SUPREME COURT OF QUEENSLAND

CITATION:	*R v Laus* [2005] QCA 33
PARTIES:	**R** **v** **LAUS, Milan** (appellant/applicant)
FILE NO/S:	CA No 347 of 2004 SC No 475 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 February 2005
DELIVERED AT:	Brisbane
HEARING DATE:	10 February 2005
JUDGES:	McPherson JA, Williams JA and Chesterman J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against convictions dismissed** **2. Leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – appellant convicted of attempted arson and one count of attempted murder – whether having reviewed the evidence, the court was not satisfied that the convictions were unsafe or unsatisfactory 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 REFUSED – appellant sentenced to imprisonment for four years on attempted arson charge and ten years imprisonment with a serious violent offence declaration on the charge of attempted murder – appellant was 74 at time of the offence and 75 at time of sentencing – serious nature of offences a factor in sentencing – whether the sentence was manifestly excessive *R v Irlam; ex parte Attorney-General (Qld)* [2002] QCA 235;

CA No 157 of 2002 and CA No 173 of 2002, 28 June 2002, followed
R v Forster [2002] QCA 495; CA No 10 of 2002, 14 November 2002, considered
R v Reeves [2001] QCA 91; CA No 276 of 2000, 13 March 2001, considered

COUNSEL: The appellant/applicant appeared on his own behalf
M J Copley for the respondent

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

[1] **McPHERSON JA:** I have read the reasons of Williams JA, and I agree with them.

[2] The evidence at trial that the appellant tried to shoot the complainant Mr Clay, supported as it was by what other witnesses saw and heard, was overwhelming. The jury were entitled to draw the inference that he had the intention to kill the complainant, who was saved only because the magazine of the rifle was not fitted correctly and it failed to discharge despite the appellant's persistent efforts. It was because of that that the charge against him was one of attempting to murder rather than murder.

[3] Under the sentences imposed, taken with the declaration, the appellant will serve eight years before becoming eligible for parole in accordance with the statutory provisions. That is a heavy burden on a man of his age; but, while age has its privileges, the offences are too serious, and their impact on the complainant and his wife have been too severe, to render the sentences excessive.

[4] The appeal against conviction and the application to appeal against sentence must be dismissed.

[5] **WILLIAMS JA:** As a result of events which occurred on 18 August 2003 in and near the residence at 99 Cairns Terrace Red Hill the appellant was charged with one count of attempted arson and two counts of attempted murder. After a trial he was convicted of the count of attempted arson and on one of the counts of attempted murder. He was sentenced to imprisonment for four years on the attempted arson charge and 10 years' imprisonment with a serious violent offence declaration on the charge of attempted murder. He has appealed against conviction and sentence. In the notice of appeal it was alleged that the convictions were unsafe and unsatisfactory and that the sentence was manifestly excessive. In an outline of argument prepared by the appellant himself the following submissions were made:

> "I did not attempt to kill anybody. There was no explosion and there was no firearm discharged. Rifle was not loaded for firing position. Nobody was hit or hurt. Only myself with gash to my head.
> I am not guilty to attempted murder of Mr Clay and also my age and health concerns.
> There should of been no sentence imposed and if you view the transcripts you will see I should have been found not guilty."

On the hearing of the appeal the appellant appeared in person and substantially repeated what was set out in his written outline.

[6] At about 5am on the morning in question Mr and Mrs Clay, who owned and occupied the house at 99 Cairns Terrace, were awoken by their dog barking loudly. Mr Clay, on looking from a window, saw in the yard of the house a person wearing a motor cycle helmet and dark jacket. Shortly after Mr Clay left the house and confronted that person. At that stage Mr Clay noticed that the person was holding a rifle. As he had previously served as a police officer Mr Clay had some experience with firearms and was able to give detailed evidence of what followed. Put very briefly, the person holding the rifle aimed it at Mr Clay on a number of occasions and pulled the trigger; there was a distinct clicking sound associated with pulling the trigger. The rifle did not discharge on any occasion. That was followed each time by the person holding the rifle operating the bolt action, which made a distinct noise, and again pulling the trigger resulting in a clicking sound with no discharge. Those noises associated with the operation of the firearm were also heard by neighbours who gave evidence, Summers and Attridge. Ultimately Mr Clay, who then had a rubber baton, tackled the person holding the rifle and held him down until police arrived. There is no doubt that the person holding the rifle and taken into police custody was the appellant.

[7] Evidence was given by a firearms expert that the rifle was an SKS semi automatic 7.62 calibre rifle with 14 rounds in the magazine. The evidence was that, with the safety catch on, the trigger could not be operated; thus the evidence was that in order for the clicking sound to be heard on depressing the trigger the safety catch had to be in the off position. The firearm expert ascertained that if the magazine was not fitted correctly then no round would enter the breach, but the bolt action mechanism could be operated. Thus the evidence before the jury strongly pointed to the fact that the reason no shot was fired when the appellant confronted Mr Clay and pulled the trigger was that the magazine was not fitted correctly.

[8] Inspection of the premises immediately after the appellant was apprehended resulted in police finding on the timber flooring of the lower deck, near to the dog's kennel, a bottle with sparklers attached. The sparklers had been lit and had partly been consumed by fire. Subsequent analysis of the contents of the bottle showed that it contained petrol. The device was referred to in the evidence as a modification of a Molotov cocktail.

[9] Police then examined the appellant's Moped motorcycle which was nearby the residence. There were two knapsacks attached to the rear of that motor cycle and in them the following items were located;

(i) A metal fuel tin containing petrol;

(ii) A plastic bottle containing petrol;

(iii) Two weapon magazines containing ammunition;

(iv) Several boxes of ammunition and some loose ammunition;

(v) Two glass bottles containing petrol and with sparklers attached;

(vi) Two boxes of matches and a cigarette lighter.

