SUPREME COURT OF QUEENSLAND

CITATION:	*R v Denham; ex parte A-G (Qld)* [2003] QCA 74
PARTIES:	**R** **v** **DENHAM, Shayne Michael** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 376 of 2002 DC No 154 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Sentence by A-G (Qld)
ORIGINATING COURT:	District Court at Mackay
DELIVERED ON:	28 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	5 February 2003
JUDGES:	McMurdo P, Jerrard JA and Cullinane J Separate reasons for judgment of each member of the Court; each concurring as to the order made
ORDER:	**Appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL – APPLICATIONS TO INCREASE SENTENCE – OFFENCES AGAINST THE PERSON – where respondent pleaded guilty to assault occasioning bodily harm and breach of domestic violence order – where respondent sentenced to six months imprisonment wholly suspended – whether sentence is manifestly inadequate in that it failed to reflect gravity of the offences – whether learned sentencing judge gave too much weight to mitigating factors *R v Brelsford* [1995] QCA 594; CA No 301 of 1995, 14 September 1995, distinguished *R v Shepherd* [2001] QCA 224; CA No 76 of 2001, 6 June 2001, distinguished *R v Wentt* [1995] QCA 613; CA No 440 of 1995, 6 December 1995, distinguished *Corrective Services Act* 2000 (Qld), s 134(1)(a)(ii) *Penalties & Sentences Act* 1992 (Qld), s 157(2)

COUNSEL: D L Meredith for the appellant
A J Moynihan for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Legal Aid Queensland for the respondent

[1] **McMURDO P:** The respondent pleaded guilty on 21 October 2002 in the Mackay District Court to one count of burglary and one count of assault occasioning bodily harm and to an additional summary offence of breach of domestic violence order. All offences occurred on 31 January 2002. He was sentenced on 22 October 2002 to 12 months imprisonment on each of the indictable offences to be served by way of an intensive correction order containing special conditions that he submit to psychiatric and psychological treatment and that he have no contact with the complainant. He was also ordered to pay $1,000 to the complainant within three months, in default one month imprisonment. He was sentenced to six months imprisonment wholly suspended with an operational period of three years on the summary offence.

[2] The appellant, the Attorney-General of Queensland, contends that sentence is manifestly inadequate in that it failed to reflect the gravity of the offence; to sufficiently take into account general deterrence and that the learned sentencing judge gave too much weight to mitigating factors.

[3] The complainant, a 59 year old man, is the father of the respondent's former partner. The respondent and his former partner were in conflict over custody and access to their young child. On the evening of 31 January 2002, the respondent approached the complainant's home. The complainant attempted to lock the door but before he could do so the respondent pushed the door open and in the ensuing struggle the respondent hit the complainant to the face four or five times, causing his nose to bleed. The respondent's conduct was in breach of a domestic violence order. The complainant and the respondent continued to struggle outside the house. The respondent had the better of the altercation; he kicked the complainant and held him in a headlock. Finally, the complainant was able to escape, locked himself inside his home and rang the police. It seems that the greater part of the altercation occurred outside the home. The respondent threw items, including furniture, around the yard and into a swimming pool. A neighbour came to the complainant's assistance. Police located the respondent shortly afterwards. He was agitated and appeared intoxicated.

[4] The complainant was admitted to hospital overnight with bruising to his right shoulder and left ribs, tenderness around the kidney region and upper chest, bruising to the right side of his jaw and neck and abrasions to his right ear and knees and mild tenderness to his back. The respondent declined to be interviewed by police.

[5] In a victim impact statement, the complainant spoke of his fear for his life during the attack and said he had sustained two broken ribs which took six weeks to heal and had ongoing pain to his neck, back and shoulders. Understandably, he found the incident emotionally distressing. He now lives with the fear he may be attacked again, a fear which is exacerbated because he lives alone on his rural property. Other members of his family, including his daughter, who was the respondent's partner, also live in fear and have moved away from the area. He outlined financial

losses, including time off work, damaged furniture and solicitor's fees, which in all approximated $1,000.

[6] The respondent had prior convictions for some minor street offences commencing in 1988, convictions in 2000 for unlawful damage but, more significantly, was sentenced to two months wholly suspended imprisonment in 1999 in the Townsville District Court for assault occasioning bodily harm. Those brief sentencing remarks were tendered in this sentence and indicate he assaulted a female who intervened to assist another female being assaulted by him.

