

SUPREME COURT OF QUEENSLAND

CITATION: *R v Braithwaite* [2004] QCA 82

PARTIES: **R**
v
BRAITHWAITE, John James
(applicant)

FILE NO/S: CA No 371 of 2003
DC No 2187 of 2003

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 26 March 2004

DELIVERED AT: Brisbane

HEARING DATE: 17 March 2004

JUDGES: McMurdo P, Jerrard JA and Philippides J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Application for leave to appeal against sentence dismissed**

CATCHWORDS: CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - SENTENCE - FACTORS TO BE TAKEN INTO ACCOUNT - PURPOSE OF SENTENCE - CIRCUMSTANCES OF OFFENDER – where applicant sentenced to 6 years’ imprisonment for grievous bodily harm – where assault on police officer in execution of his duty – where applicant not proven to have used a weapon in the attack – where applicant under influence of amphetamine at time of offence - where applicant has lengthy criminal history – whether sentence excessive in circumstances

CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - SENTENCE - FACTORS TO BE TAKEN INTO ACCOUNT - PURPOSE OF SENTENCE – DETERRENCE – where applicant convicted of grievous bodily harm against a police officer in execution of his duty – where sentence imposed appropriate on basis of deterring similar attacks on police officers

R v Nagy [2003] QCA 175; CA No 24 of 2003, 2 May 2003, applied

COUNSEL: The applicant appeared on his own behalf
DA Holliday for the respondent

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

- [1] **McMURDO P:** I agree with Jerrard JA that, for the reasons he gives, the application for leave to appeal against sentence should be refused. I wish only to add the following observations by way of emphasis.
- [2] It is commendable that the applicant in his written submissions to this Court has emphasised his remorse for hurting police officer Gordon, his determination to stay off drugs, his desire to return to his supportive family and his opportunity for employment with a family member upon his release from prison. These matters provide some hope for the applicant's rehabilitation, despite his extensive criminal history.
- [3] Despite these mitigating matters and the applicant's plea of guilty, the effective sentence imposed, of six years imprisonment with a recommendation for eligibility for post-prison community based release after two and a half years, was in no way manifestly excessive. It reflected the overall criminality of all the applicant's offending, not just the most serious count of doing grievous bodily harm to police officer Gordon. In addition to that count, the applicant assaulted and did bodily harm to police officer Keogh and unlawfully used and then burnt a Falcon station wagon belonging to Mr Eberhardt. There is no evidence as to the value of that car but no doubt, whatever its monetary value, its loss caused inconvenience and hardship to Mr Eberhardt. It was an aggravating feature that the police officers were attempting to carry out their duties when the applicant attacked them. It is also significant that the applicant, who was 30 years old at the time of his offending, has a lengthy criminal history, although no prior convictions for violence. It seems his violence on this occasion was likely to have been induced by his amphetamine abuse. Conquering his substance abuse would seem to be the key to his successful future rehabilitation.
- [4] **JERRARD JA:** On 17 October 2003 John James Braithwaite pleaded guilty to committing the offences of unlawful use of a motor vehicle, arson of that motor vehicle, unlawfully doing grievous bodily harm, and unlawful assault occasioning bodily harm. He was sentenced to six years imprisonment for the offence of doing grievous bodily harm, and to concurrent terms of three years imprisonment on each other count. The learned sentencing judge recommended that Mr Braithwaite be considered for release on parole after he had served two and a half years. Mr Braithwaite has applied for leave to appeal, arguing that the sentences imposed upon him were manifestly excessive.
- [5] Mr Braithwaite was 30 years old in early November 2002 at the time the four offences were all committed. The first offence, the unlawful use of another person's Falcon station wagon, was committed between 1 November and 9 November 2002. The complainant's car was stolen from a car park at Caboolture overnight on 1 November. Witnesses saw Mr Braithwaite and a female person in possession of

that vehicle on 6 November 2002. It appeared to have broken down and was in the process of being abandoned in a vacant allotment by Mr Braithwaite and the other person.

- [6] On the morning of 9 November 2002 Mr Braithwaite and a female person returned to the stolen and abandoned vehicle and were seen splashing petrol around the car; the vehicle was then set fire to. Police were called.
- [7] Two uniformed Constables responded to the complaint, the more senior officer being Constable Alisha Keogh and the other police Constable Ross Gordon. They are the two complainants in the counts of assault occasioning bodily harm and doing grievous bodily harm respectively.
- [8] Those two police officers arrived at the scene, were given some information by witnesses, and located Mr Braithwaite and the female person in a yard one street away from the burning vehicle. Mr Braithwaite and his companion stopped when asked to, and both denied any knowledge of the unlawful use or arson of that car. When told they were being arrested (their descriptions apparently matched those given to the police) Mr Braithwaite said:

“This is shit. It has nothing to do with us”.

The two police officers escorted their prisoners to the police car, noting that Mr Braithwaite appeared to be affected by drugs. He was compliant with the directions he was given, and was not handcuffed.

