

SUPREME COURT OF QUEENSLAND

CITATION: *R v Presgrave* [2014] QCA 105

PARTIES: **R**
v
PRESGRAVE, Joel Peter
(applicant)

FILE NO/S: CA No 217 of 2013
DC No 139 of 2013
DC No 263 of 2013
DC No 264 of 2013

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Ipswich

DELIVERED ON: 9 May 2014

DELIVERED AT: Brisbane

HEARING DATE: 15 April 2014

JUDGES: Holmes and Fraser JJA and Thomas J
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **The application for leave to appeal against sentence is refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where applicant pleaded guilty to one count of grievous bodily harm, one count of assault occasioning bodily harm whilst armed, one count of committing public nuisance, one count of going armed so as to cause fear, one count of breach of bail condition, one count of unlawful use of a motor vehicle, one count of driving without a license, one count of driving without a license (repeat offender), and one count of failing to take reasonable care and precautions in respect of a syringe or needle – where the applicant was sentenced to four years imprisonment for the grievous bodily harm, to be served cumulatively with an 18 month sentence for the assault occasioning bodily harm whilst armed; and concurrently with six months imprisonment for the count of going armed in public, and two months imprisonment for the unlawful use of motor vehicle and committing public nuisance, with a parole eligibility date set after one third of the head sentence is served – where some of the offences were committed whilst the applicant was on bail for the

grievous bodily harm offence – where the applicant is 25 years of age and has a criminal history of violent offences – where the offences were of a sustained nature and where the applicant showed no remorse – whether the sentences for grievous bodily harm and assault occasioning bodily harm should have been imposed cumulatively – whether the sentence imposed is manifestly excessive

R v Baker [2012] QCA 237, cited

R v Barry [2011] QCA 119, applied

R v Bryan; ex parte A-G (Qld) (2003) 137 A Crim R 489;

[2003] QCA 18, cited

R v Dancey [2013] QCA 135, cited

R v Johnston [2004] QCA 12, cited

R v Thomason; ex parte A-G (Qld) [2011] QCA 9, cited

Veen v The Queen [No 2] (1988) 164 CLR 465; [1988] HCA 14, cited

COUNSEL: The applicant appeared on his own behalf
P J McCarthy for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the
respondent

- [1] **HOLMES JA:** I agree with the reasons of Thomas J and the order he proposes.
- [2] **FRASER JA:** I agree with the reasons for judgment of Thomas J and the order proposed by his Honour.
- [3] **THOMAS J:** The applicant pleaded guilty to one count of grievous bodily harm, one count of assault occasioning bodily harm whilst armed, one count of committing public nuisance, one count of going armed so as to cause fear, one count of breach of bail condition, one count of unlawful use of a motor vehicle, one count of driving without a license, one count of driving without a license (repeat offender), and one count of failing to take reasonable care and precautions in respect of a syringe or needle.
- [4] He was sentenced to four years imprisonment in relation to the grievous bodily harm, to be served cumulatively with 18 months imprisonment for the count of assault occasioning bodily harm whilst armed. As to going armed in public, the sentencing Judge imposed a period of imprisonment of six months.
- [5] For the summary offences of unlawful use of a motor vehicle and public nuisance, the applicant was sentenced to two months imprisonment, and was further disqualified from obtaining a driver's license for a period of five years. As to the unlicensed driving offences, failing to take care and breach of bail, the sentencing Judge recorded a conviction, but imposed no further punishment. It was noted that the applicant had spent 118 days in presentence custody, from 10 April 2013 to 7 August 2013, and that was deemed time already served under the sentence. The sentencing Judge recorded that the applicant be eligible for parole on 10 February 2015, after one third of the sentence had been served.

