[2002] QCA 262

COURT OF APPEAL

DAVIES JA
WHITE J
WILSON J

CA No 155 of 2002

THE QUEEN

v.

MICHAEL ANTHONY SALMON (Respondent)

and

ATTORNEY-GENERAL OF QUEENSLAND (Appellant)

BRISBANE

..DATE 25/07/2002

JUDGMENT AND BENCH WARRANT

WILSON J: This is an appeal by the Attorney-General against sentences imposed on Michael Anthony Salmon by a District Court Judge at Brisbane on 18 April 2002.

There were two sets of offences. The first was a charge of breaking, entering and stealing on the 11th of March 1992. With respect to that, a conviction was recorded but no other action was taken. That is not the subject of the appeal.

The appeal relates to a serious case of home invasion. The offences to which the respondent pleaded guilty were one count of burglary with violence whilst armed and in company, two counts of assault occasioning bodily harm whilst armed and in company, and one count of child stealing. Those offences were committed on 18 December 1999. The sentence imposed was 12 months intensive correction order.

The respondent was part of a group who broke into a home unit in daylight. The group consisted of Blake Andrew Burchell, Elizabeth Daisy Dorothy Marama, the respondent and other unidentified persons, some at least of whom may have entered the house and others were in a getaway car.

The home unit was that of Mr and Mrs McAvoy who were the foster parents of the two and a half year old child. Mrs McAvoy was the aunt of the respondent and of Elizabeth Marama. Elizabeth Marama was a sister of the respondent. She was also the natural mother of the child whom she had not seen for about 12 months before the incident. Further, she was

Burchell's girlfriend and there are in fact two young children of that relationship.

The overall purpose of the home invasion seems to have been to recover the child, but the respondent's principal purpose in participating was to bash Mr McAvoy as part of a personal vendetta.

Members of the group were armed with pieces of wood. The respondent led the charge. The door to the unit was smashed open and some of the group including the respondent entered. The respondent hit Mr McAvoy in the face, jaw and ear with his fists. Mr McAvoy also suffered by the actions of other members of the group including being hit with a piece of wood. There was a struggle for possession of the child in which the respondent was involved in trying to prise Mrs McAvoy's fingers off him. She was assaulted more severely by another member of the group, unbeknown to the respondent at the time. The child was taken and not returned for three weeks.

So the respondent was criminally responsible for the offences, both on the basis of his own involvement and on the basis that he was a party to a plan to go in company and to commit violent acts and to take the child.

Not surprisingly, the whole incident has had serious impacts upon the victims. Mrs McAvoy has a hearing impairment as a result. She has also suffered emotional damage leading to counselling. Mr McAvoy has been emotionally scarred. Both of

them were abused for having called the police and were called "dogs". The child was traumatised.

Police investigated the incident. On hearing that they had been trying to contact him, the respondent made himself available for interview. There was a committal at which the respondent pleaded guilty to some of the charges brought against him. On the morning the trial was to commence, he pleaded guilty to the charges for which he was sentenced.

There had been extensive negotiations between the DPP and the respondent's legal representatives. The indictment had been presented citing as a circumstance of aggravation that persons were armed with a rifle. On the morning of the trial a fresh indictment was presented, substituting pieces of wood for the rifle and adding the charge of child stealing.

Further, it was apparently not until the morning of the trial that the respondent accepted his criminal responsibility by virtue of the party provisions of the Criminal Code for the armed attack on Mrs McAvoy by another member of the group.

The respondent was 24 years of age at the time of the home invasion, having been born on 16 March 1975. He had previous convictions for break and enter offences (1993), unlawful use of a motor vehicle (1993 and 1995) and drug offences (1993 and 1995).

He is of Aboriginal descent. He was born in Brisbane and raised largely by foster parents. His childhood was marked by frequent moves. He attended school to grade 9. He obtained qualifications to operate a chain saw and portable sawmill through an Aboriginal corporation in Sarina. He had various labouring and unskilled jobs. He has some skill in art and has had some success in selling the products of that work. He has played Rugby League with a team in the Under 14s, 15s and 16s. At the time of sentence he was single with no dependants, although he had previously been in a de facto relationship.

Before the sentencing Judge, the Prosecutor submitted that an actual period of custody was necessary. The respondent's counsel submitted that the appropriate penalty was 18 months imprisonment suspended forthwith. The Judge suggested that an intensive correction order may be appropriate.

This is an appeal by the Attorney-General against the leniency of the sentence imposed. Such appeals are approached with caution. Ultimately the question is whether the sentence imposed is outside the scope of a proper sentencing discretion. On appeal, the Attorney-General submitted that the appropriate penalty was two years imprisonment while the respondent's counsel submitted that it was the sentence actually imposed.

