SUPREME COURT OF QUEENSLAND

CITATION:	*R v Forster* [2002] QCA 495
PARTIES:	**R** **v** **FORSTER, Warren Leslie** (applicant)
FILE NO/S:	CA No 10 of 2002 SC No 567 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EXTEMPORE ON:	14 November 2002
DELIVERED AT:	Brisbane
HEARING DATE:	14 November 2002
JUDGES:	McPherson and Davies JJA and Dutney J Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDER:	**Application for leave to appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – JUDGMENT AND PUNISHMENT – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENCE – applicant shot his wife – premeditated with intention to murder her and suicide – applicant aged 62 suffering from depression after wife left him – whether sentence was excessive *R v Reeves* [2001] QCA 91, CA No 276 of 2000, 13 March 2001, followed *R v Mcadam-Kellie* no 60265 of 2000 (NSW COA), considered
COUNSEL:	D J Murray for the applicant C Heaton for the respondent
SOLICITORS:	Forest Lake Lawyers for the applicant Director of Public Prosecutions (Queensland) for the respondent

McPHERSON JA: I will give judgment now. The applicant pleaded guilty to a count of attempting to kill Blazenka

Forster on 4 October 2000 and to a second count of doing grievous bodily harm to Peter Elcham. He was sentenced to imprisonment for 12 years on the count of attempt and one year on count 2 to be served concurrently. Mrs Forster is the former wife of the applicant. Mr Elcham was a stranger who intervened and wrestled with the applicant and prevented him from firing a second shot at Mrs Forster.

The incident happened at about 4.00 p.m. on the afternoon of 4 October. Mrs Forster was in the florist shop which she had recently opened in an arcade in Given Terrace, Paddington. She was surprised to see the applicant enter the shop carrying an elongated cardboard box which he placed on the counter directing it at her. He fumbled around inside to pull the trigger of a .22 calibre rifle it contained. The bullet struck the complainant in the right breast, knocking her to the floor. The applicant straddled her and pointed the rifle at her evidently intending to fire a second shot.

She was screaming for help and trying to push the rifle away. He was saying he was going to kill her.

A group of people came running from the arcade, shouting, "she has been shot". The second complainant Mr Elcham, who was having coffee nearby, ran inside and into the shop. He grabbed the rifle and struggled with the applicant to gain possession of it. In the course of doing so, he suffered a small cut to the finger of one hand, which is the subject of count 2. He succeeded in wresting the rifle from the

applicant and ran outside locking the applicant in the shop, where the police later arrested him. He saved the complainant's life and is obviously a very courageous man, whose bravery merits public recognition.

The first complainant was taken to hospital. The bullet was found to have struck a rib and a fragment of the bullet diverged to or through the diaphragm, before lacerating her liver. It ended up in her stomach, from where it had to be extracted by a surgical operation. Mrs Forster, who was then 49 years old, made what can only be described as a marvellous recovery. She has, however, been left with scarring on her body and impaired movement of her left shoulder. As a result of her injuries, she is now unable to play tennis or to wear a bikini. Needless to say, she suffered a great deal of pain and her self confidence has been undermined by her experience. She had just opened the shop at Paddington and had planned to move her home to somewhere nearby, where she could be closer to her daughter. Her plans were completely shattered. As a result of the incident and of being immobilised for three months, she had to sell the Paddington shop for very little and sustained a loss of some $45,000 or more. For some time she suffered financial hardship as a result of the applicant's actions.

The applicant and the first complainant had been married for some 27 years and had two children when, at her wish, they separated in May 1999. The separation was followed by a period of depression on the part of the applicant, but was

later diagnosed as generalised anxiety and depression to a clinical degree. He had previously lost his job as a manager of an industrial plant and had been unable to find employment elsewhere. He was 62 years old at the time of the offence and 64 at sentence. He had a good work record until these troubles began, but after the separation he began drinking to excess while inappropriately taking anti-depressant medication at the same time. He expressed suicidal thoughts. He had drunk two Scotch whiskies on the afternoon of the incident, but Professor Ivor Jones, who provided a report after a psychiatric examination of the applicant, said he would not regard him as being sufficiently intoxicated as to deprive him of the ability to form a specific intent and that the applicant was capable of knowing his acts and that they were wrong. From a note left in his daughter's car, which the applicant had borrowed and parked outside the shop before going in, he appears to have contemplated committing suicide after shooting Mrs Forster and had even made arrangements for his own funeral.

He pleaded guilty to having committed both offences charged and did so at the earliest opportunity. The learned sentencing Judge imposed a sentence of imprisonment of 12 years and declared 437 days of pre-sentence detention, as time served under the sentence.

On this application for leave to appeal against sentence, it is submitted that the head sentence of 12 years was excessive and that the learned sentencing Judge must have given

insufficient weight to factors that went in mitigation of the primary offence of attempted murder. Those factors included the applicant's plea of guilty, his remorse, his mental condition at the time, his previous good record, his age, and so on. The Judge specifically referred to those matters and there is nothing objective to show that he gave too little weight to them. So far as the plea of guilty is concerned, it was hardly possible in the circumstances, for the applicant to have contested his responsibility for the offence, except perhaps on grounds of insanity, as to which his own actions and the report of Professor Jones were clearly against him. As his Honour said, the applicant's actions were calculated or pre-meditated, so as to avoid detection of his intentions beforehand, so far as his intended victim was concerned and I would add they were also cold blooded. It was only by the brave intervention of Mr Elcham that murder was avoided.

With respect to comparable sentences, Justice Williams said in The Queen v. Reeves [2001] QCA 91, that the range has generally been from 10 to 17 years for an offence like this. An examination of recent sentences confirms this assessment. See Queen v. Hewitt (CA 405 of 1993); Queen v. Byres (CA 430 of 1994); Queen v. Reeves, which has been referred to and Queen v. Schaefer [2001] QCA 327. The sentence of 12 years imposed here was well within and rather at the lower end of that range, even having regard to the mitigating factors referred to.

The applicant's counsel helpfully referred this Court to the New South Wales decision in Queen v. Macadam-Kellie (No 60265 of 2000) which in its circumstances resembles the present case in many ways. The sentence imposed there was 16 years imprisonment, with a non-parole period of 12, reduced on appeal to 15 and 11 years respectively. The applicant's sentence here compares favourably with that decision. Because the head sentence here was more than 10 years, it attracted automatic declaration as a serious violent offence, meaning that the applicant will serve 80 percent of it, before becoming eligible for parole after 9 years and 8 months. Both as regards the head sentence and the parole eligibility date, the applicant is considerably better off than the appellant in the New South Wales case.

One may feel a certain sympathy for the applicant here because of the unhappy condition in which he found and now finds himself. He is suffering and has suffered acute feelings of his own worthlessness. One of his children has turned against him, but he set out in a calculating way to kill his former wife, and, without the fortunate intervention of Mr Elcham, he would have succeeded in doing so.

It was only by good luck that he did not face the more serious charge of murder. It is not to be supposed that people, however unhappy they are or may be, may solve their problems by using this method of doing so. The applicant could, of course, be more usefully engaged, both in his own interests and in those of society, than languishing in a prison.

That is neither the sole nor the dominant consideration in cases like this. Using firearms in circumstances like these has, we know, the strong condemnation of the whole Australian community.

I would dismiss the application for leave to appeal.

DAVIES JA: I agree.

DUTNEY J: I agree.

McPHERSON JA: The order is that the application for leave to appeal is dismissed.
