SUPREME COURT OF QUEENSLAND

CITATION:	*R v Black* [2005] QCA 132
PARTIES:	**R** **v** **BLACK, Natalie Louise** (applicant)
FILE NO/S:	CA No 28 of 2005 SC No 783 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 April 2005
DELIVERED AT:	Brisbane
HEARING DATE:	19 April 2005
JUDGES:	McPherson and Williams JJA 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 – 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 – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – where applicant pleaded guilty to three counts of attempted murder – where sentenced to six years imprisonment with a recommendation for post-prison community-based release after serving 15 months – where applicant attempted to murder herself and her three children by carbon monoxide poisoning – where at the time the offences were committed, the applicant was suffering an adjustment disorder precipitated by the breakdown of her marriage to the children's father – where the applicant was driven by malice towards the children's father – where the applicant desisted from the attempt at the very last moment – where no prior criminal history – where plea of guilty entered at early stage – whether the sentence imposed was manifestly excessive *Penalties and Sentences Act* 1992 (Qld), s 92 *R v Bailey* [2001] VSC 461; SC No 1491 of 2001, 22

November 2001, considered
R v Richards [2002] NSWSC 415; SC 70015 of 2002, 17 May 2002, considered
R v Skipper (1992) 64 A Crim R 260; CCA SCt of WA 121 of 1992, 4 December 1992, considered
R v Thew, unreported, Court of Criminal Appeal, NSW, No 60307 of 1998, 25 August 1998, considered
R v Treloar, unreported, de Jersey CJ, SC No 342 of 2001, 2 April 2002, considered

COUNSEL: K M McGinness for the applicant
R G Martin SC for the respondent

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

[1] **McPHERSON JA:** I agree with the reasons of Williams JA for dismissing this application to appeal against sentence.

[2] **WILLIAMS JA:** The applicant seeks leave to appeal against a sentence of six years imprisonment with a recommendation for post-prison community-based release after serving 15 months which was imposed on each of three counts of attempted murder to which she pleaded guilty on 22 November 2004. The sentences were to be served concurrently. In fact the applicant was sentenced on 17 February 2005 and by then she had spent 87 days in custody; a declaration was made that that be time taken into account as part of the sentence.

[3] The charges arose from the applicant's attempt to kill herself and her three children, Mersaydeez, born 27 December 1994, Harrison, born 10 March 1997 and Chandler, born 14 November 1998, on 10 March 2003. Harrison and Chandler were children of the marriage between the applicant and Patrick Black. Mersaydeez was the child of an earlier relationship.

[4] The applicant met Black in 1995 and they lived together from 1997; they married in 1999. For some time prior to 20 January 2003 the applicant and her husband had been in constant conflict. That resulted in Black leaving the family home on that date. Black, a police officer, commenced a relationship with another police officer, Amanda Boswell, in February 2003.

[5] Counsel for the applicant informed the sentencing judge that on 14 February 2003 the applicant "wrapped Christmas lights, which were hanging outside the house, around her neck and she attempted to hang herself." Apparently Black intervened and put an end to that attempt.

[6] On 9 March 2003 the applicant learned of Black's new relationship; the applicant took that news badly and thereafter began regularly abusing both Black and Boswell whenever the opportunity presented itself. On numerous occasions the applicant contacted Black by telephone or by leaving text messages. On one occasion she said in a telephone conversation with Black: "You're never going to see the kids again. I'm taking them to Coffs Harbour"; that is where her parents resided.

[7] On the evening of 9-10 March 2003 both Black and Boswell were working. Each received between about 2.00am and 4.00am a number of abusive phone calls from the applicant. At about 4.45am the applicant's brother received a phone call from

Mersaydeez which resulted in him going immediately to the applicant's home at Macgregor. On arriving there he saw a Renault motor vehicle with the hood up and a garden hose attached to the exhaust with a black and white cloth stuck into the end. At that time the engine of the vehicle was not running. The applicant was unconscious and lying face down on the concrete.