- [9] When the four people arrived at the police car, Mr Braithwaite and police Constable Gordon were on the driver’s side. As police officer Gordon put his hand in his pocket to obtain the car key, Mr Braithwaite, without the slightest warning, punched the officer with a clenched fist very heavily in the face, knocking him both backwards and (briefly) unconscious. Mr Braithwaite is a big, strong looking man, apparently much larger than police officer Gordon, and there was no challenge to the Crown’s submission that Mr Braithwaite’s punch was delivered with a great deal of force.
- [10] At that same moment police officer Keogh heard the female say “smash the pigs”, turned to see police officer Gordon “flying backwards through the air”, as described by Constable Keogh, and Constable Keogh was then attacked by Mr Braithwaite. She was punched a number times on the head and face. Mr Braithwaite and his female companion then ran from the scene. Constables Gordon and Keogh each independently radioed for police assistance as Constable Keogh pursued the two offenders; and she succeeded in catching and detaining the female. Police officer Gordon was unable to assist, he having been quite seriously injured. He was vomiting blood which he was ingesting, and was in excruciating pain. He was admitted to hospital and underwent surgery.
- [11] A medical report described him as suffering complex fractures to the face, including to both cheek bones, his nasal bone, and both upper jaw bones. He had surgery under general anaesthetic on 10 November 2002 and was entirely unable to move his jaw until 26 November 2002. He had further surgery on 24 February 2003. Altogether he has had four metal plates and 15 screws inserted in his face.
- [12] Both police officers have suffered as a result of the violence inflicted upon them, quite apart from their physical injuries. In a victim impact statement, Constable

Keogh described experiencing guilt because she left the injured Constable Gordon by himself when she pursued the female offender, guilt because Constable Gordon suffered serious injury when he was undergoing training and when Constable Keogh felt responsible for him, and guilt because she was the senior officer and felt she might have controlled things better. She described feeling a sense of shame at what happened; what happened was a violent, unpredictable, and entirely unprovoked assault by an amphetamine affected prisoner.

- [13] Constable Gordon described experiencing embarrassment, a sense of stigma, and of his being an ineffective police officer, because of that vicious assault. Its consequences affected his relationship with his wife and with his three year old daughter. Neither police officer should feel guilt at what happened; it is Mr Braithwaite alone who should feel that.
- [14] Mr Braithwaite has been convicted on many prior occasions for offences of taking or damaging other people's property and unlawfully using motor vehicles. Convictions for that latter offence were incurred on 13 October 1989, 18 June 1993, and 26 October 1999. He has incurred convictions for wilful and unlawful damage to property on 2 March 1990, 7 December 1990, 7 January 1991, 13 April 1992 and 18 June 1993. He has a prior conviction for arson, incurred on 2 September 1993; and a conviction for a negligent act causing bodily harm, imposed on 2 October 1991. He has convictions for stealing incurred on 13 October 1989, 23 June 1992, and 2 September 1993; and for entering a dwelling house with intent and for breaking and entering, also incurred on 2 September 1993.
- [15] He was sentenced to four years imprisonment on 18 June 1993, for offences of unlawful use of a motor vehicle, wilful damage, and the like, with consideration for parole after 20 months recommended in his favour. Further imprisonment was ordered on 2 September 1993 for the offence of arson, together with those offences of stealing from houses. At that time he was sentenced to three years and three months imprisonment concurrent with his other terms, with parol recommended from and on 14 January 1995.
- [16] He was next sentenced to a significant term of imprisonment on 26 October 1999, when sentenced to 18 months for more offences involving unlawful use of a motor vehicle and for possession of dangerous drugs. He had previously been sentenced for drug offences on 26 March 1994, and again on 6 May 1997. Additionally, he has been sentenced for being unlawfully at large, on 22 June 1995; and for escaping from unlawful custody, on 21 July 2000.
- [17] Mr Braithwaite is therefore an offender with a serious prior history for dishonest use of motor vehicles and other property offences, and for offences of unlawfully possessing non-prescribed drugs. The learned sentencing judge was told that Mr Braithwaite could not recall the assaults he committed upon either police officer, and the judge was given no explanation for Mr Braithwaite having once again taken another person's motor vehicle, and this time having burnt it. The judge was told that at or about the time of the offending behaviour Mr Braithwaite had separated from his partner, and taken up briefly with his female co-offender. She had absconded and did not appear for sentence.
- [18] The learned sentencing judge expressly took into account on Mr Braithwaite's behalf the fact that he had pleaded guilty, that it was not shown that any weapon

was used, and that while Mr Braithwaite had an extensive criminal history, it contained no history of deliberate violent offending. The judge also accepted that Mr Braithwaite was himself under the influence of drugs when he punched Constable Gordon. Mr Braithwaite's counsel had informed the court that the drug was amphetamine.