Charges were brought against the respondent, Elizabeth Marama, and Burchell. Burchell had a separate committal. He was

sentenced by another District Court Judge on 21 March 2001 as follows: on a charge of entering a dwelling house with intent to commit an indictable offence with a circumstance of aggravation, 18 months imprisonment; on a charge of assault occasioning bodily harm with a circumstance of aggravation, 12 months imprisonment; on a charge of common assault, nine months imprisonment and a on a charge of child stealing, 12 months imprisonment. All sentences were ordered to be served concurrently. They were to be suspended after three months with an operational period of two years.

Burchell was one year older than the respondent and he had a more serious criminal history. It seems from the Judge's sentencing remarks in the Salmon case that in the Burchell matter the proceedings were conducted on the basis that Salmon was more central to the event than Burchell was.

Elizabeth Marama was charged jointly with the respondent Salmon. They had a joint committal. She failed to appear in the District Court. A warrant was issued for her arrest. She has since been arrested.

The sentencing Judge took into account the risk that the respondent would commit suicide if incarcerated. This issue was raised in submissions to him by the respondent's counsel who gave information from the Bar table to the following effect. In 1996 the respondent spent four months in Westbrook as the result of defaulting in the payment of compensation ordered to be paid. While there, he approached a counsellor

expressing concern that he had suicidal thoughts. He was placed on suicide watch. That information was not accepted by the Prosecutor and the relevant Corrective Services file was not available at the sentence.

The Prosecutor informed the sentencing Judge that it was watch-house practice to ask persons detained there if they had been suicidal or were feeling suicidal. On an occasion in 2001 the respondent had told watch-house staff that once when he had been drunk he had threatened to jump off the Story Bridge.

The sentencing Judge took the risk of suicide into account, apparently on the basis that he would re-open the sentence if it transpired that the information put before him was wrong (sentencing transcript page 38).

A range of comparable sentences was put before this Court by counsel for the Attorney-General.

The first was Hoffman, a decision of the Court of Appeal on 23rd of February 1999, CA 363 of 1999. Hoffman pleaded guilty to one count of the unlawful use of a motor vehicle with a circumstance of aggravation, one count of burglary with circumstances of aggravation and one count of assault occasioning bodily harm in company.

He was aged 24 at the time of the offences which involved a vigilante invasion of a private dwelling. There was the use

of a stolen car, the wearing of balaclavas. The applicant carried a knife, the co-offender carried a curtain rod or a pipe, another co-offender carried an aerosol spray and another a cricket bat. They broke in and one of the co-offenders struck the male complainant while he was sleeping. There was a struggle between the male complainant and Hoffman in which the knife was produced. Hoffman had assistance from co-offenders; others used their weapons. There were demands for money accompanied by threats. The female complainants handed over jewellery. One of the offenders held guard while the applicant went through the house removing valuables, the complainants being physically restrained.

The principal offender in that case was aged 17 and he also faced additional charges about a motor vehicle. He was sentenced to five years imprisonment with no recommendation for early eligibility for parole. Another co-offender received four years with a recommendation after four months.

In the case of Hoffman the Court of Appeal said the starting point was five years imprisonment with a recommendation after 18 months. But taking into account factors relevant to mitigation including assistance under section 13A of the Penalties and Sentences Act, schizophrenia and parity, a lesser sentence was appropriate. The sentence of three years with a recommendation after nine months was upheld on appeal, but regarded as lenient.

The next case we were referred to was McGrade, Court of Appeal

351 of 1997, 30 October 1997. He pleaded guilty to one count of entering a dwelling house with intent in the night-time, one count of assault occasioning bodily harm and one count of stealing. The head sentence he received was 18 months imprisonment. It was upheld on appeal.

There were co-offenders there who received 18 months wholly suspended. However there were factors against parity in that the applicant played a major role. There was an age disparity, the applicant being 27 and the co-offender 21 and the applicant had a more extensive criminal history.

Then we were referred to Cross CA 16 of 1996, 26 April 1996. He pleaded guilty to attempted armed robbery and receiving stolen goods. He was one of a group of five who went to a block of home units and prevailed on an occupant through the security intercom to let them in. They went to the unit of the complainant, two of them carrying baseball bats. One struck the complainant and demanded money. The complainant escaped. Others entered and took property, the applicant receiving some of it.

The applicant was aged 20. He was involved in the sale of drugs and his motive for taking part seemed to be pay-back for the complainant's supposedly having informed on the ring-leader. He had a criminal history of drug offences as well as stealing and attempted false pretences. This offence was committed whilst on probation. The ring-leader received two and a half years, another offender aged 20 received probation.