[8] Statements obtained from Mersaydeez indicated that the applicant had woken the children and induced them to go into the car on the basis that they were going for a drive. The following extracts from statements by Mersaydeez indicate graphically what happened and how the children were affected:

> "We were in the car with all the doors shut and windows up. We couldn't get out because of the child locks. There was a hose with things stuffed in it. We were screaming at Mum to let us out. Mum told to us to calm down and go to sleep; it's going to be alright. Mummy took some pills. I don't know what they are called because Mummy doesn't let me know.
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> . . .
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> We went to bed. Mum said she felt sick. . . . [she] went downstairs; did something; kept going to the bedroom to get something that rattled and I don't know what it was. I think it was sleeping pills. I don't know. And then she said to come down to the car. I thought we were going to go for a drive so I said yes . . . we wouldn't go down to the car because we didn't know if we were going for a drive or not so we just said yes anyway, and then we stayed in the car for a little while and she only for a little while and we only stayed in the car for a little while without - she - I think she put sticky tape on the window just for - to pretend that the window was down - I don't know why, no air-conditioning, no windows were down, no doors were open. We couldn't get out; the doors were locked.
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> She said "Shush and just lie down and go to sleep", and we kept screaming because we wanted to get out. We all started vomiting like, we were vomiting, I vomited over my pillow.
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> . . .
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> We started coughing and everything and then we kept like, looked like we were going to vomit. . . .
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> The two boys were in the back seat, I was in the front and my Mum was in the front.
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> . . .
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> In the car she said nothing's going to happen because I said, "Do you want to die?" and she said, "No, I just want to get used to my car because I have to give it away tomorrow."
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> . . .
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> I said I wanted to get out hundreds of times but she wouldn't she let us out. The end she let us out. She opened the door, turned the engine off and she let us out and then she fell out."

[9] Mersaydeez also indicated that during the incident she could "smell a funny smell". She indicated she was unable to say for how long the children were sitting in the car. After she was let out of the car Mersaydeez telephoned her uncle for help.

[10] During the time the children were in the car Harrison got worked up and called out: "We're going to die. We're going to die. We're going to suffocate."

[11] The children experienced headaches and nausea for some time after the incident but otherwise were not physically harmed.

[12] A handwritten note was found on the dashboard of the vehicle reading as follows:

> "Hope you're happy now, Patrick. Live with this. You and Amanda should be very happy together knowing that you both caused this - and on your son's birthday. Good luck with that. Part of me hates you, but and then . . . that might bring us back the love I had for you! Signed Natalie and the kids."

[13] In the house police also found another note in a rubbish bin contain the words: "now try and take them".

[14] The applicant was taken to hospital where she recovered; she had also taken an overdose of sleeping tablets.

[15] During a telephone conversation with a sister-in-law the following morning the applicant said of the children: "They should be alright. I was in for longer. They were only in for five minutes." She also said to a member of the nursing staff: "They were all in the car with me until they chucked a narni and we all got out."

[16] Subsequently in an interview with police the applicant said she had no recollection of what had occurred on the night in question.

[17] After the applicant was charged she was reviewed by psychiatrists but it was accepted there was no basis for any reference to the Mental Health Court. Apparently as a result of discussions between counsel for the prosecution and the very experienced criminal barrister who represented her at sentence it was agreed that medical reports would not be placed before the sentencing judge, but by agreement the following statement was made by the prosecution:

> "My friend and I have had discussions about this. Perhaps it comes to this: it's clear that she was not suffering from unsoundness of mind at the relevant time, nor was she mentally ill. She has what was described as adjustment disorder with anxiety and depressed mood, or, alternatively, an adjustment disorder with mixed disturbance of emotions and conduct."

When the sentencing judge asked for how long she had been in that condition he was told:

> "It's not really possible to say, except to the extent that the breakdown of the marriage on 20 January seems to have precipitated all of this. So that I don't think there's any doubt that was a major factor and that was what she was not adjusting to. . . . Dr Reddan says this about the adjustment disorder. . . . She described adjustment disorder as sub-threshold disorder, and it refers to a reaction to a stressor which is judged to be in excess of what could be expected or is judged to have been accompanied by functional impairment."

[18] The offences occurred on 10 March 2003 at which time the applicant was aged 31. She had no criminal convictions prior to the events in question, but was convicted of a breach of a domestic violence order between the commission of the offences and sentence.

