SUPREME COURT OF QUEENSLAND

CITATION:	*R v Anderson* [2014] QCA 134
PARTIES:	**R** **v** **ANDERSON, Tony Kristen John** (appellant/applicant)
FILE NO/S:	CA No 302 of 2013 SC No 646 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	8 April 2014
JUDGES:	Margaret McMurdo P and Morrison JA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction be dismissed.** **2. Leave to appeal against sentence be refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was found guilty of one count of serious assault, one count of dangerous operation of a motor vehicle and one count of malicious act with intent – where the appellant pointed a long barrelled firearm from the passenger window of a vehicle at a marked police car that was in pursuit – where the appellant pointed, aimed and fired a long barrelled firearm from the passenger window of a vehicle and hit the bonnet of an unmarked police car that was in pursuit at speed – where the appellant was found not guilty of, *inter alia*, one count of attempted murder – whether a verdict of guilty on malicious act with intent is inconsistent with the verdict of not guilty of attempted murder CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was found guilty of, *inter alia*, one count of malicious act with intent – where the appellant pointed, aimed and fired a long barrelled firearm from the passenger window of a vehicle and hit the bonnet of an unmarked police car that was in pursuit at speed – whether the jury could be satisfied

the appellant's actions were willed – whether the verdict of guilty for a malicious act with intent was unsafe and unsatisfactory

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was found guilty of one count of serious assault, one count of dangerous operation of a motor vehicle and one count of malicious act with intent – where the appellant was sentenced to an effective head sentence of 10 years imprisonment – where the appellant was declared to be a serious violent offender – where the appellant had been convicted of attempted murder in 2001 and was sentenced to 12 years imprisonment and declared to be a serious violent offender – where the appellant had been convicted for robbery with actual violence whilst armed with a dangerous or offensive weapon – whether the sentence was manifestly excessive

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the appellant was sentenced to an effective head sentence of 10 years imprisonment – where the appellant was declared to be a serious violent offender – where the sentencing judge did not place particular emphasis on the appellant's personal circumstances – where the sentencing judge referred to a decision involving a more dangerous series of acts – whether the sentencing judge failed to have regard to factors personal to the appellant's circumstances and whether this resulted in a manifestly excessive sentence

M v The Queen (2004) 181 CLR 487; [1994] HCA 63, cited
Mackenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, applied
R v Mulholland [2001] QCA 480, explained
R v SBL [2009] QCA 130, cited

COUNSEL: The appellant/applicant appeared on his own behalf
T A Fuller QC for the respondent

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

[1] **MARGARET McMURDO P:** The appeal against conviction should be dismissed and the application for leave to appeal against sentence refused for the reasons given by Boddice J.

[2] **MORRISON JA:** I have read the reasons of Boddice J and agree with those reasons and the orders his Honour proposes.

[3] **BODDICE J:** On 21 November 2013, a jury found the Appellant guilty of one count of serious assault, one count of dangerous operation of a motor vehicle and one count of malicious act with intent. The jury found the Appellant not guilty of one count of serious assault, one count of dangerous operation of a motor vehicle and one count of attempted murder. All of the offences arose out of events in the early hours of 5 April 2012.

[4] On 22 November 2013, the Appellant was sentenced to an effective head sentence of 10 years imprisonment. A declaration was made that he was convicted of a serious violent offence. It was also declared that 592 days in pre-sentence custody was time served in respect of the sentences. The Appellant was also disqualified absolutely from holding or obtaining a driver's licence.

[5] The Appellant appeals the convictions, and seeks leave to appeal his sentences of imprisonment. He contends the verdict of guilty on the count of malicious act with intent is inconsistent with the verdict of not guilty of attempted murder, and that that verdict is otherwise unsafe and unsatisfactory. He contends leave to appeal the sentences should be given as they were manifestly excessive, and failed to have regard to factors personal to his circumstances.

Evidence

[6] Shortly after midnight, police operating a roadside breath test on South Pine Road at Enoggera stopped a silver BMW sedan. That sedan had recently been purchased by the Appellant but was being driven by his co-offender, Kathy-Maree Green. The Appellant was seated in the front passenger seat.

[7] After Green returned a negative reading, one of the police officers questioned why there was no registration label. In response, the Appellant produced some papers to establish details of its registration. The Appellant was described as co-operative and not acting aggressively.