[7] The respondent's counsel at sentence submitted that this offence occurred because the respondent was concerned about his son's welfare. His former partner had formed a new relationship; he believed she was involved with drugs; she had failed to keep eight appointments convened by the Family Court Counselling Service in respect of their child. His former partner's new de facto had boasted at a party that they blew marijuana smoke in the baby's face. He became so concerned he went to the complainant's home to see if he could get the child away from this environment.

[8] It is not entirely clear what he hoped to achieve for he was not entitled to lawful custody of the child. It was fortunate the child was not present because any aggressive behaviour would not have been in the child's interests. He now comprehends he was wrong to behave in this way, especially where his presence was prohibited by a domestic violence order.

[9] He has not behaved unlawfully since. He now has regular and frequent access with his child, properly obtained through a Family Court order. He was 32 years old at sentence and has a good work history, mainly in rigging and truck driving. He was in full time employment as a plant operator.

[10] The respondent's lawyer tendered a report dated 28 February 2002 from counselling psychologist Ms Lina Rimond, who supervised access between the resondent and his son from November 2001. The respondent behaved responsibly and he and his son interacted warmly during these visits. After the child's mother failed to keep a number of appointments, the mother left a message for Ms Rimond that she would not permit the respondent to see his son again. The respondent worked steadily to overcome symptoms of reactive depression triggered by his feeling of exclusion from contact with his son. Since November 2001, he has tried to be positive about the direction of his life. He is a non-assertive person with mannerisms of a victim rather than an aggressor but has taken responsibility for times when he lashed out in the past. He is very keen to have contact with his son and to develop a bond and a future relationship. He had been under a range of stresses since November 2000. In a further report dated 3 October 2002, Ms Rimond reported that the respondent had been committed to gaining access visits to his son and was eventually successful in doing so through the appropriate Family Court process. He was progressing well, having obtained permanent employment and was striving to achieve suitable life goals.

[11] The respondent's lawyer also tendered a Community Based Order Suitability Assessment which noted that the respondent had not previously had the benefit of community based supervision, was willing to report, to juggle his employment around community service and that he appears to have the appropriate support to

assist him in complying with an intensive correction order. The report recommended as a condition that he take part in an anger management program.

[12] The appellant rightly points out the serious aspects of the respondent's offending: he broke into the complainant's home at night and violently assaulted a 59 year old man. The complainant has been physically and emotionally damaged by the respondent's conduct. Although the respondent's frustration over lack of access to his young son and his concern about his welfare may explain his completely unacceptable conduct, it can certainly not excuse it. The offences constituted a breach of a domestic violence order. It is fortunate indeed that the child was not present and that complainant was not more seriously injured. Such conduct is completely unacceptable and warrants a salutary deterrent sentence.

[13] The learned judge's sentencing remarks demonstrate that he was fully aware of these serious factors and took them into account in the difficult balancing act required in sentencing. On the other hand, the respondent had employment and promising prospects of rehabilitation, which could be furthered by the penalties structured by his Honour. That penalty, although compassionate, was a substantial punishment in that while it allowed the respondent to remain in full time employment, paying compensation of $1,000 to the complainant, it required him to report to the community correction authorities twice a week, to complete a significant community service order, and to take necessary psychiatric and psychological treatment. This order also protected the complainant from any contact with him for 12 months. The suspended sentence imposed for breach of the domestic violence order means that if he offends in the next three years he will return to court to show cause why the suspended sentence should not be activated. The advantage of the orders imposed is that they not only significantly punish the respondent, but also offer him the opportunity to complete his rehabilitation with the assistance and control of a community corrections officer and ensure that the courts have control over his behaviour for the next three years. Material handed up during the appeal by the appellant indicates that the respondent has now satisfactorily completed three months of his intensive correction order.

[14] The appellant relies on three comparable cases to justify his contention that the sentence imposed was manifestly inadequate and that the only appropriate sentence involves a period of actual custody. In *R v Brelsford*,[1] Brelsford was sentenced to three years imprisonment with a recommendation for parole after 12 months for one count of burglary and two counts of assault occasioning bodily harm. He had a prior conviction for assaulting police, which did not seem particularly serious. He applied for leave to appeal against that sentence. Brelsford attacked two people in their own home, accusing the male complainant of being a child molester. Brelsford entered the house once, assaulted the complainants and said he was going to get a gun and kill the male complainant. He left and later returned carrying a baseball bat with which he assaulted both complainants. He was intoxicated and had a serious problem with alcohol. The court was particularly concerned about the undesirable vigilante aspect of the incident. Brelsford is a more serious case than this, especially as he was armed, acted as a vigilante, entered the house twice, and did not appear to have the promising rehabilitative prospects of this respondent.