[19] Subsequently to the charges being laid and a domestic violence order made against the applicant, she breached that by certain conduct directed to Black and Boswell.

[20] The applicant also received counselling prior to sentence and the three children had been again placed in her custody prior to sentence. The boys were spending time equally with the applicant and their father. By the time of sentence the applicant had also formed another relationship and had given birth to another child as a consequence of that relationship.

[21] In the course of his sentencing remarks the learned sentencing judge noted that it was common ground that the applicant was "suffering an adjustment disorder precipitated by the breakdown of your marriage on 20 January". He recognised that the applicant was entitled to have her sentence mitigated because of her early plea of guilty which recognised her willingness to co-operate in the administration of justice.

[22] Counsel for the applicant at sentence had dealt at some length with the effect of imprisonment of the applicant upon the children, and referred in particular to statements from the children and the applicant's parents in that regard. In the course of his sentencing remarks the learned trial judge said: "Ordinarily the effect of imprisonment upon children of the offender cannot be applied in mitigation of sentence. To my mind, the present is an extraordinary case and I propose to take that factor into account."

[23] Thereafter the learned sentencing judge listed a number of matters which he took into account. The applicant "acted on the spur of the moment"; it was "not a planned, pre-conceived attempt at murder". The applicant "acted out of malice" toward Black. He referred to the fact that she had "initially lied to the police", and indicated that he did not accept the truth of her statement that she had no memory of relevant events. He noted that she did not "immediately feel remorse on the day of the offences" but was expressing "deep regret" at the time of sentence. He also said the applicant had not fully accepted her own guilt but was still, to some extent, blaming Black and Boswell for what happened.

[24] The learned sentencing judge described as "the major adverse factors in sentencing" as being "the enormity of the offences; the fact that they were driven by malice; your continued inappropriate behaviour toward Black and Boswell; and the imperfect remorse which you have shown due to a failure fully to accept your responsibility." He then identified the "major mitigating factors" as being that "you desisted from the attempt, albeit under some pressure from the children; that you acted on the spur of the moment and under emotional stress; that you have no prior criminal history; that you notified an early plea of guilty; and that the longer the sentence imposed, the greater the damage to your children."

[25] The learned sentencing judge then noted that it was common ground between experienced counsel that a sentence of imprisonment was called for. He considered that imprisonment would in the circumstances of this case help with rehabilitation, and would also meet the purpose of denouncing the applicant's conduct on behalf of

the community. He expressed the view that deterrence was not a relevant consideration given the circumstances of the case.

[26] In recommending earlier release on parole the learned sentencing judge indicated he would expect that such release would be on condition requiring the applicant to attend a course of anger management counselling and be of good behaviour and refrain from violent or abusive conduct towards Black and Boswell. He also said: "I have little doubt that a recommendation for release will be acted on in the present case, provided you are of good behaviour."

[27] The principal submission of counsel for the applicant is that the sentence imposed was manifestly excessive. In her submission it would have been more appropriate for the sentencing judge to have utilised s 92 of the *Penalties and Sentences Act* 1992 (Qld) and imposed imprisonment for a period slightly less than one year to be followed by probation for up to three years. The learned sentencing judge specifically rejected that approach because in his view in order to mark the community's denunciation of the offence of attempted murder a more substantial head sentence was called for. Unless it can be demonstrated that such a conclusion was outside the proper exercise of a sentencing discretion then the submission must fail.

[28] There are not a lot of relevant comparable sentences of assistance to the Court. In *R v Treloar*, unreported, de Jersey CJ, SC No 342 of 2001, 2 April 2002, de Jersey CJ had to sentence a father who pleaded guilty to the attempted murder of his two children in relatively similar circumstances to that adopted by the applicant in this case. Again the offence was committed against the background of matrimonial disharmony. The Chief Justice early in his sentencing remarks said:

> "These crimes would each warrant imprisonment for five years and you would ordinarily serve at least two and a half years of that term, but in view of the pleas of guilty the Court would usually consider reducing the time actually to be served to 18 months or so."