Circumstances of the offences

- [6] Three separate schedules of facts were tendered at the sentence hearing, one for each occasion giving rise to the offences for which the applicant seeks leave to appeal the sentences imposed. Those circumstances giving rise to the grievous bodily harm count are as follows.
- [7] On 23 June 2012, the applicant and his brother argued over morphine medication in their possession at the home of their mother. The brothers fought verbally, and the applicant's brother threatened not to share the medication with him. The applicant ran to the kitchen, and retrieved a number of knives before the altercation became physical, and a "couple of punches [were] thrown". With one of the knives retrieved, the applicant made repeated stabbing motions at his brother, who moved his arms up in protection. The applicant struck his brother, embedding the knife into his brother's arm. The knife broke whilst in the brother's arm, so the applicant returned to the kitchen, and grabbed a second, larger knife, and chased his brother from the home. After their mother called emergency services, the applicant took his mother's car, without permission, and drove away whilst he had no license.
- [8] Initially it was thought that the victim's stab wound would be amenable to surgical repair under local anaesthesia, however it was later observed that the injury had caused arterial bleeding that staff at the local hospital were unable to control; the applicant's brother was transferred to a larger hospital for treatment. The grievous bodily harm was stated to be a risk of uncontrolled bleeding and infection, which was likely to endanger life or cause permanent injury to health. Fortunately, after treatment, there was no lasting injury from the incident.
- [9] The incident of assault occasioning bodily harm whilst armed occurred when the applicant was on bail for the offence of grievous bodily harm. On 25 March 2013, a young bystander (the victim) witnessed the applicant swearing and acting aggressively towards a female, who was in fact the applicant's de facto. She had two children with her. The cause of the conduct was that the applicant's de facto had apparently acted to get the family off the bus early. The applicant pushed one of the children aside to get closer to his de facto, who asked the applicant to leave her alone.
- [10] The victim intervened, and the applicant raised his fists, advancing on the young man, who kicked him away. In the course of the applicant advancing on him again, the young man punched the applicant in the face.
- [11] The applicant retrieved an advertisement sign, striking the victim on the shoulder. After being punched in the face, the applicant dropped the sign, however, retrieved another metal sign, striking the victim again on the shoulder, causing the victim to again punch the applicant in the face, with enough force so that the applicant fell over. The victim told the applicant to "leave it alone and go, it's over" but the applicant persisted and attacked the young man with another sign. A blow directed at the young man's face was blocked with his forearm and the applicant was punched again in the face, falling over.
- [12] The young man returned to his friends and the applicant walked away, only to return, confronting the young man and holding a plank of wood with nails protruding from it. When the applicant invited the young man to "now come and have a go", the young man refused. The applicant struck the young man in the arm, puncturing the skin with a nail. Somehow, the young man managed to punch him again in the

face, knocking him to the ground. There were in excess of 15 people in the vicinity of the incident when the police arrived shortly thereafter.

- [13] On 7 April 2013, whilst again on bail for the earlier offences, the applicant attended the residence of Mr and Mrs Schlect, where he confronted the couple, asserting they had made accusations regarding his de facto. He told Mr Schlect that he was going to cut him up with a knife; retrieved a large kitchen knife from a nearby caravan and returned, threatening to kill Mr Schlect by cutting his heart out. He continued to verbally abuse the scared couple for a couple of minutes. The police later found him at his mother's home, in breach of his bail undertaking.

The applicant's personal circumstances

- [14] The applicant, now 25 years of age, was between 23 and 24 at the time of offending, and has lived in a de facto relationship for a period of around nine years. He has two children from that relationship.
- [15] The applicant has a criminal history involving offences of violence. In 2008, the applicant was convicted of offences of threatening violence, assault occasioning bodily harm and wilful damage, receiving a suspended sentence, but breaching it on a number of occasions. In 2009 the applicant was sentenced to imprisonment for offences of burglary and armed robbery in company with personal violence (three charges). The applicant was given parole and, in August 2012, whilst on bail for the grievous bodily harm charge, was convicted for breaching a domestic violence order which involved violence against his de facto partner.
- [16] The applicant suffers an alcohol and drug problem which he is endeavouring to overcome.

