

SUPREME COURT OF QUEENSLAND

CITATION: *R v Fairbrother; ex parte A-G (Qld)* [2005] QCA 105

PARTIES: **R**
v
FAIRBROTHER, Roderick Matthew
(respondent)
EX PARTE ATTORNEY GENERAL OF
QUEENSLAND
(appellant)

FILE NO/S: CA No 350 of 2004
DC No 57 of 2004

DIVISION: Court of Appeal

PROCEEDING: Sentence Appeal by A-G (Qld)

ORIGINATING COURT: District Court at Townsville

DELIVERED ON: 15 April 2005

DELIVERED AT: Brisbane

HEARING DATE: 14 March 2005

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

ORDER: **Appeal against sentence dismissed**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AGAINST SENTENCE – APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER – APPLICATIONS TO INCREASE SENTENCE – OFFENCES AGAINST THE PERSON – where respondent entered plea of guilty to offence of assault occasioning bodily harm on second day of trial – where sentenced to two and a half years imprisonment fully suspended with an operational period of four years – where no circumstance of aggravation charged in indictment – where no facts placed before trial judge upon which plea of guilty accepted – where trial judge sentenced on the basis the assault was not preconceived and comprised the respondent bringing hot water into contact with the complainant – where applicant argues to increase sentence would offend s 575 *Criminal Code* 1899 (Qld) as no circumstance of aggravation was charged in the indictment – whether sentence manifestly inadequate

Criminal Code 1899 (Qld), s 1, s 339(3), s 575

Everett v The Queen (1994) 181 CLR 295, applied
R v Melano; ex parte Attorney General [1995] 2 Qd R 186,
 applied

COUNSEL: R G Martin SC for the appellant
 E G Bassett for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the
 appellant
 Stevenson & McNamara Lawyers for the respondent

- [1] **McMURDO P:** Mr Fairbrother was originally charged with intentionally doing grievous bodily harm to Julie Ann Edwards on 12 October 2002 and alternatively that he unlawfully assaulted her and did her bodily harm. He pleaded not guilty to both counts and his first trial commenced in Townsville on 24 February 2004. The jury were discharged on 25 February 2004 without returning a verdict. A retrial commenced in Townsville on 14 April 2004 but the jury were again discharged on 15 April 2004 without reaching a verdict. His third trial began in Townsville on 14 September 2004. On the second day of this trial after discussion between the prosecutor and defence counsel, Mr Fairbrother was re-arraigned on count 2 and pleaded guilty. The Crown indicated they would accept the plea in satisfaction of the indictment and the jury was discharged. He was sentenced to two and a half years imprisonment fully suspended with an operational period of four years.
- [2] The appellant, the Attorney-General of Queensland, contends the sentence was manifestly inadequate and that instead Mr Fairbrother should be required to serve 12 months actual custody before the sentence is suspended.

The complainant's evidence

- [3] On 14 September 2004, Ms Julie Ann Ryder (formerly Edwards) gave the following evidence in the trial. She and Mr Fairbrother developed a personal relationship and began living together in 1999. Her teenage daughter also lived with them. Although they separated on occasions, in October 2002 she was living with him, her teenage daughter and her brother. On 11 October 2002, she returned home in the early afternoon. Shortly afterwards, Mr Fairbrother came home with a friend. They had been drinking alcohol. She told him firmly that she did not want him in her house after he had been drinking and he left. She and her brother were invited to neighbours for a drink and they decided to share in the purchase of a carton of beer. Mr Fairbrother returned home again later, by which time her daughter had come home from school. He was upset and angry when he saw the beer because Ms Ryder would not allow him to drink in the house. She asked him to return to his friend's home because she "wanted him to sleep it off". She was angry with him because he knew that he was not to come to her home when he was drunk or upset. He refused to leave and became very angry. He threw three or four cans of beer out through the louvres. Her daughter yelled at him to stop and threatened to call the police. Mr Fairbrother ripped the phone out of the socket. Her daughter left to get assistance. Mr Fairbrother removed the cans of beer from the carton. She told him to leave the beer alone. He pushed her and she fell onto the floor. He hit her over the head with at least two cans of beer. One burst open and he poured the beer over her. She was scared so she stayed on the floor. He calmed down but continued to

swear. She got off the floor and walked to the front yard. The police arrived and after a time Mr Fairbrother left with them.

