through the doorway and seriously assaulted Harrison who, by that time, was in the lounge room. The person first to strike the blow was the appellant. Renyee Preston was alerted by Edward's screams and came out of her room and attempted to render assistance to Harrison.

Meanwhile Edwards had picked up the baby and left the house to call the police. In the course of the assault Harrison went into Preston's room and escaped out of her window to the next door neighbours. On 16 August 2000 Harrison, Edwards and Renyee Preston were in the Flinders Street Mall in Townsville at some teller machines. Preston allegedly recognised the man standing at the next teller as one of the assailants, the

appellant, on 14 May.

She made a gesture towards Edwards. Edwards looked at him and allegedly recognised him also as one of the assailants from that night. They followed the man until they saw two police women and identified him to them. The major issue at the trial, so far as the appellant was concerned, was his identity as the assailant. His co-accused, Mark Preston, was well known to Harrison and Edwards and recognised by his daughter when he appeared on the third visit to the house when the offences occurred.

None of the residents had seen the other two men previously. Harrison was unable to identify the appellant as the man who had assaulted him. The prosecution called Edwards and Renyee Preston who gave identification evidence and were extensively cross-examined about it. The prosecution did not call Warren Eugene Stanley and the failure to do so was the subject of complaint by defence counsel.

Stanley was called by the co-accused, Preston. His evidence was that he was a life-long friend of Mark Preston's with whom he had been drinking on the evening of 13, 14 May. And together they were walking past the residence where the complainants lived. They were doing so, he said, in order to look at a new car which Preston's daughter had recently purchased. He said they heard a commotion and went up to the house.

Stanley's evidence was that he was unable to recognise two aboriginal males who ran out of the house. The appellant is his cousin. Stanley was cross-examined by the prosecutor about his previous convictions for dishonesty offences some 16 years previously. That the Trial Judge permitted her to do so is the subject of complaint on this appeal.

Turning then to the grounds of appeal which are set out in Mr Richards' outline of argument. In ground 1 the appellant complains that the quality of the identification evidence was so unreliable that no reasonable jury could have convicted. And in ground 2 he contends that the Trial Judge failed to draw to the attention of the jury the weaknesses in the identification evidence.

The weaknesses which, it is submitted ought to have been drawn to the jury's attention, were three: the location, description or intensity of Renyee Preston's bedroom light; the use of the word "chocolate" to describe the skin colour of the appellant by both Edwards and Renyee Preston suggesting discussion between them and thereby diminishing the notion of independent identification by each of them; and, finally, that there was no evidence about the height of the door which both women used to suggest the height of the assailant.

His Honour reminded the jury of the evidence of each witness in respect of the identification of the assailant whom they said was the appellant. He did so in detail, canvassing each

occasion when they attempted to describe him. The Trial Judge had asked counsel for the appellant at what was, in effect, the end of the prosecution case to raise with him any specific weaknesses in the identification evidence.

Counsel mentioned what he called "the cross-racial identification issue" and undertook to reflect on any others overnight. Nothing further was mentioned to his Honour the following day and, indeed, no redirections were sought by defence counsel in respect of the identification directions given by his Honour. His Honour warned the jury of the need for caution when evaluating identification evidence generally in well accepted terms including the physical circumstances, the time available to the identifying witnesses for looking at the offender, and he mentioned the light.

He drew attention to the inherent difficulties in identifying a person of a different race and gave examples. His Honour did point to the differences in the witnesses' descriptions of the assailant and referred to additions to their original evidence. He reminded them that one of the witnesses had said one assailant wore a plaster cast, while the other had said that it was a bandage.

His Honour did not point out to the jury any specific weaknesses about what light was available, although that had been canvassed more in passing in the evidence than specific exploration in examination-in-chief and cross-examination.

Whilst Domican v. The Queen (1992) 173 CLR 555 makes clear that the jury's attention must be drawn to any weakness in the identification evidence, a trial Judge is not bound to discuss all the evidence or to analyse all the conflicts in the evidence, at page 560. Although the direction to the jury need not follow any particular formula in identification cases "it must be cogent and effective" and "it must be appropriate to the circumstances of the case", at page 562.

