

SUPREME COURT OF QUEENSLAND

CITATION: *R v Devon* [2004] QCA 216

PARTIES: **R**
v
DEVON, Bobby Leigh
(applicant)

FILE NO/S: CA No 60 of 2004
DC No 25 of 2004

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Maryborough

DELIVERED ON: 25 June 2004

DELIVERED AT: Brisbane

HEARING DATE: 21 June 2004

JUDGES: McPherson, Williams and Jerrard JJA
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 – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – CIRCUMSTANCES OF OFFENDER – where applicant convicted on own pleas of guilty of one count of burglary, three counts of stealing, one count of unlawful wounding and one count of wilful damage – where sentenced to four years imprisonment for unlawful wounding – where applicant seeks leave to appeal against sentence – where applicant has significant criminal record – where unlawful wounding involved the use of a knife – whether sentence manifestly excessive

R v Meehan [1996] QCA 215; CA No 128 of 1996, 5 June 1996, considered
R v Curley [2002] QCA 140; CA No 366 of 2001, 16 April 2002, considered

COUNSEL: The applicant appeared on his own behalf
P F Rutledge for the respondent

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

- [1] **McPHERSON JA:** I agree with the reasons of Jerrard JA. The application for leave to appeal must be dismissed.
- [2] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Jerrard JA and I agree with all that he has said. The application for leave to appeal against sentence should be dismissed.
- [3] **JERRARD JA:** On 9 February 2004 Bobby Devon pleaded guilty in the District Court at Maryborough to an indictment charging him with one count of burglary, three counts of stealing, one count of unlawfully wounding, and one of wilful and unlawful damage to property. He also pleaded guilty to three summary offences, two being for possession of cannabis sativa. He was sentenced to four years imprisonment for the offence of unlawfully wounding, to 18 months imprisonment for the burglary, and to six months imprisonment for the other offences, all such sentences to be concurrent; the learned judge declared that 181 days spent in custody since 14 October 2003 would be declared time served pursuant to the sentences then pronounced. Mr Devon seeks leave to appeal against those sentences, arguing that the overall sentence of four years imprisonment is manifestly excessive.
- [4] Mr Devon has quite a significant record of committing criminal offences. Since mid 1996 he had appeared in Magistrates and District Courts, mostly in Gladstone, Bundaberg, and Rockhampton, on 22 separate occasions prior to 9 February 2004. On all of those he was dealt with for the commission of offences. Some of the pattern of repeated appearances in court is explained by the fact that Mr Devon was frequently dealt with on different dates for offences committed at around the same period of time, rather than having all matters dealt with on the one occasion. If Mr Devon's offending behaviour is considered by looking at the dates of offences, six separate periods can be seen in which he broke the law, usually in a number of ways in each period, and was ultimately punished by imprisonment. He has routinely re-offended after each release from jail.
- [5] The first period covers offences committed before mid 1996, for which the most severe term of imprisonment was that imposed on 17 July 1996, being two years. The offences involved wilful damage to property, possession of drugs, breaking and entering, and unlawful use of a motor vehicle. Those offences were committed in September, November and December of 1994, and in April and May of 1996. The second period of offending behaviour happened between late June 1998 and late November 1998, involving offences of possession of a knife in a public place, robbery with actual violence, assault occasioning bodily harm, going armed so as to cause fear, and wilful damage. The most significant sentence imposed for those offences was that of six months imprisonment followed by three years probation, imposed on 2 February 1999 in the Bundaberg District Court. The robbery offence involved Mr Devon punching a man in the nose and causing that man to fall to the ground, whereupon Mr Devon stole the man's wallet. The offences of assault occasioning bodily harm and going armed so as to cause fear involved Mr Devon having assaulted security personnel at a night-club and threatening them with a screwdriver.
- [6] The next separate offending behaviour was in April 2000, being the possession of a knife in a public place. That was followed soon after by an offence of burglary, committed in July 2000, for which Mr Devon was sentenced to two months

imprisonment on 4 September 2000. He was sentenced soon after to a period of 10 months imprisonment to be served cumulatively, imposed on 24 October 2000 for offences of burglary, wilful damage and possession of a knife in a public place, committed in June and July of 2000.