- [4] Mr Fairbrother left the Townsville watch house at about 7.30 pm subject to release from custody conditions under the *Domestic Violence (Family Protection) Act 1989* (Qld), including a condition that he have no contact with the complainant and that he not go to her residence.
- [5] Later that evening, after the complainant drank about six or seven full strength cans of beer with her brother and neighbours, she returned home and went to sleep at about 11.30 pm. Her daughter was nervous and slept in the complainant's bed that evening. At about 5.30 am, the complainant heard a banging on the door and Mr Fairbrother yelling. She got up and saw him enter the kitchen through an unlocked door. Her brother and daughter were also present. She asked him to leave. He said he wanted his gear. She told him to return for it later but he insisted he wanted it then. He went to the fridge, took out a can of beer and opened it. She threw that can out the window and told him he was not drinking in her house and it was not his beer to drink. He went to return to the fridge but she stood in front of it to prevent him. He grabbed her by the chin and pushed her back against the fridge, swearing at her and her brother. She pushed him away and he let her go.
- [6] He walked to the electric kettle and said he would make himself a coffee. The kettle lid was damaged and came off easily when knocked. He filled the kettle to the very top and switched it on. She repeated that she wanted him to leave and threw the coffee tin into the laundry. He did not. He pushed her and she stepped back. He picked up the kettle which had boiled and clicked off. She put her hand on top of the kettle to prevent him from making the coffee. She was concerned that he might throw the contents of the kettle at her because he seemed to be threatening her with it. She again put her hand on top of the kettle, apparently this time in an effort to have him put it on the cupboard but she knocked off the faulty top. He told her to shut up or she would wear it. She said something like, "Oh, you haven't got the guts" and told him to leave. Her brother told Mr Fairbrother not to be stupid. She stepped backwards. Mr Fairbrother told her to "F'ing shut up" and then he threw the water in an upward motion onto her face and chest. He then turned the kettle the other way and emptied the rest of it onto her face, arm and leg in a second motion. Her brother became angry, saying, "That was my sister and it was f'ing boiling water". He hit Mr Fairbrother and told her to get into a cold shower. She immediately did so. The police and ambulance arrived shortly afterwards and she was treated at hospital.
- [7] After about five or six weeks they resumed their relationship because he was attending rehabilitation. One day in January 2003, Mr Fairbrother was not in a good mood and said, "Oh, it's good to see that you don't yell at me anymore. I know how to shut you up if you yell at me." She said, "Oh, don't be silly. You wouldn't do that again." He said, "Yeah, I would. ... I'll throw hot water over you if you yell at me or scream at me." She said, "No, you wouldn't." He said, "Go on, yell at me and we'll see," in a sarcastic tone. She finally terminated their relationship in August 2003.
- [8] Her cross-examination did not begin until late in the afternoon. Defence counsel put to her that the Mr Fairbrother boiled the jug to make himself a cup of coffee and when he was pouring it into the cup she took hold of the kettle to stop him. He tried

to pull it one way whilst she pulled it another. He said something like, "Don't be silly. Don't be bloody stupid. Somebody could get hurt here." Whilst he was holding onto the kettle, her brother hit him in the right eye causing him to bleed. The complainant denied that events occurred in this way. The trial was then adjourned before the completion of the complainant's cross-examination until 10 am the next day.

The plea of guilty

- [9] The court resumed the next day at 12.06 pm. The prosecutor asked that Mr Fairbrother be re-arraigned on count 2. His guilty plea on that count was accepted by the Crown in full discharge of the indictment. The court adjourned at 12.16 pm and the sentence proceedings resumed later that afternoon.
- [10] Unfortunately, neither counsel placed before his Honour the facts upon which the plea of guilty had been accepted and neither counsel in their sentencing submissions made further reference to these facts.
- [11] Mr Fairbrother was in his early forties at the time of the offence and at sentence. He has some criminal history. The matters of relevance are as follows. In May 1992 he was convicted and fined \$200 for assault occasioning bodily harm when he head-butted his then partner and causing her some temporary blurred vision and a lump on her head. On 18 December 2001, he was convicted and fined \$250 for breaching a domestic violence order concerning the complainant in this matter: in the course of an argument with Ms Ryder, he scratched Ms Ryder's daughter from another relationship and punched Ms Ryder. On 26 February 2002, he was convicted of common assault on 28 December 2001 and was fined \$400. The complainant in this incident was Ms Ryder's daughter whom Mr Fairbrother pushed to the ground; she struck her head on concrete and he pulled her hair.
- [12] A medical report tendered at sentence recorded that Ms Ryder sustained partial thickness burns to her lower face, legs, neck anteriorly and upper chest to her nipple line and her right shoulder over approximately 17 per cent of the surface area. She was treated with pain relieving drugs, burn cream, dressings and intravenous fluid. She was discharged from the emergency department of the Townsville hospital later that day but continued to attend daily to change her dressings. In her tendered victim impact statement, she described the pain as excruciating. The burns to her mouth and lips prevented her from speaking properly for about a week and she was treated with morphine injections. She has been visiting counsellors since September 2003. The prosecutor told the sentencing judge that over time the scalding settled and she has been left with only minor discolouration on her arm and breast.
- [13] Mr Fairbrother's counsel at sentence emphasised Mr Fairbrother's excellent work history. He had been a truck driver since he was 17 years old. In August 2002, he was involved in a car accident with a speeding car. Although the accident was not his fault, a young person was killed.¹ This had a dramatic effect on him and it

