SUPREME COURT OF QUEENSLAND

CITATION:	*R v Marsden* [2003] QCA 473
PARTIES:	**R** **v** **MARSDEN, Barry William** (applicant)
FILE NO/S:	CA No 282 of 2003 DC 3466 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	30 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	30 October 2003
JUDGES:	McPherson JA, and Mackenzie and Wilson JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. The application is allowed** **2. The appeal is allowed** **3. The sentence is set aside** **4. In lieu thereof, the applicant is sentenced to a period of 120 hours community service, of which the time served under the community service order imposed by the original sentence are to count as part** **5. No conviction recorded**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEALS BY CONVICTED PERSONS – APPLICATIONS TO REDUCED SENTENCE – WHEN GRANTED – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – where applicant pleaded guilty to common assault – where domestic violence case – where sentenced to three years probation and 240 hours community services with special conditions – where conviction also recorded – where Trial Judge expressed personal views and applied general personal policy in sentencing applicant – whether erroneous exercise of discretion – whether sentence manifestly excessive
COUNSEL:	T Moynihan for the applicant M J Copley for the respondent

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

MACKENZIE J: The applicant is a 37 year old man with no previous convictions who pleaded guilty in the District Court to common assault of his wife. He is a student in the second year of the Bachelor of Business Information Systems Degree.

He was ordered to be placed on probation for three years and to do 240 hours' community service with special conditions that he undertake an anger management course and have no contact with the complainant. A conviction was also recorded.

The facts of the matter were that an argument had started between the applicant and his wife over, amongst other things, an accusation by her that one of their small children had become dehydrated. After words were exchanged heatedly he threw a can of baby food that he had in his hand at her, but missed. He then walked towards her and hit her with his fist or forearm four or five times to the back and top of the head. One misdirected blow connected with her nose.

At that time she had one of the children on her hip. She fell to the floor, got up and was slapped across the face by the applicant. She suffered pain between her shoulder blades and in her lower back following the incident and has suffered a degree of anxiety since.

Unsurprisingly, the couple have since separated. A protection order has been taken out and a Family Court mediation, which

included arrangements for access to the children has been held.

The applicant told the police when interviewed on the day of the assault that he did not dispute his wife's version of events and that he had "lost it" to use his words. Although he said he had been under stress he accepted that the incident was entirely his fault. There was a full hand-up committal and a timely plea of guilty.

The Crown Prosecutor below submitted that a combination of probation and/or community service with conditions that the applicant undertake an anger management course and refrain from contact with the complainant would be an appropriate disposition of the matter.

Counsel for the applicant said that his client would consent to being placed on probation and/or perform community service, whichever Her Honour thought was more appropriate. He asked the learned sentencing Judge to consider not recording a conviction having regard to his previous good history, the nature of his studies and, to use his words, “particularly based on the facts” that had been placed before her. The learned sentencing Judge asked for elaboration of what they included apart from the plea of guilty. Counsel advanced the reason that while there was not strictly provocation, the assault had occurred in a situation where there had been anger between the parties.

The principal ground relied on in support of the application is that the sentencing discretion miscarried because in response to this submission, and subsequently in her sentencing remarks, the learned sentencing Judge expressed herself in a way that demonstrated that she impermissibly employed a general personal policy of always recording a conviction in cases of domestic violence, adopting a "particularly tough attitude" to it and holding a view that certain sectors of society sanitise domestic violence and do not view it with seriousness.

Before us the applicant's counsel conceded that any demonstration of violence within the community and particularly within the family is serious. However, he submitted that the learned sentencing Judge placed too much weight on that matter alone. The case was one where there was an isolated aberration in an emotive and stressful situation which resulted in violence and injury towards the lower end of the scale of seriousness. The submission further went on that the applicant was a person because of his general character and circumstances, who was unlikely to reoffend. It was submitted that ordering a maximum period of probation and the maximum number of hours of community service, and recording a conviction as well, rendered the sentence manifestly excessive.