The sentence

- [17] The sentencing Judge noted that personal deterrence loomed large in the sentence as the applicant had "fear anger management problems" with which the applicant had to deal.
- [18] In relation to the grievous bodily harm, the sentencing Judge took into account that the offence was committed as a result of an argument that occurred with his brother, and that there was no permanent damage to his brother's arm. The sentencing Judge noted that there was some persistence in chasing his brother after stabbing him and grabbing a second larger knife.
- [19] As to the offence of assault occasioning bodily harm whilst armed, the sentencing Judge noted that the offence occurred in a public place in the afternoon and that the applicant had been shouting at a female and pushing a child when the 17 year old victim attempted to intervene. Whilst the victim was well capable of defending himself, the applicant ultimately made use of weapons to pursue him, culminating in hitting him with a fence paling with nails protruding, puncturing the complainant's skin and leaving a significant cut.
- [20] The summary offences also involved further violence: going armed in public, threatening to hurt someone with a knife and to kill someone and, being aggressive and verbally abusive. The offences, again, occurred whilst on bail for the grievous bodily harm.

- [21] The sentencing Judge observed that, in comparable cases, few offenders had such a serious history of violence as did the applicant. The applicant's age, the early plea of guilty, and evidence as to attempts to overcome the drug problem were considered, but balanced against the persistent offending and, the fact that some offences occurred in public, such as the assault occasioning bodily harm whilst armed.
- [22] The sentencing Judge observed that general deterrence was important, as was personal deterrence in the case of the applicant, and concluded that a substantial period of imprisonment was called for.

The submissions

- [23] The applicant submitted that the sentence was manifestly excessive in all the circumstances and specifically, that:
- Too much reliance was placed upon his prior history.
 - Too much weight was given to the comparatives submitted by the Crown.
 - In the comparative cases submitted, the offences were far more serious in nature and the injuries were far more serious in all respects.
 - The 18 month sentence imposed for assault occasioning bodily harm should not have been imposed cumulatively as this was manifestly excessive.
 - Too much emphasis was placed upon the importance of general deterrence.
 - Too little consideration was given to the fact that there had been an early plea of guilty.
 - Too little regard was had for personal mitigating circumstances such as, that:
 - The applicant is 25 years old with two young children having been with his partner for nine years.
 - The applicant had been trying to rehabilitate himself, not just for himself but for his children and partner.
 - Prospects of rehabilitation would be hampered by a lengthy sentence due to insufficient treatment available in jail and a lack of support.
 - The argument with the applicant's brother was over drugs available through the methadone program and, got out of hand because, had the applicant been deprived of his medication, he would have become very ill and suffered withdrawal systems and serious harm to his health which could have caused a major lapse.
 - The applicant was truly trying to change his life for his young family and an excessively long sentence would impact upon his chances of being able to turn his life around and would have an effect on his children and family.

[24] The applicant submitted that the appropriate range for sentencing would be in the range of two to three years as a head sentence.

[25] The respondent:

- Pointed to the numerous prior convictions for offences of violence, including unprovoked attacks, using weapons, precipitated by consumption of alcohol and temper and to the fact that a number of the offences were committed whilst on bail.
- Drew attention to the fact that the sentencing Judge demonstrated a careful balancing of the guiding principles in sentencing and matters relevant to the process including the use of violence and factors identified in section 9(4) of the *Penalties and Sentences Act 1992*.
- Submitted that the sentencing Judge did not permit extraneous or irrelevant matters to have any impact and did not fail to take into account any material consideration, particularly recognising matters in favour of mitigating the sentence, including the applicant's young age, the early plea and the applicant's efforts to try to overcome his drug problem. These features were recognised in a meaningful way through an advanced date for parole at 1/3 of the effective sentence imposed.
- As to the prior criminal record, submitted that it was properly a significant factor to be addressed in light of the applicant's continued offending, with a more severe penalty being warranted where the applicant had demonstrated a continuing attitude of disobedience of the law.
- Submitted that the sentencing Judge was well justified in imposing cumulative sentences in recognising the overall criminality in the offending. In this respect, it was submitted that it was necessary for the Court to consider the totality of the criminal behaviour so as to impose appropriate sentences for all offences.
- Submitted that the component sentences imposed were not an error when measured against yardsticks of other sentences addressed in the more or less comparable authorities.

Consideration

[26] It is difficult to identify a range within which the appropriate sentence will fall when considering the offence of grievous bodily harm. This is because the appropriate sentence is influenced by factors such as the nature of the conduct, whether the conduct involved a swift and short event or was more sustained in nature, the extent and nature of the injuries, the age of the offender, the offenders criminal history, whether, and in what way, a weapon was used, and whether any remorse is shown by the offender.

