

SUPREME COURT OF QUEENSLAND

CITATION: *R v McDonald* [2003] QCA 439

PARTIES: **R**
v
MCDONALD, Sam
(applicant/appellant)

FILE NO/S: CA No 243 of 2003
DC No 256 of 2003

DIVISION: Court of Appeal

PROCEEDING: Application for Extension (Sentence)

ORIGINATING COURT: District Court at Cairns

DELIVERED EX TEMPORE ON: 13 October 2003

DELIVERED AT: Brisbane

HEARING DATE: 13 October 2003

JUDGES: McMurdo P, Davies JA and Mackenzie J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **1. Application for extension of time granted**
2. Application for leave to appeal against sentence granted
3. The sentence imposed below be varied by substituting suspension after 12 months in lieu of suspension after 18 months

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – WHEN GRANTED – where applicant/appellant pleaded guilty to unlawful wounding – where sentenced to three years imprisonment suspended after 18 months – where application for leave to appeal sentence filed out of time – where application for extension of time – whether reasonable prospects of success on the appeal

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN GRANTED – OFFENCES AGAINST THE PERSON – GENERALLY – where extension of time

granted – where no previous convictions – where remorseful
– where citizen of Papua New Guinea – where illegal
immigrant – where to be deported on release – where
communities affected by incident had engaged in a formal
reconciliation ceremony – whether sentence manifestly
excessive – whether ceremony relevant to sentencing

COUNSEL: J T Bradshaw for the applicant/appellant (pro bono)
M J Copley for the respondent

SOLICITORS: The applicant/appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the
respondent

MACKENZIE J: In this matter there is an application for an
extension of time in which to seek leave to appeal from a
sentence of three years' imprisonment suspended after 18
months in respect of a conviction of unlawful wounding.

The sentence was imposed on the 16th of June 2003. The
application was filed on the 25th of July 2003. It was,
therefore, only slightly out of time and the Prosecution
accepts that the delay has adequately been explained.

The application for extension is not resisted on that ground.
However, it is submitted that if an extension of time were
granted there would be no reasonable prospects of success on
the appeal in the written submissions and that the application
should, therefore, be refused.

It was contended, particularly, that the trend of authority
may be upwards in respect of offences of this kind rather than
at a level demonstrated at around the sentence imposed by the
learned sentencing Judge as a head sentence. The applicant

was actually sentenced to three years' imprisonment suspended after serving 18 months and time in pre-sentence custody was declared to be time already served.

Briefly, the facts were that the complainant who is a Cook Islander was at his cousin's home in Cairns when the applicant threw a stubby which broke outside the house. The complainant's cousin remonstrated with the applicant for creating a danger to children in the neighbourhood by breaking the bottle. The applicant, who was a citizen of Papua New Guinea, walked away and came back with one of his compatriots, entered the property and a challenge to a fight was issued. Rather than fight on the premises in front of the children, the men, including the complainant, went up the road for that purpose. Other people joined the group as it went.

During the fight that ensued, the complainant was engaging another man when he was stabbed in the back by the applicant who had obtained a knife from a house into which he had run during the fight. The wound was substantial, penetrating to a depth of four centimetres and of 7.5 centimetres length. It was delivered in a position where there would ordinarily be a risk of penetrating the lung but because of the complainant's size he was spared that complication. The knife broke during the attack.

Police inquiries revealed that the applicant was the person responsible for the stabbing. He surrendered himself five days later. However, he gave a self serving account,

contradicted by a number of other witnesses, but eventually pleaded guilty.

The sentence imposed was that contended for by the Crown so far as the three years was concerned. The learned sentencing Judge imposed a suspended sentence rather than leaving it to the processes of post prison release because the applicant was an illegal immigrant. He had been visiting his family in Cairns at that time but his visa had expired and it is expected that he will be deported at the end of the sentence.

He was sentenced on the basis that he had no previous convictions; that he had a good work record; that he was well thought of by those who knew him; and that the offence was out of character because of over-consumption of rum which he was not accustomed to drinking. It was also said that he was remorseful for what he had done.

The Crown, as I have said, suggested the three year head sentence. The learned sentencing Judge said he proposed to fix a head sentence that reflected the seriousness of the offence but then went on to say that he proposed to reflect the credit he gave to the prisoner for matters of mitigation by a partial suspension.

He did that, he said, mainly because of his status as an illegal immigrant and that suspension would more conveniently give him credit for the matters to be taken into account than shortening the head sentence or a recommendation for parole.

The effect of what was done was that there appears to be, apart from certainty of time of release, no tangible benefit given to the applicant in terms of the matters in his favour. It seems to me that the approach taken by the learned sentencing Judge is not in accordance with principle and for that reason the sentencing process has miscarried. It was conceded by Mr Copley that it would not be tinkering with the sentence if the usual discount of the order of one third was given to reflect the matters in the applicant's favour. That would involve suspension after 12 months.

There is one other matter that needs to be mentioned in passing. That is that a submission was made that, because of the members of the Cook Island and Papua New Guinea communities in Cairns holding a formal ceremony with a view to reconciling the communities over the incident and for the prevention of any consequential violence, that was also relevant to the level of sentencing. It was a situation where this was not placed before the learned sentencing Judge at sentence. It seems to me, in any event, that that would be of marginal relevance, at best, and for that reason it is not necessary to pursue it any further.

Having regard to what I have said, it seems to me that the application for an extension of time and the application for leave to appeal against sentence should both be granted. I would order that the sentence imposed below be varied by

substituting suspension after 12 months in lieu of suspension after 18 months.

THE PRESIDENT: I agree.

DAVIES JA: I agree.

THE PRESIDENT: Those are the orders of the Court.