¹ This is now disputed by counsel for the appellant, Mr Martin SC, who wished to have the appeal adjourned to have this issue determined in a re-opening of the sentence before the primary judge under s 188 *Penalties and Sentences Act 1992* (Qld). This Court refused that application because this fact was not one on which his Honour placed reliance and had little relevance to the issue to be determined by this Court, namely whether the sentence imposed for the offence charged was manifestly inadequate.

contributed to his excessive drinking. He was in employment at the time of sentence and was highly regarded by his employer. At the time of the offence he was an alcoholic, unemployed and had difficulties with anger management. A week after he committed this offence he voluntarily took part in a Salvation Army alcohol and drug rehabilitation course from 21 October until December 2002. He returned to the course in February 2003 for treatment and counselling until June 2003. A tendered letter dated 24 March 2003 from a Salvation Army rehabilitation services counsellor, Mr Alan Reynolds, noted that when Mr Fairbrother commenced treatment he became aggressive and angry over trivial matters; by 24 March 2003, he was largely able to control his behaviour; Mr Reynolds was confident Mr Fairbrother would further improve the longer he was on the program; Mr Fairbrother was a very hard worker whom he hoped would remain in sobriety with continued support. Mr Fairbrother's counsel at sentence submitted that whilst Mr Fairbrother was not a total abstainer, he was now able to control his drinking. He had formed a new relationship which had already lasted 12 months and his present partner reported no relationship problems and that he was a very hard working man.

The judge's findings

- [14] The learned sentencing judge described the case as "a fairly bad case of bodily harm". The upshot of Mr Fairbrother's conduct, his Honour noted, "... was that the hot water that was in the jug made contact with Miss Ryder. I will put it as neutrally as I can. You have admitted that it constituted an unlawful assault.

I will sentence you on the basis that this was not a preconceived intention on your part. Rather, it was done on the spur of the moment ...".

- [15] His Honour observed that incidents of assault and violence in relationships between men and women require significant deterrent sentences and that a sentence of imprisonment had to be imposed in this case. However, because of Mr Fairbrother's good work history, present employment, efforts at rehabilitation and his new relationship, his Honour rejected the prosecutor's submission that a period of actual custody was required.

The issues in the appeal

- [16] The issue for this Court is whether, in fully suspending the period of imprisonment, his Honour imposed a manifestly inadequate sentence for the offence to which Mr Fairbrother pleaded guilty.
- [17] Under s 339(1) *Criminal Code* the maximum term of imprisonment for this offence since 1997 has been seven years imprisonment. Section 339(3) relevantly provides: "If the offender does bodily harm, and is or pretends to be armed with any dangerous or offensive weapon or instrument ... the offender is liable to imprisonment for 10 years."
- [18] In response to an argument based on the principles discussed in *R v De Simoni*,² *Kingswell v R*,³ *R v Boney; ex parte Attorney-General*⁴ and *R v McGoldrick*⁵

² (1981) 147 CLR 383.

³ (1986) 60 ALJR 17.

counsel for the respondent, Mr Bassett, contends that Mr Fairbrother could not be sentenced on the basis that he intentionally poured near boiling water on the complainant because this would constitute a circumstance of aggravation as defined in s 1 *Criminal Code* and would offend s 575 *Criminal Code* which requires that any circumstance of aggravation intended to be relied upon must be charged in the indictment. He contends that Mr Fairbrother must be sentenced on the basis that he caused Ms Ryder's scalding injuries but the sentencing court must completely put aside the way in which he caused them because the prosecution did not allege, as they could have, that he caused bodily harm whilst armed with a dangerous or offensive weapon or instrument, namely a jug of near boiling water.

- [19] Mr Martin SC for the appellant concedes that deliberately pouring a jug of near boiling water is capable of amounting to the offence of assault occasioning bodily harm with the circumstance of aggravation under s 339(3) *Criminal Code*. He contends that Mr Fairbrother must be sentenced on the basis that he was responsible for twice deliberately bringing the complainant's body into contact with near boiling water.