- [19] The learned judge took into consideration, as he was obligated to, that both police officers were acting in the execution of their duty when attacked, and that the sentence to be imposed would need to reflect the overall criminality of Mr Braithwaite's conduct, and also have the capacity to deter other persons from attacking police officers. In *R v Nagy* [2003] QCA 125, Williams JA at [46] – [47] and Muir J at [72] - [74] emphasised the community need, which deterrent sentences can help to satisfy, for protection of police officers from violent assaults on them when performing their duties. In these circumstances the sentence of six years imprisonment for the offence of grievous bodily harm was an appropriate one, and so were each of the concurrent terms imposed. The recommendation that Mr Braithwaite be considered for post prison community based release after serving two and a half years adequately reflected his plea of guilty, and the fact that one blow only, although a very savage one, had been delivered.
- [20] Mr Braithwaite argued his own appeal and relied on three sentences upheld by this court, which he argued showed that the six years imprisonment imposed on him for doing grievous bodily harm was manifestly excessive. The first was in the matter of *R v Haydon*, CA No 396 of 1996, in which the sentence was five years imprisonment for an offence of dangerous driving causing grievous bodily harm. That case is not comparable, it being a driving matter, in which that applicant had driven a vehicle with a blood alcohol level of .213% at excessive speed, and after travelling on the incorrect side of the road had collided with an oncoming vehicle. Its occupants suffered serious injuries.
- [21] Mr Braithwaite also relied on the decision in *R v Johnston*, CA No 263 of 2003, in which this court did not disturb a sentence of six years imprisonment imposed for doing grievous bodily harm. In that matter that applicant had stabbed another person without warning with a large bladed knife, causing significant life threatening injuries. That applicant gave no explanation at any time for his attack, which occurred when the complainant was visiting a friend at her home, as was that applicant. Mr Johnston had a limited previous history of criminal offences, and while his conduct included the aggravating circumstance that he used a dangerous weapon, it did not include the aggravating circumstance of attack upon a police officer performing his or her duty.
- [22] Much more relevant is the matter of *R v Pascoe*, CA No 459 of 1995, in which this court did not disturb a sentence of five years six months imprisonment, imposed upon an applicant who had assaulted another person with punches and kicks after that applicant had become angry when drinking and playing pool at a hotel. That applicant had struck the complainant in the hotel, dragged or thrown him outside the hotel, then punched and kicked him to the ground, then dragged the complainant from a car into which the complainant had gotten, and again severely kicked the complainant. That complainant suffered a severe closed head injury, significant lung disease, marked weakness on his left side, and a severely impaired mental state and associated behavioural problems. Mr Pascoe had had a difficult childhood in which he was physically brutalised, and was intoxicated when he committed the

offence. Like Mr Braithwaite, Mr Pascoe had a lengthy criminal history, which included two prior convictions for assault occasioning bodily harm and numerous convictions for offences to property.

- [23] Mr Pascoe committed a very violent assault which had very severe consequences, and his assault did not involve the use of any weapon. The assaults he committed were far more sustained than that Mr Braithwaite committed, but his otherwise more serious behaviour lacked the critical aggravating circumstance which required a deterrent sentence in this case. The sentence imposed in the matter of *Pascoe* does not demonstrate that this sentence is manifestly excessive.
- [24] Mr Braithwaite also supplied the court with a hand written statement which described his childhood, in which he suffered a great deal of physical violence at both his father's hands and from a stepfather. There is no reason to doubt that description at all, and Mr Braithwaite also described his pleasure at being a father, and his own efforts in having played and coached rugby league in the Caboolture area, as well as his having had a good job as a spray painter. Those latter matters are all to his credit, but his hand written statement entirely failed to explain at all why he was participating in stealing and burning a car in November 2002, or why he was taking non-prescribed amphetamine, or for how long he had been doing that. It really ignored all his own offending behaviour.
- [25] It is clear from his hand written submission that he would very much like a partially suspended sentence and the certainty of a known release date. However, he faces two problems there. The first is that a court can only suspend a sentence of imprisonment of five years or less (s 144(1) of the *Penalties and Sentences Act 1992*); and a sentence of five years imprisonment would not adequately reflect the need to deter people from deliberately doing grievous bodily harm to police officers who are simply performing their duty. The second matter is that a partly suspended sentence would leave Mr Braithwaite with an inadequate incentive to work hard at changing his behaviour when he is not in prison. The need to demonstrate that change to the Community Corrections Board which considers his application for parole does give him that incentive.
- [26] It appears from submissions made on Mr Braithwaite's behalf to the learned sentencing judge that Mr Braithwaite is pessimistic about his chances of early release. This is because of his general criminal history and his conviction for escaping, which will mean he receives a high security classification. It is entirely a matter for the relevant Community Correction Board as to whether that Board is satisfied that Mr Braithwaite's release at any time before his sentence expires poses no unacceptable risk to the welfare of the community. That will very much depend upon efforts Mr Braithwaite makes.
- [27] I would dismiss the application for leave to appeal.
- [28] **PHILIPPIDES J:** I agree with the reasons of Jerrard JA and with the order proposed.