It was submitted on behalf of the respondent that the penalty was not demonstrated to be manifestly excessive. The applicant was a man of mature years, subjected his wife to a

beating that was more than merely momentary. He assaulted his wife without regard to the safety of the child in her arms and without regard to the example he was setting for his children. It was submitted that since the applicant's counsel at sentencing had said that the applicant would consent to performing both probation and community service and no submission was made as to the duration of the probation order or the number of hours of community service it was demonstrated that it had been conceded below that orders imposing maximum periods for each of probation and community service were within the appropriate range.

I note in passing that the provisions of the *Penalties and Sentences Act* relating to each of probation and community service contemplate not only consent to the general proposition that probation or community service should be imposed but also to consenting to perform it in the terms ordered. That seems not to have been strictly complied with in this case although that is perhaps a relatively minor matter in view of the circumstances of the case.

With regard to the decision to record a conviction, it was submitted that despite other remarks made by the learned sentencing Judge during submissions, she had nevertheless demonstrated elsewhere that she understood there was a discretionary power to be exercised. It was submitted that recording a conviction did not render the sentence manifestly excessive and was not the product of an erroneous exercise of discretion. There had also been a concession below, it was

submitted, that there was no real basis for thinking that the recording of a conviction would have adverse impact on the applicant's future employment prospects.

It is important to ensure that the sentencing process is as dispassionate as possible and that personal attitudes are not expressed in a way that may lead to a perception that it has been distorted by them. If the exercise of the sentencing discretion is flawed because of the factors to which reference has been made, as I am persuaded that it is in this case, the question is what the appropriate sentence would be to be substituted.

It is undoubtedly beyond argument that domestic violence is something that is to be condemned. However in the present case, the assault did not have serious physical consequences, but nevertheless involved delivery of several blows to the complainant as well as throwing the baby food. The degree of violence was therefore not really properly described as being at the bottom of the scale, and as I have said, conduct of that kind even in a stressful situation must be condemned.

However the points made by counsel for the applicant are essentially to the effect that given the particular circumstances of the case, the combination and quantum of the penalty was manifestly excessive.

Probation in the present case seems to me to be of little assistance to the applicant because of his antecedents and because of his age.

With regard to the special conditions that were imposed, the applicant informed the sentencing Judge that he had done an anger management course. The special condition was imposed notwithstanding this information. The personal protection of the complainant has been secured by the domestic violence order which is in place and it has already been noted that the Family Court is also involved in the aftermath of these events. There therefore seems to be little call for the special conditions to be reimposed in the particular circumstances.

It was conceded by Mr Copley that if the sentence was to be disturbed, the case may be met by an order for the service of community service of the order of 120 hours community service. Furthermore, he did not strongly press for the recording of conviction.

In the particular circumstances of the case, it seems to me that the approach that he has taken is one that is within proper range.

The orders that I would make would be to set aside the sentence imposed in the District Court and order in lieu thereof that the applicant serve 120 hours community service without a conviction being recorded and the intention is that

the 88 hours of community service which we have been informed has already been served be taken into account as part of the 120 hours.

McPHERSON JA: I agree. It should be stressed that the offence that was charged against the applicant and to which he pleaded was common assault and not assault occasioning bodily harm. No bodily harm was alleged to have been committed or caused to the complainant in the case. For reasons that appear in what has been said by Mackenzie J, it has been necessary for us to exercise the sentencing discretion afresh.

I agree with what Justice Mackenzie has said.

WILSON J: The learned sentencing Judge rightly considered domestic violence to be a matter for serious concern in society. Regrettably, she expressed a level of that concern in terms of her own personal view on the issue, rather than the view taken by the law as applied by the Courts. It is the latter which is relevant to the sentencing discretion.

Further, in her sentencing remarks, the learned sentencing Judge focused more on the general issue than on the circumstances of the particular offence.

I agree with Justice Mackenzie that the discretion is carried. Further, I agree with the orders he proposes.

McPHERSON JA: The order of the Court is that the application and appeal are allowed.

The sentence is set aside. In lieu, the applicant is sentenced to a period of 120 hours' community service, of which the time served under the community service order imposed by the original sentence are to count as part. No conviction will be recorded.

That is the order of the Court.
