SUPREME COURT OF QUEENSLAND

CITATION:	*R v Jackson* [2011] QCA 103
PARTIES:	**R** **v** **JACKSON, Maree Ann** (applicant)
FILE NO/S:	CA No 36 of 2011 DC No 20 of 2011 DC No 16 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Maryborough
DELIVERED ON:	20 May 2011
DELIVERED AT:	Brisbane
HEARING DATE:	9 May 2011
JUDGES:	Margaret McMurdo P, Muir and Chesterman JJA Separate reasons for judgment of each member of the Court, Muir and Chesterman JJA concurring as to the order made, Margaret McMurdo P dissenting
ORDER:	**Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to unlawfully wounding her husband – where the applicant pleaded guilty to a summary offence of breaching the terms of a protection order – where the applicant was sentenced to 18 months' imprisonment with release on parole after six months – whether the sentence imposed was manifestly excessive *Domestic and Family Violence Protection Act* 1989 (Qld), s 13(2) *R v Clark* [2008] QCA 51, considered *R v Cui* [2009] QCA 334, considered *R v Kidner* [2005] QCA 430, considered *R v Meehan* [1996] QCA 215, considered
COUNSEL:	S M Ryan for the applicant B J Merrin for the respondent

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

[1] **MARGARET McMURDO P:** I will not repeat the facts set out by Chesterman JA in his Honour's comprehensive and thoughtful reasons, other than as necessary to explain why I, unlike Chesterman JA, would grant the application for leave to appeal against sentence and allow the appeal.

[2] The applicant's offending in throwing a knife at her husband and wounding his leg was a concerning example of domestic violence. Only a few weeks earlier, she was convicted of breaching a protection order in respect of her husband. This suggested her violence was escalating. Although the complainant's injuries were fortunately minor (he needed only one stitch to his leg), the applicant's use of a knife, when she was both angry with the complainant and intoxicated, meant that much more serious injury, even death, could have resulted from her conduct. The community does not tolerate domestic violence and courts must impose appropriately condign sentences to deter perpetrators, whether male or female, and to express the community's disapprobation of such behaviour.

[3] There were, however, many mitigating features in this case beyond the fact that the complainant, through good fortune, was not seriously injured and that the applicant was cooperative with the authorities and pleaded guilty to an *ex officio* indictment at an early time. She was 41 at the time of her offending and, apart from the related episode of domestic violence a few weeks earlier, had no prior convictions. There was no psychiatric or psychological material placed before the sentencing court, but it was clear from the submissions then made on her behalf that she was emotionally and mentally vulnerable when she offended, both on this occasion and a few weeks earlier when she breached the protection order. She had a family history of mental illness, a history of self-harming and suffered post-natal depression after the birth of her sixth child to her former partner. He had recently taken the children to Western Australia without her permission and without any court order. She had tried to pursue him in the Family Court but without result. Both she and the complainant were abusing alcohol. She had been a victim of the complainant's domestic violence but she loved him and was reluctant to disclose the full extent of it to police. He was at the sentencing court and her defence counsel told the judge he loved her and wanted her to return to live with him and they had both promised to undertake counselling. At sentence, she had spent 86 days in pre-sentence custody, during which she had been assaulted and hospitalised; she suffered blurred vision and headaches and was treated by a neurologist.

[4] The primary judge, in his sentencing remarks, recited what his Honour considered were the relevant facts of the offending. I consider it significant that his Honour did not mention that, on the agreed statement of facts, the complainant had ordered the applicant to go to bed after he saw her packing her bags and attempting to leave him because, she said, she was sick of him telling her what to do. It is also significant that the applicant's sole previous conviction a few weeks earlier (breaching a protection order in respect of the complainant) also arose in circumstances where he had ordered her to bed shortly beforehand. In my view, the unchallenged statements of defence counsel clearly depicted a relationship in which the applicant was more a victim of the complainant's domestic violence than he was of hers. This does not excuse her criminal conduct to which she pleaded guilty, but it does help explain it and places it in a more mitigating context.

[5] In my view, the contention made by the applicant's barrister, that the judge gave insufficient weight to the applicant's vulnerabilities and particularly that the offence occurred in circumstances where the complainant had prevented the applicant from leaving the relationship, is made out. That error warrants this Court re-exercising the sentencing discretion.

[6] The cases referred to by Chesterman JA in his reasons, when applied to the competing exacerbating and mitigating circumstances in this case, warranted a sentence of imprisonment for 18 months with a parole release date set at the day of sentence. The fact is that the applicant has now served a further period of more than two and a half months in custody. I would therefore order that her parole release date be set at the day of delivery of these reasons.

[7] **MUIR JA:** I would refuse the application for leave to appeal against sentence for the reasons given by Chesterman JA. Although the sentence imposed was severe, I am not persuaded that it was outside the range of sentences that were open to the sentencing judge. There were aggravating features of the applicant's conduct. She threatened to kill the complainant and her conduct was not only protracted, but was in breach of a protection order.

