SUPREME COURT OF QUEENSLAND

CITATION:	*R v Kerwin* [2005] QCA 259
PARTIES:	**R** **v** **KERWIN, Brian Norman** (applicant)
FILE NO/S:	CA No 421 of 2004 SC No 764 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 July 2005
DELIVERED AT:	Brisbane
HEARING DATE:	26 July 2005
JUDGES:	McPherson, Williams and Keane 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 - 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 - GENERALLY - where applicant pleaded guilty to one count of burglary in the night with violence and was convicted after trial on one count of attempted murder - where applicant had attempted to murder his estranged wife - where applicant had broken into his wife's house and attempted to strangle her in front of their eight year old daughter - where police had to intervene to prevent the applicant from harming his wife - where applicant was sentenced to 12 years imprisonment - whether sentence imposed was manifestly excessive *R v Cole* [2004] QCA 109; CA No 434 of 2002, 16 April 2004, cited *R v Forster* [2002] QCA 495; CA No 10 of 2002, 14 November 2002, considered

R v Lester [2004] QCA 34, CA No 325 of 2003, 20 February 2004, distinguished
R v Reeves [2001] QCA 91; CA No 276 of 2000, 13 March 2001, applied
R v Rochester; ex parte A-G (Qld) [2003] QCA 326; CA No 362 and CA No 399 of 2002, 1 August 2003, cited

COUNSEL: G J Seaholme for applicant
S G Bain for respondent

SOLICITORS: R J Cutler for applicant
Director of Public Prosecutions (Queensland) for respondent

KEANE JA: On 11 November 2004, the applicant was convicted upon his plea of guilty of burglary by breaking in the night with violence. On 15 November 2004, he was convicted after a trial of the offence of attempted murder on the same occasion as the offence the burglary was committed. The applicant had attempted to kill his estranged wife.

The applicant was sentenced on 15 November 2004 to six years imprisonment in respect of the offence of burglary and 12 years imprisonment in respect of the offence of attempted murder. These sentences are to be served concurrently with each other but cumulatively upon an activated suspended sentence of 135 days imposed when he was convicted on 4 April 2002 of assault occasioning bodily harm. On that occasion he was sentenced to six months imprisonment suspended after 28 days and with an operational period of two years. The commission of the offences of burglary and attempted murder breached that suspended sentence. The learned sentencing judge declared that the applicant had served 432 days in pre-sentence custody.

The complainant, the applicant's wife, was estranged from him at the time of the offences in question. The relationship was characterized by a history of violence involving a number of convictions for assaults by the applicant upon the complainant and breaches of domestic violence orders obtained by her. On the night when the offences in question occurred, there was a domestic violence order in place which was designed to protect the complainant from the applicant's violence. As has been mentioned, the applicant was subject to a suspended sentence in relation to the conviction on 4 April 2002. That conviction resulted from the applicant's violence upon a friend of the complainant who sought to rescue her from his violence.

As to the circumstances of the offences, on the night of 10 August 2003, the applicant caught a taxi to the complainant's house. He told the driver, "I will only be 10 minutes, leave the meter running." He then broke into the complainant's house by smashing a window next to the front door. Once inside, he started abusing the complainant saying, "You dirty rotten bitch. You caused this situation. You are nothing but a piece of shit. I'm going to kill you." The complainant tried to calm him down but the applicant pushed her against the lounge and struck her across the head several times with both his hands saying, "I'm going to kill you, you fucking dirty bitch."

The applicant then put his hands around the complainant's neck and squeezed it with extreme force. She tried to scream but could not breathe. She then blacked out. This occurred in

front of their eight year old daughter who had come into the room.

The complainant's neighbours called the police. One neighbour went to the door of the complainant's unit and called out to her. The applicant came to the door and said, "They are both dead. Don't bother coming in." The neighbour asked the applicant to come outside and the applicant replied, "Don't bother coming in, I've killed them." The applicant then slammed the door. When the police arrived, they called out to the applicant who replied, "Fuck off, cunts. I'm going to kill her."

The police then entered the complainant's unit and saw the complainant lying on her back next to a couch. The appellant was lying on top of her with his hands on her throat and appeared to be strangling her. She was not moving and appeared to be unconscious. The police told the applicant to get off her but he did not respond and continued to choke her. The police then grabbed the applicant and grabbed him away from the complainant.

The applicant was born on 15 December 1956. He was 46 years of age at the time of the offence and almost 48 years of age at the time of sentence.

In sentencing the applicant, the learned sentencing judge referred to the significant part which the excessive consumption of alcohol has played in the applicant's history of offences of violence. The learned sentencing judge

expressed the view that the applicant had manifested little insight into the seriousness of his offending and no remorse.