When the whole of his Honour's direction to the jury on how they should approach the identification evidence, his isolation and reading of that evidence to them, and the linking remarks between those passages of evidence together with the specific directions on the weaknesses in the evidence is considered, it cannot be said that his Honour failed to deal adequately with the identification evidence and its weaknesses. Neither can it be said, in my view, that the identification evidence was unreliable. The witnesses were cross-examined vigorously and at length about the weaknesses in the identification of the appellant as the assailant. Edwards had three occasions to observe the visitors; Renyee Preston had two and they were far from fleeting glimpses it would seem.

In ground 3 it is contended that the trial Judge erred in suggesting to the jury that they could have regard to, "other evidence" in assessing the identification evidence when there was no other evidence upon which the jury could rely for

assistance. But in my view, there was at least the evidence from the Townsville General Hospital records to the effect that the appellant had had the plaster cast on his right hand removed by 10 May 2000 and that as far as the hospital records recorded no other treatment was given.

Mr Richards submitted that that was equivocal evidence and that the appellant could have gone elsewhere for further treatment to his arm. Nonetheless, that was the evidence that was before the jury and it seems to me that it was not inappropriate for that evidence to be mentioned as other evidence.

In ground 4 the appellant alleges that the trial Judge in failing to draw to the jury's attention that if they disbelieved the evidence of Stanley about the appellant not being present they could not rely on that false statement to support the identification evidence. As Ms Bain submits in her written submissions, Stanley's evidence was not relied upon by the prosecution as evidence of lies and was not relied upon in that sense as supporting the identification of the appellant. There was, in my view, no need for the trial Judge to warn the jury that the relationship between Stanley and the appellant would not support the identification evidence.

In ground 5 the appellant contends that the Judge ought to have directed the jury that they could not reliably draw any inference relating to the identification of the appellant from

the evidence of Dr Gopolan, the manager of the Townsville General Hospital as to whether the appellant had a plaster cast or bandage on his arm at the time of the incident. There was no need, in my view, for his Honour to do so. The evidence was a discrete piece of evidence which the jury could use as they saw fit.

It is also contended that the trial Judge ought to have drawn to the jury's attention the failure of the prosecution to call a doctor capable of interpreting the condition of the appellant's arm so as to have some evidence upon which they could draw the inference that the appellant may not have been able to use the right hand and arm to punch Harrison. But Dr Gopolan was not asked in cross-examination any questions which the appellant now contends ought to have been led by the prosecution.

Mr Richards submits that it is clear that he was not a specialist but he was a medical practitioner and at least the matter could have been explored with him. Perhaps it was and the answers were not favourable. When I say that I refer, of course, to discussion with witnesses outside the courtroom.

The Judge could hardly have commented, in my view, as the appellant contends that he ought without drawing attention to the failure to ask those questions of Dr Gopolan in cross-examination.

Grounds 6 and 7 are in the alternative, namely, that the trial Judge erred in accepting the prosecution's decision that there was a proper basis for failing to call Stanley as a witness or that he should have exercised his discretion not to allow her to cross-examine Stanley about his previous dishonesty convictions.

The role of a prosecutor in such circumstances was discussed in Appostilides (1984) 154 CLR 563. His Honour conformed to the general propositions formulated by the High Court in that decision about the role of prosecutors. It could not be said that the decision not to call Stanley when viewed against the conduct of the trial as a whole constituted a miscarriage of justice. See page 575. Stanley was seen by the prosecution as in Preston's camp. His evidence at committal was inconsistent with his statement.

In my view, there was nothing more for the learned trial Judge to have done once the prosecutor had given a considered answer to his Honour. Stanley's credit was clearly in issue and cross-examination about his previous convictions for dishonesty only was not inappropriate.

Ground 8 is a general challenge to the verdict of the jury against the identification evidence. All of the necessary issues about identification were clearly laid before the jury. There is no basis for concluding that the jury would improperly regard the evidence of Stanley and the evidence of

Dr Gopolan as supporting the identification of the appellant. At least in the case of the Townsville General Hospital records that evidence may well have tended to favour the appellant.

It follows that, in my view, there is no basis in any of the grounds of appeal and appeal against conviction should be dismissed.

I turn now to the question of the application for an extension of time in which to appeal against sentence. The explanation given by the applicant in the notice is that after the verdict he asked his solicitor to draw an appeal against conviction which as has been mentioned was done on the 13th of September prior to sentence. He assumed that his appeal would also be against sentence following his sentencing the following day.