[8] **CHESTERMAN JA:** On 2 March 2011 the applicant pleaded guilty to an *ex officio* indictment which charged her with unlawfully wounding Kim Jackson at Maryborough on 5 December 2010. She also pleaded guilty to a summary offence, that of breaching the terms of a protection order (see section 13(2) of the *Domestic and Family Violence Protection Act* 1989) made on 23 August 2010. The applicant had been in custody since the date of the wounding, a period of 86 days, when sentenced. The sentence imposed for the charge of wounding was 18 months' imprisonment with a parole release date fixed at 4 June 2011. The time in custody was declared to be time already served so that the applicant was effectively sentenced to a term of 18 months' imprisonment with release on parole after six months. She was convicted but not further punished for the summary offence.

[9] The applicant applies for leave to appeal against her sentence on the ground that it is manifestly excessive.

[10] The applicant was 41 years' of age at the time of the offence and 42 when sentenced. She was married to the complainant. Their relationship was described by the sentencing judge as:

> "… volatile and tumultuous as they were bizarre … fuelled by the consumption of excessive amounts of alcohol."

[11] The applicant had a prior conviction, breaching the same protection order on 1 November 2010. On 23 November 2010 she was convicted and fined $400 in default of eight days' imprisonment. The breach involved the applicant striking her husband with a glass bottle on the legs, back and the stomach without sufficient force to break it. Her motive was to deliberately breach the protection order

> "… so … the … police can come and take (her) away."

[12] The facts relevant to the sentence were agreed and reduced to a written schedule:

> "On the 5 December 2010 the complainant and defendant were having a few drinks at their house. Both of them had been drinking

> for several hours. The complainant decided to go to bed and was woken up by the defendant who was in the lounge packing her bags. The complainant asked her what she was doing and she told him that she was leaving as she was sick of him telling her what to do. He then told her to go to bed.
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> The defendant and the complainant went to bed. A short time later, the defendant got up and went into the kitchen and got a knife. She came back into the bedroom holding the knife behind her back before putting the knife under her pillow. The complainant lifted the pillow and asked the defendant what she was doing with the knife. The defendant replied 'I'm going to kill you'. The defendant swung the knife at the complainant which caused the complainant to put his hand up in front of him to block it. This resulted in him receiving a small cut on the inside of his wrist.
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> The complainant walked out of the bedroom and he was followed by the defendant who continued swinging the knife around him. He picked up the telephone and told the defendant to 'stop and go to bed or he will call the police' but the defendant continued swinging the knife. He tried to contact the police but the phone was off the hook. He was standing in the lounge area when the defendant threw the knife at him hitting him on the left leg. He pulled the knife from his leg and told the defendant to go to bed. The defendant grabbed her bag and left the house. The complainant went next door and called police. Police and an ambulance arrived a short time later. The complainant was taken to the hospital where he received one stitch to the wound on his left leg. He attended the police station and reported this matter.
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> At around 11.30pm police attended 51 Cardigan Street, Maryborough and located the defendant. The defendant was arrested and made admissions to throwing the knife at the complainant to police. She was transported to Maryborough watchhouse where she refused to provide a formal interview. She was charged and bail was refused."

[13] Additional facts urged on the applicant's behalf were that it was she who called the ambulance to attend to her husband and that in the course of their relationship there had been "a history of violence" by her husband about which she had taken no action because of her affection for him, and because of his promises "to stop drinking and attend anger management courses." Nothing is known about the nature or degree of the violence said to have been inflicted by the applicant's husband on the applicant, or the frequency or regularity of its occurrence.

[14] The complainant attended the sentence hearing and informed the applicant's solicitor that he wished to resume co-habitation with the applicant, professed his love for her and intimated his intention to attend marriage guidance counselling with the applicant. This is something she had long desired.

[15] As the judge noted excessive consumption of alcohol was a conspicuous feature of the domestic life of applicant and complainant. On the evening of the offence the complainant had drunk 11 stubbies of beer and was about to consume a 12th when

the wounding occurred. It appears that, perhaps as a result of consuming so much alcohol, the complainant felt the need to retire early to bed and used to insist that the applicant go with him, not for the purposes of intimacy but for enforced rest which she appears to have found irksome.

[16] The applicant's submission that the sentence is manifestly excessive was made by reference to three authorities: *R v Kidner* [2005] QCA 430, *R v Clark* [2008] QCA 51 and *R v Cui* [2009] QCA 334.

[17] Kidner was a 22 year old Aboriginal man who argued with his brother about the supply of alcohol. He armed himself with a kitchen knife with which he stabbed his brother on the left side of the abdomen. The wound was small and shallow and three centimetres long. He pleaded guilty and was sentenced to two years' imprisonment suspended after three months with an operational period of two years. An application for leave to appeal against sentence was refused. In refusing the application the court referred to *R v Meehan* [1996] QCA 215 in which it had been said that:

> "…offences of wounding, inflicted by the use of a knife, are to be punished by condign sentences, even where the offender is young, is a first offender and is otherwise of good character."

