

COURT OF APPEAL

McMURDO P
JERRARD JA
ATKINSON J

CA No 92 of 2002
CA No 97 of 2002

THE QUEEN

v.

IAN ROSS McGREGOR and
ALAN GRATTAN PAYNE

Applicants

BRISBANE

..DATE 02/09/2002

JUDGMENT

THE PRESIDENT: The applicants each pleaded guilty to one count of burglary in company, one count of assault occasioning bodily harm in company and two counts of unlawful use of a motor vehicle. McGregor also pleaded guilty to one count of demanding property with menaces. They were sentenced to two and a half years' imprisonment on the burglary in company count and to lesser concurrent sentences on the remaining charges.

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Two other co-offenders, Michelle Kruger and Donna Maree Dakin, also pleaded guilty to entering a dwelling with intent whilst armed and in company, unlawful assault and two counts of unlawful use of a motor vehicle. Dakin also pleaded guilty to an additional count of demanding property with menaces. Dakin and Kruger were sentenced to six months' imprisonment and two years probation for the burglary offence and to lesser concurrent terms of importance on the remaining counts. Not surprisingly Kruger and Dakin have not appealed or not applied for leave to appeal against their sentences.

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All four offenders pleaded guilty on the morning of the trial in front of the large jury panel assembled for that purpose in Dalby. Nevertheless the plea was accepted as an early plea in the circumstances because the charges on the indictments to which the offenders pleaded were only settled that morning and this was the first arraignment of the offenders.

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The factual situation is quite complex. The complainants, Mr Ruddick and his partner Ms Bryant, were living in a farmhouse

three kilometres outside Warra. The house was half a kilometre from the road and had no telephone. Mr Ruddick knew Payne, Dakin and Kruger. A man called Alan Cornack rented a house with Payne near Warra. Cornack owed Payne money and it was agreed that Cornack would give his Yamaha motor cycle to Ruddick and in return Ruddick would repay Payne for Cornack's debt. Ruddick took possession of Cornack's motor bike.

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Ruddick's partner, Ms Bryant, owned a blue Ford Falcon which Ruddick used as his own. Dakin owned a red Commodore. Payne borrowed the blue Ford Falcon so that Kruger and Dakin could move into Payne's residence and assist with the care of his two young children whilst he was away working. Kruger and Dakin left their red Commodore with Ruddick whilst they used Ruddick's blue Falcon. Kruger and Dakin's vehicle was quite badly damaged whilst in Ruddick's possession.

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Payne's home was relatively isolated and had no telephone connected to it and Kruger and Dakin felt vulnerable without a reliable vehicle. Although Ruddick made some efforts to rectify the damage done to Dakin's vehicle, the major damage to the engine head was not rectified.

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Kruger and Dakin requested Ruddick to repair the vehicle for about four weeks and they became involved in these offences out of frustration. There was therefore some ill-feeling over the treatment of these vehicles in the days leading up to the offences. During that period Payne, Dakin and Kruger visited the complainants at their property on a number of occasions

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and asked for the blue Ford to repay the debt for the damage done to the red Commodore. Payne was principally involved in these requests whilst the two women remained in their car.

Kruger contended that no damage was done to the blue car whilst it was in her possession.

On the day of the offences Dakin and Kruger waited for Ruddock to return to their home as he had promised to fix their red Commodore. When he did not come they became involved in the commission of these offences out of frustration.

On the evening of Thursday 28th June 2001 the complainants heard a knock at the kitchen door and saw Payne. He entered with his three co-offenders. The plea to burglary was accepted on the basis that Kruger and Dakin entered the house with the intent of intimidating the complainants to gain possession of the blue Ford Falcon. Payne and McGregor pleaded guilty on the basis that they entered the house intending to threaten and intimidate the complainants to get possession of the motor cycle.

Kruger was armed with a screwdriver and assaulted Ms Bryant by waving the screwdriver towards her and telling her to get out of the way. McGregor and Payne accosted Ruddick. McGregor punched Ruddick.

Payne demanded Ruddick tell him where the motor cycle was. Ruddick announced it was at his father's house in Warra. The

motor cycle was still registered in Cornack's name but had been paid for by Ruddick and Payne had no claim on it. McGregor and Payne decided they would get the motor cycle from the home of Ruddick's father and told Ruddick that if he tried anything funny they would harm his partner. All protagonists got into the red Commodore.

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Kruger drove and Dakin was in the passenger seat. They stopped near the home of Ruddick's parents and Ruddick was again threatened with consequences if he did not come back with the bike. Ruddick pushed the motor cycle out from under his parents' home and Payne started it and drove it back to Ruddick's property, followed by the others in the red Commodore.

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They all went to Ruddick's home and forced Ruddick to sign over the motor cycle and the blue Ford. Dakin put two statutory declaration forms on the table in front of Bryant. McGregor by his presence added support to Dakin's demand. Dakin dictated to Ruddick the terms of a statutory declaration and Ruddick signed the declaration because of the offender's threats and intimidation. Dakin then dictated the terms of the second statutory declaration which gave ownership of the vehicle to Dakin because of the damage done to her red Commodore.