[27] The decisions in the cases of *R v Baker*,¹ and *R v Dancey*² are, in my opinion, relevant. The sentence imposed by the sentencing Judge was broadly consistent with the sentences imposed in those cases.

¹ [2012] QCA 237.

² [2013] QCA 135.

- [28] In *Baker*, there was an argument between two brothers which resulted in one receiving a knife injury, which, if it had been left untreated, was likely to have endangered his life. The sentence of four years was upheld, being described as ‘moderate’.
- [29] In *Dancey*, the victim was stabbed, leaving a laceration to the lung, which, if left untreated, would have also have endangered his life. The sentence was five years to be served cumulatively on a current sentence. Ann Lyons J reviewed a number of earlier decisions (particularly *R v Bryan; ex parte A-G(Qld)*,³ *R v Johnston*⁴ and *R v Thomason; ex parte A-G (Qld)*⁵), all of which suggested a sentencing range contemplating a minimum of six years imprisonment. Ann Lyons J upheld the sentence of five years, noting that it was consistent with previous sentences. Her Honour noted it was moderated, given that it was a cumulative sentence, by fixing a parole eligibility date of 16 months.
- [30] In relation to the grievous bodily harm, the applicant here was sentenced to four years imprisonment. In relation to the assault occasioning bodily harm whilst armed, the applicant was sentenced to 18 months imprisonment, so the effective “head sentence” was a term of five and a half years imprisonment. A date was fixed of 10 February 2015 for eligibility for parole – effectively 22 months or 1/3 of the “head sentence”.
- [31] The sentence imposed here is consistent with those earlier authorities.
- [32] The applicant argues that the sentencing Judge erroneously placed a ‘great deal of emphasis’ on previous history. Previous criminal history is a factor which can be taken into account in determining the level of sentence which is appropriate. It should not be given a weight such that it becomes more influential than the circumstances of the offence in question. It may be relevant to the question of whether the offence is uncharacteristic for the offender or, on the other hand, whether the offender demonstrates a continuing attitude of disobedience of the law.⁶
- [33] The penalty which is relevant may take account of continuing disobedience of the law.
- [34] The sentencing Judge did not take account of previous criminal history so as to impose a penalty which was disproportionate to the seriousness of the offences.
- [35] Multiple offences were involved, and the sentences of four years and 18 months were applied cumulatively. The applicant argues that the sentences should not have been imposed cumulatively.
- [36] A question arises as to whether the “totality principle” requires the sentencing Judge to review and reduce the aggregate sentence so as to ensure it is fair. The principle has been described as follows:

“[T]he effect of the totality principle is to require the sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is “just and appropriate”.⁷

³ (2003) 137 A Crim R 489.

⁴ [2004] QCA 12.

⁵ [2011] QCA 9.

⁶ *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 477.

⁷ Thomas, *Principles of Sentencing*, 2nd edition (1979), pages 56-57.

- [37] As Fraser JA pointed out in the case of *R v Barry*:⁸
- “... The totality principle does not require such a reduction in every case. In some cases of multiple offending the offender should not be given the benefit of that merciful approach.”⁹
- [38] In that case, the sentencing Judge considered factors such as the applicant’s criminal history, the fact that the applicant committed a serious offence only shortly after being released from prison and the fact that the offence was committed whilst the suspended sentence was in place. Fraser JA concluded that the sentencing Judge was plainly right to take those matters into account and that they would weigh against any reduction in sentence.
- [39] Fraser JA also pointed out that some allowance for the totality principle may have been manifested in an early parole eligibility date.
- [40] Those factors also come into play in the applicant’s case. The component sentences imposed are consistent with previous authorities. In determining that the sentences should be imposed cumulatively, the total sentence was appropriate taking into account factors such as the criminal history, which included violence and use of weapons, the serious nature of the offences in question, being of a sustained nature which escalated as the event unfolded and included use of weapons in public, the fact that some of the offences occurred during a time the applicant was on bail with respect to previous offences, and that the applicant showed no remorse.
- [41] In all the circumstances, the sentences imposed were not manifestly excessive.
- [42] I would therefore refuse the application for leave to appeal against sentence.

⁸ [2011] QCA 119.

⁹ At [18].