[18] The case and the observation were referred to by the sentencing judge.

[19] Clark was convicted after a trial. He and the complainant had argued over a car park during which the applicant punched the complainant in the face. The complainant who was proficient in martial arts restrained the applicant for a while, then released him and punched him twice in the head. The applicant then stabbed the complainant twice in the thigh. One wound penetrated to the layer of subcutaneous fat. The other penetrated muscle to a depth of six centimetres. The complainant suffered depression for about 12 months. The applicant was sentenced to 18 months' imprisonment suspended after four months. The sentence was not disturbed on appeal. Clark had no prior convictions.

[20] *Cui* was a case in which the applicant and complainant argued over a trifling sum, $20, which the applicant owed to the complainant. The complainant made a disturbance outside the applicant's door, kicking and punching at it. The applicant emerged armed with a knife with which he cut the complainant's upper arm, then damaged a door and threatened to cut another man with the knife. The complainant's wound was five centimetres long and superficial but required stitches. He also suffered a scratch to his left forearm. Cui sentenced to two years' imprisonment suspended after six months for an operational period of two and a half years. On appeal the sentence was reduced to 18 months' imprisonment with release after about two months.

[21] Cui had no previous conviction, was 25 years old and had demonstrated genuine remorse by paying the victim $3,000 by way of compensation. The offending was regarded as out of character for the applicant who was thought not to constitute any risk of re-offending.

[22] The applicant's submissions complain that the sentence imposed failed to take into account that the wounding was a result of criminal negligence rather than a deliberate assault with a knife and that imprisonment had been unusually difficult for the applicant. She had been assaulted in jail and briefly hospitalised. The

sentence was also said not properly to take into account the nature of the applicant's relationship with the complainant and her "mental vulnerabilities". There was no evidence from a psychologist or psychiatrist to lend support to the last submission.

[23] The Schedule of Agreed Facts makes it impossible to accept the submission that the offence was the result of criminal negligence. The contents of the schedule make it clear that the applicant did not throw the knife carelessly, but "at" the complainant, striking him in the leg from which he had to extract the blade.

[24] There is much to be said in the applicant's favour as the submissions made on her behalf indicate. She was involved in a difficult domestic relationship with a demanding and inconsiderate partner. However the fact that the protection order was taken out to restrain both parties is evidence that both husband and wife were guilty of disruptive and violent behaviour towards the other. The applicant has been a worthwhile member of the community, and apart from the present offences she has no criminal history.

[25] The cases do suggest that the applicant has been punished severely. That, however, does not dispose of the application. To succeed the applicant must demonstrate that the sentence imposed was beyond the permissible range, not that it was severe, or that a lesser punishment would have been appropriate, or even more appropriate than the one in fact imposed. There is no one "right" penalty in any case. There is always a range of permissible sentences. Different judges legitimately put weight on different circumstances and their opinions must be respected unless the sentence imposed is beyond the allowable range, or is otherwise affected by an error of fact or law.

[26] There is a feature present in this case which is absent from the authorities cited. It is that the applicant is a mature woman with a relevant, though slight, history of violence. It is that history which was regarded by the sentencing judge as significant. His Honour was referred to, and discussed, the cases and then said:

> "I consider that your circumstances can be distinguished from the circumstances of all of the authorities cited … if for no other reason than you were the subject of a domestic violence order at the time of the commission of the … offence before the Court, and this offence represents the second occasion you have breached that order in the space approximately one month, and only two weeks from when you were dealt with for the first breach on the 23rd of November 2010."

[27] That was a relevant circumstance and the judge was entitled to emphasise it. The fact that the applicant had breached the protection order by using a knife with which she threatened to kill the complainant, cut him as he attempted to defend himself, and then threw the knife at the complainant, wounding him, makes this case more serious than the others. The offending occurred not long after the making of the protection order and very shortly after she had breached the order and been dealt with for that breach.

[28] The courts are familiar with the phenomenon in which domestic violence continues and escalates to the point of death or permanent disability. The sentencing judge was entitled to impose a sentence which would have a salutary effect on the applicant in order to prevent such a calamity.

[29] The penalty imposed, given the nature of the wound and the circumstances in which it was inflicted, was substantial. The applicant could well have been dealt with

more sympathetically, but the relevant question, was the sentence beyond the permissible range, should, in my opinion, be answered in the negative. The offence demonstrated a degree of persistence in violence against the complainant and a deliberate disregard of the protection order. The sentence had to act as a special deterrent to persuade the applicant not to resort to violence.

[30] I would accordingly refuse the application for leave to appeal against sentence.