He waited for his appeal to be processed by his legal representative, the Aboriginal and Torres Strait Islanders Legal Community Service. That organisation requested aid from Legal Aid. The applicant was notified by letter dated the 11th of January 2002 that Legal Aid had been refused. He then applied to the Wakka Wakka Legal Aboriginal Corporation for aid and that was approved on the 14th of February 2002 and his application for an extension of time was then filed.

There is then, in my view, a reasonable explanation and if there is any fault it would perhaps lie with those advising

the appellant in as much as they did not check the notice of appeal.

The basis for challenge to the sentence was that the learned sentencing Judge erroneously took the view that the offence was premeditated and planned in advance. It is submitted for the applicant that there was no evidence to suggest he was involved to such an extent as his co-accused, Preston, who clearly would have planned this attack. It was Preston's contention that he had attended at the residence because he was disturbed about Harrison giving his daughter drugs. It was not inappropriate for his Honour to express the view that this visit was premeditated.

There were three visits to the house which included the appellant in the course of the evening and, on the third visit, the intention was expressed to Edwards at the door that they were going to beat up Harrison. His Honour did note that Preston was more likely to have been involved in much earlier planning of this attack.

The applicant also complains that the learned sentencing Judge took into account the psychological injuries suffered by the complainants when there was no medical evidence to support that proposition. His Honour relied on the statements by the complainants as to the enduring effects on them of the assault that evening and that was not challenged.

The applicant complains that the learned sentencing Judge placed undue emphasis on the appellant having been placed on a good behaviour bond on 3 September 1999 for social security offences but they were of a different character. His Honour did note that the applicant did not have a serious criminal history and he merely mentioned that fact, correctly, with respect.

The applicant also complains that the learned sentencing Judge failed to take into account that the applicant had held a gaming licence which he would lose by virtue of the conviction and the consequent loss of income was an additional penalty. It is not every factor mentioned before a sentencing Court that must be referred to in the sentencing remarks. His Honour would have been aware of this factor. There is nothing to suggest that he did not have it in mind as one of those factors that he should take into account. A loss of future income is often a consequence of a conviction.

The applicant further complains that insufficient account was taken of his otherwise good character and, coupled with the intoxication of Preston, the appellant may have been more easily persuaded by Preston because Preston was white and he was an Aboriginal man. There was, however, no evidence advanced below to support this view.

The applicant also complains that the learned sentencing Judge failed adequately to address the issue of the appellant and

the two co-accused taking the law into their own hands because Preston was unhappy about his daughter living with Harrison and being exposed to drugs. This was hardly surprising because the evidence of the trial suggested that the daughter had been introduced to drugs by Preston and that there were other issues between them.

Further, his Honour noted that these were not the appellant's articulated concerns and he had no such justification being merely there to provide, as it was expressed, "the muscle". This must surely be an aggravating feature.

The applicant complains that insufficient weight was given to the fact that he suffers from claustrophobia and anxiety and that he would experience greater hardship than other prisoners because of his previous service in the Queensland Corrective Services Commission. Not only did his Honour not overlook the applicant's health, he made special mention of it so that his and Preston's medical conditions would be monitored by the Corrective Services Commission.

There is also a contention that his Honour gave undue weight to a comment by Justice Pincus in a case where he referred to armed raids when there were no weapons involved in this invasion. His Honour particularly noted that the assailants here were not armed.

Mr Richards contends for a head sentence of two years which he says was not inappropriate but that it should have been suspended after six months after taking into account all of those matters to which I have made reference.

His Honour treated both offenders the same and Mr Richards submits that that was not appropriate but, having balanced the matters favourable to the applicant as well as the serious aspect that, unlike Preston, he could not even be said to have had an interest in the matter, it is not possible to say that the sentence that his Honour imposed was inappropriate in making it the same as Preston's.

This was a violent offence. It involved persistence in returning to the house on three occasions. The applicant involved himself significantly in the assault on Harrison at the behest of another. While recognising that his Honour might have imposed a differently constructed sentence, there is nothing in imposing a head sentence of two years without a recommendation for early release after a trial which is outside the range of a sound sentencing discretion.

Accordingly, the orders which I would make are to dismiss the appeal against conviction. I would grant the application to extend time but I would dismiss the appeal against sentence.

McPHERSON JA: I agree. The orders should, in my opinion, be as they have been stated by Justice White.

HOLMES J: I agree also.

McPHERSON JA: The orders will be as I have expressed them.