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McGregor, Kruger and Payne walked to the front gate of the complainant's home. Dakin remained behind to take possession of the blue Ford. The offenders then left, Dakin driving the

blue Ford, Payne the motor cycle and Kruger the red Commodore with McGregor as a passenger.

The complainants walked into Warra to get assistance but were unsuccessful in raising help and walked home again. The next morning they returned to Warra and made a formal complaint.

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They were treated at the Dalby Hospital. Ruddick had bruises around the face, arms and hands, a broken bone in the tip of his nose, a cut over the bridge of his nose and a small orbital floor blow-out fracture of the left eye and blurred vision. Ruddick claimed to have blurred vision in his eye at the time of sentence although an ophthalmologist could find no physical reason for this and suggested psychiatric treatment may be required.

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Mr Ruddick in his victim impact statement said that he was 33 years old and had suffered because of these offences. His relationship with his partner ended and his parents had become very anxious for him. He is now less outgoing and trusting and is a recluse in his own home. He fears for his security at night. He had made many medical appointments since the offences were committed and has had difficulty paying for his expenses. He was working in the building trade before the assault but is now on sickness benefits and unable to work.

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A victim impact statement on behalf of Ms Bryant who was 47 years old at the time of the offences indicated that she was frightened during the events and in fear of her life. She was also afraid her partner would be killed. She has now returned

to Brisbane to be closer to her brother and children and is seeking a referral to a psychiatrist and social worker. Ms Bryant suffers from schizophrenia and has other mental and physical health problems.

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The motive for the offences was for Payne to obtain the bike from McGregor to repay a debt and for Dakin to get the blue Ford because of the damage she believed that had been done to her vehicle whilst it was in the complainant's possession.

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McGregor was 38 years old at sentence, he had an extensive criminal history commencing with offences of stealing in 1981 for which he was placed on two years' probation. His criminal history included minor offences of dishonesty, wilful damage, drinking driving offences and minor drug offences. In 1989 he was sentenced to two months' imprisonment for break enter and steal and unlawful use of a motor vehicle and later that year to a further two months' imprisonment for carrying a firearm whilst under the influence of liquor or a drug. Later again in 1989 he was sentenced to one month's imprisonment for breaching his probation and three months' cumulative imprisonment for unlicensed driving. In 1990 and 1995 he was convicted and fined for minor drug offences. In May 1995 he was convicted of a weapons offence and convicted and fined \$200 for assault occasioning bodily harm. In December 1995 and again in December 1996 he was sentenced to one month's imprisonment for breach of domestic violence orders. Between 1997 and 1999 he was convicted of and fined for a large number of drug offences.

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Ten years earlier McGregor suffered serious injuries in a car accident including scarring to his face and head and an injury to his right arm causing obvious wasting and a 75 per cent loss of that limb. He also injured his leg and has not been able to work since. He suffers from chronic pain and has psychological injuries. He is currently on a disability pension. He received a large sum as compensation for his injuries but that has been dissipated, much of it given to family and friends. In recent years he has abused alcohol and cannabis.

Payne was 32 years old at sentence. He too has an extensive criminal history. He was first convicted of wilful destruction of property in 1983. In 1986 he was convicted in the Childrens Court of indecent dealing with a girl under the age of 15. In 1987 he was convicted of making menacing phone calls and three counts of stealing. In 1991 he was convicted of assault and entering enclosed land without lawful excuse. Just two weeks before he committed these offences he was convicted and fined \$750 in the Dalby Magistrates Court for a number of drug related offences.

Payne had the sole care of his two children aged seven and eight. Payne was in desperate circumstances financially and was concerned as to how he would care for his children. He considered that Ruddick still owed him money and decided to sell the motor cycle in Ruddick's possession to get money to pay his landlord. Payne did not take part in the actual physical violence and was not himself armed. Payne's mother

was able to care for the children whilst he served a term of imprisonment.

Kruger was 27 years old. She had a dysfunctional home life, moving between her natural parents and their subsequent partners and foster homes. She was sexually abused by her step-father. She abused drugs from the age of 20, graduating eventually to heroin. She suffers from hepatitis C. Since 1997 she has been in a relationship with her co-accused, Dakin. Kruger had a number of previous convictions for drug related offences for which she was sentenced to community based orders. Interestingly, just two days before this offence occurred she was convicted and fined \$300 in the Dalby Magistrates Court, common assault on 17 February 2001. She was cooperative with police and made admissions of her involvement in a record of interview. She indicated her intention to plead guilty as soon as the prosecution indicated their preparedness to accept her plea on these counts.