- [7] His next bout of offending behaviour occurred in mid 2002, those offences being ones of wilful damage and wilful destruction of property, and offences relating to drugs, all committed on four separate dates in April, May, and June of 2002. For those he was sentenced to imprisonment for one month. His sixth event of lawbreaking, committed after serving that one month in prison began with offences in October and December 2002, for which he was sentenced to six months imprisonment on 30 January 2003. Those offences were wilful destruction of property and stealing.
- [8] He was then sentenced as well on 2 May 2003 to eight months imprisonment for offences committed in January 2003, and obviously prior to the imprisonment ordered on 30 January 2003. Those offences included stealing, fraud, burglary, wilful destruction of property, common assault, and drug offences. The assault offence involved his threatening a man with a tyre-lever. He was released from prison after serving that eight month term on 22 July 2003.
- [9] Mr Devon submitted a hand written statement to the learned sentencing judge, which does assist in understanding this pattern of repetitive wrong doing. He described a difficult childhood in which he at first lived unhappily with his father and stepmother, then with his mother and a man who sexually abused him. Unsurprisingly he soon drifted into alcohol and drug abuse, and associated offending.
- [10] That pattern was continued in the behaviour constituting the offences to which he pleaded guilty on 9 February 2004. The burglary offence was committed on 9 August 2003, less than three weeks after his release from prison, when he stole a large quantity of jewellery, some was not recovered; it was valued at \$2,950.00. On 19 August 2003 he stole a television and video cassette recorder from his then landlord, and was arrested on 22 August 2003. He must have been released on bail, because he then committed each of two further offences of stealing on 5 September 2003 (two of the offences to which he pleaded on 9 February 2004) and he was arrested for those on 13 September 2003, and given bail. He had been arrested on 12 September 2003 for possession of a dangerous drug, and when his caravan was searched on 13 September 2003 the property stolen from the burglary on 9 August 2003 was located in it.
- [11] After that release on bail on 13 September, he committed the offence of unlawful wounding on 13 October 2003. On Mr Devon's version the complainant engaged in some provocative behaviour towards him, in that the complainant offended Mr Devon by swearing at the woman in whose home Mr Devon stabbed the complainant and requiring that woman to "control your kids". The complainant's version of Mr Devon's motivation was that the complainant had removed some CD's from a CD player to which Mr Devon was listening, because the complainant feared the CD's might become scratched. In any event Mr Devon stabbed the complainant in the chest with a knife, causing a two centimetre laceration above the left nipple and a "non-tension pneumothorax". The complainant spent two days in

- hospital and had an intercostal drain inserted. When interviewed some hours later that same day Mr Devon denied stabbing the complainant or having even seen him.
- [12] The count of wilful damage, also committed on 13 October 2003, resulted from Mr Devon having deliberately smeared faeces over the walls, door, and video camera in his cell, and on a smock he was then wearing. He pleaded guilty to all offences by way of an ex-officio indictment.
- [13] In reality Mr Devon is appealing against the four year sentence imposed for the unlawful wounding offence. Two earlier decisions of this court to which the respondent referred us show that that sentence is not manifestly excessive. The first is the matter of *R v Meehan* [1996] QCA 215. In that matter the complainant was wounded with a knife; the applicant had stabbed him in the stomach when the complainant approached the applicant, and after the complainant had aggressively struck the applicant about the head with an open hand some six times, causing the applicant to fall back on a bed. That incident had occurred in a flat owned by a third person. It was after that incident and when that applicant was rolling a cigarette that the complainant approached the applicant and was stabbed.
- [14] That applicant pleaded guilty, and was described as remorseful. He had acted in self-defence but used excessive force, which had resulted in a laceration to the right of the complainant's umbilicus measuring three centimetres in length, and extending to a depth of approximately 10 centimetres. The applicant was an alcoholic, and a smaller man than the complainant. That applicant had a lengthy criminal history, but with no major offences being committed in more recent years. Even so, since his offence involved the use of a knife, a sentence of three years imprisonment with parole recommended after 12 months was not disturbed on appeal. There were more personal mitigating circumstances in that applicant's case, although the wounding itself resulted in a more serious injury.
- [15] In *R v Curley* [2002] QCA 140, that applicant was convicted of the two offences of assault occasioning bodily harm and unlawful wounding. She had assaulted her daughter by striking her on the head with a beer bottle, thus breaking the bottle, and she then used the broken bottle to cut her daughter's face and neck. Both women were significantly affected by alcohol, and were arguing over an issue of care for the daughter's young child. That applicant pleaded guilty, and was remorseful. However, it was her third conviction for unlawful wounding; and only four months from when she had finished the period of probation to which she had been sentenced for her second offence of unlawful wounding. In her favour was the fact that she and her daughter had since reconciled, and that the daughter did not want that applicant to be imprisoned. Nevertheless, this court upheld a sentence of four years imprisonment, suspended after 18 months.
- [16] Those earlier decisions reinforced the statement made by Demack J in *R v Meehan* that "the courts have indicated that the use of a knife is something that, in itself, requires condign sentencing". The learned sentencing judge expressly remarked that it was only because of the matters in Mr Devon's favour that the judge was not making that sentence of four years imprisonment for the unlawful wounding cumulative on the sentences for the earlier offences. That remark undoubtedly reflected the fact that the unlawful wounding offence was committed when on bail, which in itself is an aggravating circumstance.

- [17] Mr Devon can expect others to feel sympathy for him regarding his childhood experiences, and because imprisoning him is plainly not working to deter him from repetitive offending. He also can expect others to feel sympathy for the victims of his crimes, and to expect him to see the pointlessness of his present choices. He undoubtedly needs counselling when in the community, and could therefore be expected to benefit from post prison community based release at the half way mark of his sentence. I would strongly suggest that the relevant Community Corrections Board favourably consider his application for such release and would dismiss this application.