[29] However, the determinative factor in that case was that the offender had spent 405 days in custody prior to being sentenced. In those circumstances the Chief Justice moulded the sentence imposed to meet the particular circumstances of the case. He concluded that there would be no utility in imprisoning the offender further; indeed the prosecution did not seek further imprisonment. In consequence the sentence imposed was three years probation with special conditions.

[30] I find the observations of the Chief Justice as to the more usual sentence called for by crimes of this type to be of greater assistance than the sentence in fact imposed in that case.

[31] Counsel for the applicant referred in particular to *R v Bailey* [2001] VSC 461, *R v Skipper* (1992) 64 A Crim R 260, and *R v Richards* [2002] NSWSC 415. The offender in *Bailey* pleaded guilty to the offence of reckless conduct placing her child in danger of death. It is not clear what the maximum penalty was for that offence. She was not suffering from any specific psychiatric illness at the time of the incident but was in a state of emotional turmoil and not thinking in a rational manner. Counsel for the prosecution did not press for a custodial sentence. She was released on a bond to be of good behaviour for a period of three years. There was no appeal.

[32] The offender in *Skipper*, who attempted to poison her children, was suffering from a psychiatric illness, and the court regarded her temporary but major depressive illness as a special circumstance. The Western Australian Court of Criminal Appeal did not allow a Crown appeal against an order placing the offender on probation for two years with special conditions.

[33] The offender in *Richards* was "probably suffering from a delusional disorder possibly caused by the hypomanic phase of bipolar affective disorder" and whilst that could not be conclusively established the Crown accepted a plea of guilty to manslaughter of one of her children on the basis that she was at that time substantially impaired by an abnormality of mind. That child had died from carbon monoxide poisoning in an incident reasonably similar to that involved here. She pleaded guilty to the attempted murder of the other two children who survived. The offender there had been in custody from 7 February 2001 until 17 May 2002 when sentenced, and in consequence the judge imposed no additional term of actual imprisonment. There was no appeal.

[34] Those cases can clearly be distinguished from the present, as can *R v Thew*, unreported, New South Wales Court of Criminal Appeal, CA No 60307 of 1998, 25 August 1998. There the offender pleaded guilty to the attempted murder of his two daughters in circumstances similar to the present case. A sentence of five years and nine months imprisonment was imposed and the Director of Public Prosecutions appealed against its inadequacy. The Court of Criminal Appeal held the sentencing judge had failed to give due weight to general deterrence and increased the sentence to nine years imprisonment requiring the offender to serve a minimum of five years. For present purposes *Thew* is relevant because it indicates the serious nature of the type of offence with which the Court is now concerned and it clearly establishes that the non-custodial sentences imposed in some of the other cases do not set the norm for sentencing for such offences.

[35] The learned sentencing judge carefully considered all issues relevant to the imposition of sentence on the applicant and no error in his reasoning has been demonstrated. Given the serious nature of the offences to which the applicant pleaded guilty, and recognising that she was motivated by malice towards Black and Boswell in putting the three children through the ordeal, I am not persuaded that the sentence in fact imposed was so outside the range of proper sentencing discretion as to be described as manifestly excessive. In requiring the applicant to serve 15 months imprisonment before becoming eligible to apply for post-prison community-based release the sentence in fact imposed was broadly in accord with the indicative sentence referred to by de Jersey CJ in *Treloar*.

[36] Given the facts of this case, and the circumstances of the applicant, this is a situation where one would ordinarily expect the prisoner to be released in accordance with the Court's recommendation, provided nothing occurred during the period of imprisonment to override that.

[37] Offences such as these would ordinarily call for the imposition of an actual custodial sentence. Contrary to what was said by the learned sentencing judge in this case, I agree with the reasoning of the New South Wales Court of Criminal Appeal in *Thew* where emphasis was placed on the aspect of deterrence in imposing a sentence for this type of crime. It is only where the offender was suffering from a serious mental condition falling short of unsoundness of mind which would justify the imposition of a non-custodial sentence.

[38] In the circumstances the application for leave to appeal against sentence should be dismissed.

[39] **PHILIPPIDES J:** I agree with the reasons for judgment of Williams JA and with the order proposed.