COURT OF APPEAL

McMURDO P
JERRARD JA
DUTNEY J

CA No 177 of 2005

THE QUEEN

v

VADIM OLEG SHEV Applicant

BRISBANE

..DATE 11/08/2005

JUDGMENT

MR P SMITH (instructed by A W Bale & Son) for the applicant

MR M COPLEY (instructed by Director of Public Prosecutions (Queensland)) for the respondent

THE PRESIDENT: Justice Dutney will deliver his reasons first.

DUTNEY J: The applicant was convicted after a trial of one count of unlawful wounding and sentenced to two and a-half years' imprisonment to be suspended after serving nine months for an operational period of two and a-half years.

The applicant seeks an extension of time within which to seek leave to appeal against the severity of the sentence. An application for an extension of time within which to appeal against conviction has been abandoned.

The offence arose out of a neighbourhood dispute. The complainant was holding a party and playing music at what the applicant believed was an excessive volume. It appears that the party had started prior to the applicant and his wife having dinner. The applicant and his wife went for a walk after dinner. They returned and the applicant watched football on TV. The loud music continued. The applicant went down to the fence and requested that the complainant turn down the music. He was ignored.

At about 11.20 p.m. the applicant telephoned the police to complain. The police said they could not attend immediately to which the applicant responded by saying that he would take matters into his own hands. The applicant took a machete down to the fence line. He banged on the fence with the machete to

attract attention. The applicant was approached by five men including the complainant. The applicant again asked for the music to be turned down. The complainant said that he would not turn the music down until midnight.

The applicant, in his interview with police, said that the complainant threw a couple of punches at him and shaped as if to jump the fence. The applicant then lashed out and struck the complainant on the head with the machete. Other witnesses denied the complainant punched at the applicant. At least one witness agreed that there had been aggression on both sides and that there were threats exchanged in both directions.

The applicant was sentenced on the basis that only one blow was delivered but that blow penetrated to the bone. The complainant made a good recovery and has been left only with a scar on his forehead and occasional headaches. He was, however, hospitalised for two days and was off work for four weeks. The applicant suffered a broken rib in the ensuing altercation.

At the trial the applicant called evidence as to his good character and reputation. One witness with whom the applicant had been in business for almost 14 years described the applicant as level-headed and a clear thinker. The applicant was 59 years old with no previous convictions. He had a degree in chemical engineering from the University of New South Wales and had worked as an engineer for a number of years. He had then spent 15 years as a financial planner. By the time of trial the applicant had retired.

The sentencing Judge acknowledged the applicant's good character and very impressive career. He also acknowledged that the proceedings had been a great strain on the applicant's family. Nonetheless the sentencing Judge considered that a custodial sentence was required.

The applicant took a weapon to the fence line. In a heated situation involving a neighbourhood argument over noise it is not surprising that the weapon was used. That was an ever present risk of the applicant taking the machete with him.

I agree with the sentencing Judge that a custodial sentence was required. Having arrived at that conclusion it is difficult to argue with an actual custodial term of nine months. The applicant argues for a sentence of 18 months to two years suspended after six months. In my view the difference between six and nine months' actual custody in this instance is not sufficient to warrant the intervention of this Court even if I was of the view that I would have given the lighter sentence.

In fact the sentencing Judge may have been considered by some to have been lenient in suspending part of the sentence where the applicant had pleaded not guilty and been convicted following a trial. Likewise I am not persuaded that the difference between a head sentence of two years and a head sentence of two and a-half years in this case is sufficiently material to justify interference even if I were persuaded that the sentence contended for by the applicant was a proper one.

This is especially so where the applicant is not being asked to serve more than nine months except in the unlikely event that he re-offends. In any event the sentence imposed was, in my opinion, a proper one and well within the range suggested by the cases to which we were referred.

Looked at as a whole the applicant has received a sentence of nine months' imprisonment and is at risk of serving further time if he re-offends. Cases such as *R v Cooney* [2005] QCA 149; *R v Orreal* [2002] QCA 547; *R v Roberts* [2002]QCA 105; *R v Toohey* [2001] QCA 149 and *R v Hays; ex parte A-G(Qld)* [1999] QCA 443, on which the applicant relies do not collectively suggest that the sentence is outside the range of a sound sentencing discretion.

The weapon here was potentially deadly. The applicant took the weapon to the scene. It cannot be said to have been taken up opportunistically because it was there, as is often the situation with glassing cases. The applicant does not attract the discount often afforded to youthful offenders and his actual period in custody compares more than favourably with a sentence of two years with no suspension imposed in Cooney, who was also convicted after a trial.

The cases to which we were referred by the respondent, *R v McDonald* [2003] QCA 439 and *R v Jasser* [2004] QCA 14, also support the overall effect of the sentence imposed below. In my view the appeal has insufficient prospects of success to justify an extension of time within which to seek leave and I would refuse the application.

THE PRESIDENT: I agree. Mr Shev's application for an extension of time for leave to appeal against sentence is a little over one month late. By way of explanation he says there were delays in the postal system from his correctional centre and of engaging lawyers and that these factors resulted in the lateness of his application. This explanation is not entirely satisfactory but this Court would not dismiss it summarily without considering whether the interests of justice nevertheless required that time be extended.

He contends that the sentence imposed of two and a half years imprisonment suspended after serving nine months with an operational period of two and a half years is manifestly excessive.

Justice Dutney has set out the relevant facts and I agree with what he has said. I would add by way of emphasis that the applicant was a mature man who did not have the benefit of a plea of guilty or substantial cooperation with the administration of justice. The cases to which we have been referred by Mr Shev's counsel relate mainly to woundings inflicted with drinking glasses or glass jugs. In some ways this case is more serious than those matters in that Mr Shev armed himself with the machete to attend the neighbourhood dispute. It is particularly concerning that he then resorted to assaulting the complainant with that machete at 11.20 pm in a neighbourhood dispute over loud music at a party. Our community cannot accept the resort to violence in circumstances such as those. Mr Shev should have used lawful

means to settle the dispute, which, with a little tolerance, consideration and common sense on all sides should never have escalated. The complainant received a wound to his skull which, in fact, caused a divot to the skull bone. He was hospitalised for two days. He made a good recovery but was left with a scar to his forehead and suffered headaches. He was off work for four weeks.

The learned primary judge was right in recognising that a deterrent penalty was required despite the applicant's prior excellent history. Mr Shev has not demonstrated that the sentence imposed was manifestly excessive. The application for an extension of time should be refused.

JERRARD JA: I agree with the reasons for judgment of Dutney J and of the President and add that the minimum period in custody which Mr Shev must serve is less than the period that the applicant in *R v Jasser* [2004] QCA 14, would have been required to serve. It is also either less or equal to the time in custody which the applicants were obliged to serve in each of the matters of *Cooney*, *Orreal*, *Roberts* and *Toohey* which were relied upon by the applicant.

In those circumstances I do not consider that it was established that the sentence imposed was manifestly excessive, either as to the head sentence or the minimum period in custody.

THE PRESIDENT: The application is refused.