[8] Green was also asked to produce her licence. She did not do so. Instead, Green placed the sedan in reverse and drove off at great speed. One of the police officers, Keys, shouted for her to stop and attempted to remove the keys. He ran beside the sedan for approximately 10 metres. Whilst doing so, he was struck by the sedan causing bruising to his hip. That event constituted Count One on the indictment. The Appellant was found not guilty of that count.

[9] The sedan continued to reverse at speed for a distance before executing a sudden U-turn and driving the wrong way along South Pine Road and turning right into Stafford Road. The sedan remained on the incorrect side of the road for approximately 100 metres. That driving constituted Count Two on the indictment. The Appellant was found not guilty of that count.

[10] Another police officer, Higgs, gave chase, activating the police light and siren. He estimated the sedan initially was travelling at around 100 kilometres per hour but after a distance slowed to about 60 to 70 kilometres per hour. At some point, Higgs observed the Appellant lean out the passenger window and point a long barrelled firearm at the windscreen of the police vehicle. Higgs immediately terminated the pursuit. This event constituted Count Three on the indictment. The Appellant was found guilty of that count.

[11] An unmarked police car travelling along Stafford Road then became involved in the pursuit. Police officers Guelen-Oates and Olsson were the occupants of that

vehicle. The sedan had passed their vehicle at speed near the intersection of Stafford and Webster Roads. The sedan was said to be travelling at 80-90 kilometres per hour. The unmarked police vehicle activated its lights and siren and set off in pursuit.

[12] After travelling approximately 300 metres along Stafford Road, Guelen-Oates observed the Appellant lean out of the vehicle momentarily before returning inside the vehicle. Olsson also observed the Appellant lean out the passenger window of the vehicle. The Appellant then pointed a rifle or something similar, steadied himself and aimed at the vehicle. Both officers heard a metal ting sound from the front of the vehicle. They immediately terminated the pursuit. This episode of driving constituted Count Four on the indictment. The Appellant was found guilty of that count.

[13] A later investigation revealed the unmarked police vehicle had sustained damage to the bonnet, proximate to the windscreen on the driver's side. According to a ballistics officer, the damage was consistent with the bonnet having been struck by a lead .22 calibre projectile. Two small fragments of a lead projectile were found in the engine bay.

[14] On 9 April 2012, the Appellant was found in possession of a shortened .22 calibre rifle. An examination revealed it had a single stage trigger design with a trigger pressure of 1.7 kilos. This was above custom standards for a safe firearm. The ballistics officer gave evidence the rifle did not have a "light" trigger, and that only one motion was required to discharge the rifle.

[15] Counts Five, Six and Seven, which were in the alternative, all concerned the Appellant's actions in pointing and discharging a firearm at the unmarked police vehicle. Count Five alleged the Appellant had attempted unlawfully to kill Guelen-Oates. The act relied upon was the discharge of the firearm in the direction of the unmarked police vehicle containing Guelen-Oates. The Appellant was found not guilty of that count.

[16] Count Six, in the alternative, alleged the Appellant, with intent to prevent his lawful arrest, unlawfully attempted to strike Guelen-Oates with a projectile. The Appellant was found guilty of this count. That verdict rendered it unnecessary to obtain a verdict in respect of Count Seven.

Conviction

Appellant's submissions

[17] The Appellant submits that once the jury found him not guilty of attempted murder there was no basis upon which a jury, properly instructed, could be satisfied of the requisite intent sufficient to found his guilt on Count Six, being malicious act with intent. A verdict of guilty on that count is therefore inconsistent with the verdict of not guilty of attempted murder. Further the jury could not be satisfied, on the evidence, that his actions were a willed act. A finding to that effect was unsafe and unsatisfactory.

Respondent's submissions

[18] The Respondent submits there is no inconsistency between the verdicts of guilty of malicious act with intent, and not guilty of attempted murder. The charge of attempted murder required the jury to be satisfied beyond reasonable doubt that the Appellant had an intention to kill Guelen-Oates. There were many reasons why the jury might have had a reasonable doubt about the existence of that intention.

[19] The count of malicious act dealt with a different intent, namely, an intent to evade lawful arrest. Having regard to the circumstances of the pursuit, and the actions of the Appellant in leaning out of the vehicle and discharging a loaded firearm, it was open to the jury to be satisfied beyond reasonable doubt the Appellant had deliberately discharged the firearm in the direction of the police vehicle with the intent of avoiding arrest.