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Dakin too grew up in a dysfunctional household with alcohol abuse and violence. Her mother was an alcoholic and her parents separated when she was in her early teens. Her father died when she was in year 10. Her mother died a few months later from a brain tumour and her grandparents died shortly afterwards. She was engaged to be married but her fiancé died in 1996 during an asthma attack. Whilst recovering from her grief she formed a relationship with her co-accused, Kruger. Dakin also has poor health. She is a chronic asthmatic, has contracted hepatitis C, has suffered from Ross River Fever and

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this has left her with arthritic pain. She also suffers from severe depression and was on a disability pension. Dakin had a number of convictions for minor property offences and minor drug convictions for which she was sentenced to community based orders.

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His Honour observed that the invasion of Mr Ruddick's home was planned as demonstrated by the use of the screw driver and the production of the statutory declarations for completion. His Honour considered the burglary (home-invasion) offence the most serious of the offences because the complainants had a right to feel safe and private in their own homes. His Honour considered the dispute over the motor cycle a very doubtful validity. On the other hand, Dakin's and Kruger's dispute about the car seemed to be based upon a legitimate grievance, although not one which could justify their unlawful conduct.

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His Honour determined that although McGregor engaged in the actual violence, no real distinction could be drawn between McGregor and Payne as to sentence. He had in mind an overall sentence of three years' imprisonment for McGregor and Payne but reduced this to two and a-half years in recognition of the plea of guilty. On the other hand he sentenced Kruger and Dakin on the basis that they had a legitimate grievance and lesser criminal histories so that but for the plea of guilty a sentence of 18 months' imprisonment would have been appropriate. He then determined that the community interest and the best interests of Kruger and Dakin would be served by a period of imprisonment of six months followed by probation.

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The applicants contend that the sentence of imprisonment of two and a-half years without recommendation for early release was manifestly excessive; that the learned primary Judge erred in finding the applicants had not shown remorse when the contrary submission was made by their counsel and to police in the record of interview; insufficient weight was given to the plea of guilty which, in the circumstances, was an early plea; there was an unjustifiable sense of grievance between the disparity of sentences imposed upon these applicants and their female co-offenders.

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Although exception was also taken to some comments made by the learned sentencing Judge in discussion with counsel prior to sentence, his Honour was merely clarifying with prosecuting counsel that he had instructions from the complainants as to the basis of the facts placed before his Honour at sentence. Once his Honour was given that assurance by the prosecutor his Honour plainly accepted those facts placed before him on sentence. There is nothing in this contention and indeed it is no longer pressed by counsel for the applicants.

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There was a proper basis for distinguishing between the female offenders and the applicants in this case. The applicants had more serious criminal histories and were more involved in the commission of these offences. In particular, his Honour accepted that there was some legitimate basis for grievance on the part of Kruger and Dakin which did not exist on the facts involving the applicants. His Honour also observed that

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Kruger and Dakin would not have become involved in these offences but for the behaviour of these applicants.

An applicant's statement of remorse need not necessarily be accepted by the sentencing Judge, as long as proper credit is given for the plea of guilty. His Honour's observations here do not persuade me that the learned primary Judge gave insufficient weight to the mitigating factors, especially the pleas of guilty. Although his Honour's sentencing remarks show that he gave a discount of only six months credit or one-fifth of the sentence he had in mind for the applicant's plea of guilty, and he considered six months of a possible 18 months sentence or a one-third discount was appropriate to the sentence of Kruger and Dakin for their pleas of guilty, this does not indicate judicial error. There is no set formula as to how much discount must be given for a plea of guilty.

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In circumstances where some offenders have been guilty of conduct which is less serious than other co-offenders who have a more significant criminal history, a Judge may be prepared to give a bigger percentage discount for the plea of guilty.

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Ultimately, the only issue for determination here is whether the sentence was manifestly excessive and/or whether there was a justifiable sense of grievance between the sentences given to the applicants on the one hand and Kruger and Dakin on the other. For the reasons I have already stated I am not persuaded there is a justifiable sense of grievance here. The

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Judge articulated sound reasons for distinguishing between the sentences he imposed on the two lots of co-offenders.

As to whether the sentence of two and a-half years' imprisonment on these applicants was manifestly excessive, the Courts take a very serious view of offenders who take the law into their own hands and invade the homes of others to settle their grievances with threats and violence. Offenders who behave in such a way can ordinarily expect substantial periods of actual custody. These offenders were mature men with significant criminal histories. In their favour was their plea of guilty. A review of comparable sentences does not persuade me that the applicant's sentence is manifestly excessive, see in particular R v. Palmer [1998] QCA 293, CA No 181 of 1998, 6 August 1998.

Although slightly more credit could have been given for the pleas of guilty in the applicant's case I am not persuaded that the sentences imposed upon either of them are manifestly excessive. I would refuse the application for leave to appeal against sentence.

JERRARD JA: I agree, I have nothing to add.

ATKINSON J: I agree.

THE PRESIDENT: That is the order of the Court.