The applicant's participation was limited and he did not carry a weapon. The sentence of two years imprisonment with no recommendation for early eligibility for parole was reduced to 18 months.

The next case to which we were referred was Bower-Miles and Smith, CA 278 and 279 of 1995, 14 September 1995. They pleaded guilty to entering a dwelling house with intent at night and assault occasioning bodily harm with a weapon. It, too, was a home invasion case. The two applicants went with a third person to confront the occupants about a car that had been stolen and parts taken from it. Bower-Miles carried a wooden baton, Smith a broken pool cue and the third one two torches.

There was a fight with the occupant when comparatively minor injuries were sustained by the occupant and the applicants. Bower-Miles was aged 19. He had no previous convictions. Smith was aged 29. He had convictions for two minor drug offences. Smith's part in the incident was slightly less prominent than that of Bower-Miles.

The sentencing Judge sentenced them both to three and a half years imprisonment with a recommendation after 12 months. That was set aside. In each case the sentence was reduced to two years suspended after three months, the operational period in Bower-Miles' case being two years and in Smith's case three years.

Brelsford, CA 301 of 1995, 14 September 1995, pleaded guilty to one count of entering a dwelling house at night with intent, two counts of assault. His sentence of three years with a recommendation after 12 months was upheld on appeal. He was aged 27 with a minor criminal history of no real significance.

In that case the female occupant answered the door. She was thrust aside sustaining a fractured rib. The male occupant got out of bed. There was an argument with the applicant who said he would return with a gun and kill the male occupant.

In fact he returned with a baseball bat and hit the male occupant around the head causing bruising to the head, face and back. There was a struggle in which the applicant ended up sitting on top of the male occupant. The incident seems to have been the result of alcohol and some self-righteous indignation on the part of the applicant at the way the male occupant had spoken to his young nephews.

There were two other cases to which we were referred, the first of them Fatnowna, CA 259 of 1999, 25 November 1999. That was an Attorney-General's appeal against the sentence imposed on conviction after trial. The offences were one count of unlawful assault occasioning bodily harm and one count of entering a dwelling-house with intent in the night-time using actual violence and being armed. The sentences

imposed, 18 months suspended after four months on the first count and three years suspended after six months on the second, were not interfered with on appeal.

The incident occurred after 1 a.m. The respondent entered the complainant's house armed with a wooden club. He struck the complainant a number of times breaking his nose and causing bruising to his arms and chest.

He had a co-offender who did not actually enter the house or assault the complainant. In fact it was the co-offender who was attempting to settle a score with the occupant and the respondent was helping as a friend. The respondent was aged 41. He had a criminal history, but not of violence. The history related to property and driving offences. The sentence was described by the Court of Appeal as being not heavy but within range.

Finally, Houghton and Genrich, CA 424 and 425 of 1997, 26 February 1998: they pleaded guilty to one count of housebreaking and one count of assault occasioning bodily harm in company whilst armed. They were both sentenced to four years imprisonment with a recommendation after 15 months. That was upheld on appeal.

Houghton was aged 30 with no criminal history, Genrich 32 with one conviction for a similar offence. The complainant was a 56-year-old man living in a unit block. He had complained to the body corporate of Houghton's de facto using the premises

for prostitution. The two applicants appeared as bikies at the door with a concealed wooden baton. There was a threat by Houghton. They were about to leave when the situation was inflamed by something the complainant said. Houghton lost his temper, bent the security door and attacked the complainant with the baton. The complainant sustained a fractured left cheekbone, double vision, laceration and bruises. There were more threats before they left. Genrich supported Houghton by entering the unit and he stood by during the assault knowing Houghton was armed with a bat.

Well, turning to the present case against that background, probably the most disturbing feature of it is the child stealing which was not a feature of any of the comparable cases to which we have been referred. Deterrence must be a substantial factor in setting the appropriate sentence in such a case. It would be wrong to suggest that deterrence is any less important in the context of a quasi family feud than it is in the context of a home invasion by strangers intent on robbery. The contexts are quite different, but equally serious.

The respondent's own primary motivation was to settle a personal score with Mr McAvoy, but he was a party to all that happened. The community must understand that even where there is a family feud, home invasion for the purpose of child stealing or simply to settle some score will not be tolerated.

The respondent was quite young and I would not regard his

criminal history as of great significance in the circumstances.

He was properly given the benefit of early pleas of guilty.

While a risk of suicide if incarcerated is always a matter for serious concern, I think the sentencing Judge erred in the respondent's favour in taking it into account in the absence of evidence. There was nothing on which he could be satisfied on the balance of probabilities that there was a real risk, and it might well have been better for him to have adjourned the sentence until the matters put before him from the Bar table were investigated. At any rate, there is no evidence before this Court that the risk was real.