Importantly, the learned sentencing judge referred to the concern expressed by the complainant as to the prospect of suffering further violence at the hands of the applicant when he is released from custody. His offending has caused the complainant and her daughter psychological suffering and is affecting their ability to get on with their lives.

The learned sentencing judge referred to the circumstance that two of the applicant's siblings committed suicide while the applicant was a young man and that this had a serious effect upon him.

In *R v Reeves* [2001] QCA 91; CA No 276 of 2001, 13 March 2001, Williams JA, with whom McMurdo P agreed, said that:

> "The authorities indicate that the appropriate range for the offence of attempted murder is generally from 10 years to 17 years…"

That view has been referred to with approval in subsequent decisions of this Court including *R v Forster* [2002] QCA 495; CA No 10 2002, 14 November 2002; *R v Rochester; ex parte A-G (Qld)* [2003] QCA 326; CA No 362 and CA No 399 of 2002, 1 August 2003 and *R v Cole* [2004] QCA 109; CA No 434 of 2002, 16 April 2004.

In *R v Forster*, a sentence of 12 years imprisonment was imposed in a case of the attempted murder of a wife following the breakdown of a marriage. In that case, the accused shot

the complainant at close range. The accused in that case pleaded guilty. He had a previous good record and he demonstrated remorse for his conduct. He was suffering significant emotional strain by reason of his wife having ended their 27-year marriage. Direct comparisons are difficult to make in this area but *R v Forster* does provide some guidance as to the appropriate sentence, within the broad range referred to in *R v Reeves*, which is applicable to the present case.

The present case involved the applicant breaking into the complainant's unit in breach of a domestic violence order and making a persistent attempt to kill her. Importantly in this regard, his persistence in the attempt continued even after the attempted intervention by the complainant's neighbours and the police. The applicant's attempt on the complainant's life ceased only by reason of the active intervention of the police. This was a serious case of attempted murder. It has had serious consequences for the complainant and her daughter who, understandably, have been adversely affected by the applicant's violent behaviour for which he does not appear to have any real remorse.

The applicant's contentions that the sentence of 12 years was manifestly excessive, and that a sentence in the range of eight to nine years was appropriate, were founded on the proposition that the learned sentencing judge gave insufficient weight to a number of important factors which are said to take the present case out of the range discussed in *R v Reeves*. These factors were said to be that the applicant was

adversely affected by alcohol; that the attack was not planned or premeditated; that the applicant was not armed with any weapons.

The learned sentencing judge obviously took the first of these factors into account. It is equally obvious that, having regard to the part which the excessive consumption of alcohol had played in the history of the applicant's violence towards the complainant, his Honour did not regard this is a mitigating factor.

As to the second of these factors, it is hardly correct to speak of a case as one of an unpremeditated attack when the event is explicable only as the manifestation of a determination to harm the complainant which must have built up in the applicant against the complainant before he decided to break into her home.

As to the last factor; the applicant's history of violence toward the complainant meant that he could always proceed with confidence that she was unable to effectively defend herself against him and that he could dominate her physically. Further, the argument that the applicant did not use a gun or a knife in his attempt on the life of the complainant serves to highlight the applicant's determination and persistence in failing to desist from his attack on the complainant even after the attempted intervention by the neighbours and the arrival of the police. This last consideration does not lessen the overall criminality of his conduct.

The applicant's counsel relied on the decision of this Court in *R v Lester* [2004] QCA 34; CA No 325 of 2003, 20 February 2004 but that was a case of an attack made somewhat spontaneously upon a man who had entered into a sexual relationship with the accused's wife. The use of a weapon in that case was certainly not premeditated.

In my opinion, none of the factors identified by the applicant's counsel provides any support for the proposition that the sentence was manifestly excessive. In my opinion, the application for leave to appeal against sentence should be dismissed.

McPHERSON JA: I agree with what Justice Keane has said. The application for leave should be dismissed.

WILLIAMS JA: The applicant submits the sentence is manifestly excessive because no weapon was used and there was no planning or premeditation established. Those factors are, in my view, outweighed by the facts that this assault took place in front of the applicant's daughter, that he persisted in the attack after the intervention of a neighbour and that the police had to physically pull the applicant off his wife. Given his extensive criminal history involving offences of violence and his breaches of domestic violence orders, the sentence of 12 years' imprisonment was well within range.

Indeed, it could be said it was towards the lower end of the range for so serious an offence. The application should be refused.

McPHERSON JA: The order is that the application for leave to appeal is dismissed.