When asked by a police officer at the scene "what did he think he was doing" the appellant replied that he "was having fun".

[10] Subsequently police officers searched the appellant's residence and there located amongst other relevant items an empty box of sparklers, more sparklers, and bottles similar to that located at the scene. There were also quantities of various inflammable liquids found.

[11] In a subsequent interview with police the appellant denied committing the offences in question. He claimed that at the time he was shifting from his residence to another. He asserted that the items in the Moped were being conveyed to the new residence. Briefly his statement to the police was that as the Moped came up a hill near 99 Cairns Terrace its headlight failed and so he stopped. The rifle then fell out of the knapsack onto the ground. He picked up the rifle for the purpose of replacing it. At that time a man came running out of the house with a stick and belted him. When asked about the sparklers attached to the bottles containing the petrol he said he could give no reason for that. However he admitted tying the sparklers to the bottles with tape. He said the petrol was spare petrol for his bike. He specifically denied throwing a bottle into the backyard of the residence at 99 Cairns Terrace.

[12] It was also established that back in about the year 1986 the appellant had lived in the house at 99 Cairns Terrace which was then owned by a man named Grbic. Apparently Grbic had sold the house to Mr and Mrs Clay in about the year 1999. Whilst the appellant and Grbic were living in that house the appellant claimed that Grbic stole from him a Gold Lotto winning ticket worth $2.5 million. Amongst property found by the police when they searched the appellant's residence after the events in question were a number of letters written by the appellant and lawyers acting on his behalf to the operators of Gold Lotto and the police over the intervening years from 1986 about that alleged theft. Despite that the appellant denied in his record of interview with police that he went to 99 Cairns Terrace because he believed Grbic was still living there.

[13] The appellant did not give evidence at the trial.

[14] I have read the summing-up of the learned trial Judge and I can find no fault with it. The defence case was put fully and fairly to the jury.

[15] It is understandable that a reasonable jury would have had a doubt as to whether the appellant intended to kill the occupants of the house by throwing the lighted Molotov cocktail onto the lower back veranda. However, there was evidence on which a guilty verdict of attempted arson could have been reached. There is nothing inconsistent in the jury verdict.

[16] The issue of intent to kill was clearly put to the jury in the course of the summing-up with respect to the incident involving the use of the rifle. It was not unreasonable for the jury in all the circumstances to have concluded that at the material time the appellant had an intent to kill but that intent was thwarted by the faulty affixation of the magazine to the rifle.

[17] The verdicts of the jury are in all the circumstances not unsafe and unsatisfactory and in all the circumstances the appeal against the convictions should be dismissed.

[18] The appellant was born on 22 December 1928 making him age 74 at the time of the offence and 75 when sentenced. He had no relevant criminal history; there were some convictions for minor offences prior to 1970. The learned sentencing Judge noted that the appellant had migrated to Australia from Eastern Europe in 1948 and had a continuous good working history until he retired on medical grounds aged about 60. He had qualifications as a fitter and mechanic.

[19] It is clear, as pointed out by the learned sentencing Judge, that the appellant's belief that Grbic had deprived him of winnings in excess of $2 million had played on the appellant's mind for some years possibly resulting in either a paranoid personality disorder or a delusional disorder but, of more importance, was the fact that a deal of planning was involved in the commission of these offences. However, the learned sentencing Judge was prepared to sentence on the basis that the intention to kill Mr Clay was formed suddenly when the appellant was confronted by Mr Clay.

[20] The learned sentencing Judge recorded that the appellant's age was the factor that caused him "particular concern as to what sentences I should impose". But nevertheless the sentences had to be such as to be appropriate for actions "that could so easily have resulted in the death of one or two people". The learned sentencing Judge correctly noted that this court in *R v Reeves* [2001] QCA 91; CA No 276 of 2000, 13 March 2001 and *R v Forster* [2002] QCA 495; CA No 10 of 2002, 14 November 2002 had recognised that the broad range of imprisonment for offences of attempted murder was from 10 to 17 years.

[21] It was against that background that the learned sentencing Judge imposed a sentence of 10 years' imprisonment for the offence of attempted murder. In my view that cannot be said to be manifestly excessive, even having regard to the appellant's age. As was said by this court in *R v Irlam; ex parte Attorney-General (Qld)* [2002] QCA 235; CA No 157 of 2002 and CA No 173 of 2002, 28 June 2002: "While an offender's ill health is a mitigating factor in circumstances where imprisonment will lead to additional burdens beyond those experienced by others, that feature must not be allowed to overwhelm appropriate reflection of the grave nature of offences like these." The court was there concerned with the appropriate sentence to be imposed on an offender, then aged 75, convicted of several sexual offences, including rape, committed many years earlier.

[22] It cannot be ignored that a sentence of 10 years would carry with it an automatic declaration that the appellant was convicted of a serious violent offence. However, it is significant that the learned sentencing Judge here indicated that the nature of the offences was such that even if a sentence of less than 10 years was imposed such a declaration would be called for.

[23] The offences in question were serious. The rifle was a particularly high powered one and on the morning in question the appellant was clearly in possession of items which could have been used to cause serious harm to persons and property. The fact that no personal injury was occasioned and no harm done to property was more the result of good fortune than anything else. Once it is accepted that the appellant had the intention to kill nothing else in the circumstances of this case would result

in the conclusion that a sentence of 10 years' imprisonment was manifestly excessive.

[24] In all the circumstances leave to appeal against the sentence should be dismissed.

[25] The orders of the court should therefore be:

(1) Appeal against convictions dismissed;

(2) Leave to appeal against sentence dismissed.

[26] **CHESTERMAN J:** I agree with the orders proposed by Williams JA for the reasons given by his Honour.