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1 [1995] QCA 594; CA No 301 of 1995, 14 September 1995.

[15] In *R v Shepherd*,[2] Shepherd, a 34 year old man, with a bad criminal history including drug offences, possession of firearms and offences of dishonesty, pleaded guilty to wilful damage, break enter and committing an offence, common assault and serious assault. He was sentenced to two years imprisonment with a recommendation for parole after nine months. After being evicted from a Bowen hotel at about 11 pm, he returned at 3.40 am to abuse the female publican and to break into the hotel. Shepherd assaulted with a bar stool the publican and another person who came to assist her. Police arrived and the applicant fled but later assaulted a police officer by kicking him in the arm, chest and legs and causing him to lose his footing and fall backwards hurting his shoulder, arm and fingers. The applicant had an extensive criminal history, had had the benefit of community based orders and had previously breached parole. His application for leave to appeal against sentence was refused. *Shepherd* is not closely comparable to this matter on its facts and, again, it does not seem Shepherd had the promising prospects of rehabilitation of this respondent.

[16] The final case relied upon by the appellant, *R v Wentt*,[3] is of no particular assistance and turns on very different facts. He was sentence to two years imprisonment with a recommendation for parole after six months. Wentt was naked and masturbating in the yard of the 53 year old complainants' home. When confronted he entered her unit and ran towards the bedroom of her 80 year old mother. The complainant pursued him with a knife. He moved towards her and she stabbed him twice in the chest. Ultimately he fled and was captured later that night. He had no explanation for his bizarre behaviour which was totally out of character, for he had no prior convictions. His wounds were sutured and he was not seriously injured. Thomas J (as he then was) observed that "Offences of this character, which threaten the safety of persons in their own home, are commonly regarded as sufficiently serious to demand custodial sentences, even in the case of persons of previous good character." Whilst I heartily endorse those observations, I do not understand them to demand an actual custodial sentence in every case within those parameters.

[17] The comparable sentences relied upon by the appellant demonstrate that a custodial sentence of 18 months to two years imprisonment suspended after some months to reflect the plea of guilty and mitigating factors was within the sentencing range here. It was not however the only appropriate penalty. Such a sentence would not allow lengthy community supervision, for parole can no longer apply to a sentence of two years imprisonment or less[4] and a partially suspended sentence does not involve community supervision. The sentences imposed here, whilst compassionate, sufficiently reflect the gravity of the offence, including principles of deterrence, and provide appropriate punishment and protection of the complainant. They additionally provide continued structured supervised rehabilitation, with onerous consequences for the respondent should he reoffend in the next three years.

[18] The appellant has not demonstrated that the sentence imposed was, in the particular circumstances of this case, manifestly inadequate justifying intervention on an Attorney's appeal.

[19] I would refuse the appeal against sentence.

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2 [2001] QCA 224; CA No 76 of 2001, 6 June 2001

3 [1995] QCA 613; CA No 440 of 1995, 6 December 1995.

4 S 157(2) *Penalties & Sentences Act* 1992 (Qld); s 134(1)(a)(ii) *Corrective Services Act* 2000, but cf s 76 of that Act.

[20] **JERRARD JA:** The respondent's conduct in this matter had a number of significant aggravating circumstances. One was that it was committed within three years of his having received a suspended sentence of imprisonment, for what was in reality assaults by him on two separate women. Another was that his conduct in his quite savage attack on the complainant was also conduct in breach of a domestic violence restraining order; and the other obvious circumstances include that his serious assault was upon a much older person, who seems to have done him no injury, and the assault was committed in and about the complainant's home. Further, the matters which the respondent relies on for his having gone to the complainant's home in the first place should have been raised with the police and the Family Court, rather than by aggressive conduct in breach of a restraining order.

[21] Ordinarily this behaviour would amply justify a sentence which included at least six months of actual imprisonment. However, I have read the reasons for judgment of the President and am persuaded by those that in the circumstances the respondent should (just) escape a finding that the combination of sentences imposed upon him was manifestly inadequate. Accordingly, I agree with the order proposed by the President.

[22] **CULLINANE J:** I agree with the reasons and the order proposed by the President in this matter.