Burchell's sentence, 18 months suspended after three months, was, I think, a lenient one, even having regard to the fact that it seemed to be based on the respondent having played a more central role in the incident than was put forward in the respondent's case.

As Chief Justice Gibbs observed in Lowe v. The Queen (1984) 154 Commonwealth Law Reports 606 at 609:

> "It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal and such matters as the age, background, previous criminal history and general character of the offender and the part which he or she played in the commission of the offence have to be taken into account."

Even where other things are more or less equal, an appellate court will not interfere to reduce a sentence where the consequence would be two inappropriately low sentences instead of one; see Dale Cox (1991) 55 Australian Criminal Reports 396 at 401 per Justice Thomas.

It is difficult to form a clear view of the respective roles of the respondent and Burchell. As the sentencing Judge acknowledged, Burchell seems to have been sentenced on a somewhat different factual basis from that put before him.

Their motives were different, but they were equally serious. In this case it seems that persons other than the respondent engaged in arguably worse physical violence. Whether those others included Burchell and to what extent is not clear. The respondent's counsel submitted, in effect, that there was no significant difference in the roles they played.

However, Burchell had a worse criminal history. It was a long criminal history including assaults on the police and it had resulted in imprisonment. This respondent's history involved only four months in prison for default in the payment of a fine.

I think the proper approach is to assess the appropriate range within which the respondent should have been sentenced having regard to the version put before the sentencing Judge. If the sentence was outside that range, is there any reason why this Court should not intervene?

In my view, an actual custodial term was warranted, and I think the range was 18 months to two years suspended after six to eight months.

The respondent has actually served three months of the intensive correction order, apparently satisfactorily. In Solway, CA 164 of 1995, 22 August 1995, an Attorney-General's appeal, a non-custodial term (namely a suspended sentence) had been imposed. It was submitted on appeal that a short term of actual imprisonment was called for. The Court of Appeal declined to interfere, Fitzgerald P and Pincus JA expressing reluctance to send an offender who was at large to prison for a relatively short period.

Also in Bazeley, Court of Appeal 220 of 1997, 5 August 1997, Davies and McPherson JJA said:

> "It has long been accepted that an appeal against sentence by the Attorney-General cuts across the time honoured concepts of criminal administration by putting in jeopardy for the second time the freedom beyond the sentence imposed; Everett v. The Queen (1994) 181 Commonwealth Law Reports 295 at 299. A case such as this in which in which in consequence of the sentence imposed below the offender has not been put in actual custody illustrates the difficulty facing the Attorney in such an appeal. This Court made that point in The Queen v. Melano ex parte Attorney-General [1995] 2 Queensland Reports 186 at 190 by saying that especially where liberty is at stake the Court is sometimes less reluctant in an appeal by the offender to alter the sentence imposed below. In any event it will not do so in an Attorney's appeal unless the sentencing Judge has erred in principle either because an error was discernible or demonstrated by a manifest inadequacy of sentence."

So it is necessary to balance this Court's reluctance to

interfere where someone's at liberty, the fact that this is an Attorney-General's appeal, and the fact that time has already been served under the intensive correction order against the seriousness of the offence.

I am ultimately persuaded that this Court ought to interfere.

I would allow the appeal, set aside the sentence imposed and impose a sentence of 18 months imprisonment to be suspended after six months.

DAVIES JA: Notwithstanding the restrictions which this Court has accepted in interfering with sentences which have been opposed where the appellant is the Attorney-General, were it not for two factors which I am about to mention, I would have increased the sentence imposed in this case to at least two years imprisonment without any suspension of that term. The first factor is the need to achieve some parity with the sentence imposed on Burchell and as Justice Wilson has already pointed out it is difficult to see in the circumstance of this offence whose conduct was worse. So unless a sentence similar to that imposed on Burchell were imposed in this case it would be correct that the respondent would have a justifiable sense of grievance. The second factor, also mentioned by Justice Wilson, is the satisfactory compliance so far with the

intensive correction order.

For those reasons I agree with the orders proposed by Justice Wilson and substantially with the reasons which she has given.

WHITE J: I agree with the orders proposed and I also agree for the reasons expressed by the learned presiding Judge and by Justice Wilson.

DAVIES JA: The orders are as indicated by Justice Wilson.

MR RUTLEDGE: Could I ask for a warrant for the arrest as well in case we end up needing it?

DAVIES JA: Yes.

MR RUTLEDGE: Thank you, your Honour.

DAVIES JA: I so order.

MS McGINNESS: I ask that the warrant lie for seven days.

DAVIES JA: Yes, we will order that too.