Conclusion

- [20] These contentions have more than a little of *Alice in Wonderland* about them. They highlight the importance of counsel stating adequately in court the facts on which a negotiated guilty plea has been accepted. Despite the absence of any recorded discussion between the judge and counsel on this issue, his Honour's careful and limited findings of fact quoted earlier in these reasons⁶ suggest that he was alive to the concerns now raised about s 339(3) *Criminal Code*. His Honour found the case was a reasonably bad example of bodily harm and that by his plea of guilty Mr Fairbrother had admitted his responsibility for the hot water in the jug making contact with Ms Ryder and injuring her. Tendered photographs showed significant scalding injuries and blistering which must have caused Ms Ryder great pain and anguish for some months and which could well cause long term psychological problems. It is clear from the sentencing remarks that his Honour did not find Mr Fairbrother deliberately poured the hot water onto Ms Ryder but nor did his Honour find he acted solely in a criminally negligent way. It seems the parties at sentence were content for his Honour not to make a finding on this issue but to have Mr Fairbrother sentenced on the basis that he was responsible for the injuries because of his plea of guilty, perhaps to put beyond doubt that the sentence imposed did not take into account any matters which the prosecution could have alleged in a circumstance of aggravation under s 339(3) *Criminal Code*. The findings of fact made by his Honour were open on the evidence and this Court is now bound by them. It follows that Mr Fairbrother was not and could not be sentenced on the basis that he twice deliberately brought Ms Ryder's body into contact with near boiling water.
- [21] Nevertheless, as his Honour found, it was a reasonably bad example of the offence. Mr Fairbrother entered the complainant's home within hours of being removed from it by police. He was then arrested and released on condition that he have no contact with the complainant and that he stay away from her home. Within hours he returned to her home where he confronted her, creating the volatile atmosphere

⁴ [1986] 1 Qd R 190.

⁵ [1995] 1 Qd R 553.

⁶ See [14].

which erupted into his commission of this offence. She suffered painful scalding injuries which have left her with minor skin discolouration on the breast and arm and perhaps ongoing psychological problems. He has some previous criminal history for like behaviour. He is a mature man in his forties who does not have the mitigating benefit of youthful immaturity.

- [22] On the other hand, it is to his credit that he pleaded guilty, although not at an early stage. He has an excellent work history, was in steady employment at sentence and had made apparently genuine and reasonably encouraging efforts at rehabilitation by addressing his alcohol problem which seems to be the essence of his offending behaviour.
- [23] Domestic violence is an insidious, prevalent and serious problem in our society. Victims are often too ashamed to publicly complain, partly because of misguided feelings of guilt and responsibility for the perpetrator's actions. Members of the community are often reluctant to become involved in the personal relationships of others where domestic violence is concerned. Perpetrators of domestic violence often fail to have insight into the seriousness of their offending, claiming an entitlement to behave in that way or at least to be forgiven by the victim and to evade punishment by society. Domestic violence has a deleterious on-going impact not only on the immediate victim but on the victim's wider family and ultimately on the whole of society. It is not solely a domestic issue; it is a crime against the State warranting salutary punishment. The cost to the community in terms of lost income and productivity, medical and psychological treatment and on-going social problems is immense. Perpetrators of serious acts of domestic violence must know that society will not tolerate such behaviour. They can expect the courts to impose significant sentences of imprisonment involving actual custody to deter not only individual offenders but also others who might otherwise think they can commit such acts with near impunity.
- [24] Had Mr Fairbrother been sentenced for an offence of deliberately pouring boiling water on Ms Ryder and scalding her, he would have been required to serve a period of actual custody of at least 12 months imprisonment before suspension, even with the mitigating factors here. His Honour did not sentence Mr Fairbrother on that basis but found that he was responsible for the complainant's injuries when the hot water in the jug made contact with Ms Ryder and that this was not a preconceived intention; the possibility that the injuries occurred through Mr Fairbrother's criminal negligence whilst the complainant and Mr Fairbrother struggled with the jug of hot water was not rejected. Even so, the offence remains a serious example of domestic violence because Mr Fairbrother should not have returned to the complainant's home after the police removed him; had he obeyed the conditions of his release from the watch house earlier that evening the complainant would not have suffered the dreadful scalding injuries she received at his hand. The sentence of two and a half years imprisonment fully suspended for four years is a substantial penalty for if Mr Fairbrother reoffends during the next four years, he is at risk of having to serve two and a half years imprisonment.
- [25] Courts will not lightly allow an Attorney-General's appeal against sentence for the reasons discussed in *Everett v The Queen*⁷ and *R v Melano; ex parte Attorney-*

⁷ (1994) 181 CLR 295.

*General.*⁸ On the facts found by his Honour, which were open to him, and which are consistent with the appellant's concession that Mr Fairbrother cannot be sentenced on the basis that he used the jug of near boiling water as a weapon, the appellant has not demonstrated that the sentence imposed of two and a half years imprisonment fully suspended for four years was manifestly inadequate. The appeal against sentence should be dismissed.

[26] **JERRARD JA:** In this appeal I have read and respectfully agree with the reasons for judgment of McMurdo P, and the order Her Honour proposes.

[27] **CULLINANE J:** I agree that the sentence cannot be regarded as manifestly inadequate.

⁸ [1995] 2 Qd R 186.