Discussion

[20] Whether different verdicts are inconsistent requires a consideration of whether those verdicts represent an unacceptable affront to common sense and logic.[1] Satisfaction of this test is not met if there is a proper basis to reconcile those different verdicts.

[21] A consideration of the different elements in the alternate counts of attempted murder and malicious act with intent provides a logical basis to reconcile those differing verdicts. The evidence which must have been accepted by the jury established the Appellant, whilst an occupant in a car being pursued by a police vehicle which had activated its lights and siren, had deliberately leaned out of that moving vehicle and aimed and discharged a loaded firearm in the direction of the bonnet of the vehicle, not its windscreen.

[22] Whilst a jury, on those facts, may have had a reasonable doubt as to whether the Appellant in discharging that firearm in the direction of the bonnet, intended to kill the police officer in that vehicle, the count of malicious act did not require any such intent. That count required the jury to consider whether the malicious act of discharging the firearm was done with the intent of evading lawful arrest. Having regard to the distance over which the pursuit had occurred, it was open to a jury, properly instructed, to be satisfied beyond reasonable doubt the malicious act was done with that intent.

[23] The verdict of guilty on Count Six is not inconsistent with the verdict of not guilty on Count Five. That verdict was also not inconsistent with the verdicts of not guilty on Counts One and Two which both arose out of the initial driving by Green. There was a logical basis for a jury to have a reasonable doubt as to the Appellant's involvement in the initial stage of the incident. The situation was different once the Appellant became actively involved in the pursuit by pointing the rifle in the direction of the first police vehicle.

[24] The verdict of guilty on Count Six was also not unreasonable. There was ample evidence to support a verdict of guilty.[2] The evidence of the police officers as to the actions of the Appellant in leaning out of the vehicle, and in aiming the firearm in the direction of the police vehicle before discharging that firearm, supported a finding that the discharge of that weapon was deliberate and did not constitute an unwilled act on the part of the Appellant.

Sentence

Sentencing remarks

[25] The sentencing judge observed the most serious offence was that of malicious act with intent. Whilst there were not many vehicles on the road on the night in

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1 *Mackenzie v The Queen* (1996) 190 CLR 348 at 367-368; *R v SBL* [2009] QCA 130 at [29]-[30].

2 *M v The Queen* (1994) 181 CLR 487.

question, the sentencing judge accepted that discharging a firearm from a moving vehicle towards another moving vehicle was an act of extreme danger.

[26] The sentencing judge found the decision in *R v Mulholland*,[3] although involving a much more dangerous series of acts, was comparable in that it also involved the discharge of a firearm in order to evade arrest. After noting the Court of Appeal, in *Mulholland*, had observed a sentence of ten years imprisonment fell towards the lower end of an applicable sentence, the sentencing judge found the basic facts in the Appellant's case were the same. He sentenced the Appellant, on the count of malicious act with intent, to imprisonment for ten years. The Appellant was declared to be convicted of a serious violent offence. On the remaining counts, the Appellant was sentenced to imprisonment for two years and 18 months respectively.

Discussion

[27] Whilst the Appellant contends the sentence of ten years imprisonment, having regard to the declaration that he was convicted of a serious violent offence, was manifestly excessive in the circumstances, such a sentence was well within the sentencing discretion having regard to the serious nature of the offence and the Appellant's antecedents.

[28] The offences involved a sustained course of conduct engaged in for the purposes of evading arrest. That course of conduct included aiming and discharging a loaded firearm in the direction of a unmarked police vehicle during a pursuit at speed. As the sentencing judge rightly noted, "to fire a rifle from a moving vehicle towards another moving vehicle is an act of extreme danger".

[29] The Appellant was born on 18 June 1982, having been 29 years of age at the time of the offences and 31 years of age at the time of sentence. He has an extensive criminal history, including a previous conviction for attempted murder in 2001 for which he was sentenced to 12 years imprisonment with a declaration that he was convicted of a serious violent offence. He also has a previous conviction for robbery with actual violence whilst armed with a dangerous or offensive weapon. The present offences were committed less than 12 months after his release from his earlier lengthy period of imprisonment.

[30] The sentencing judge acknowledged the decision of this Court in *R v Mullholland*[4] involved a much more dangerous series of acts, including firing multiple shots. However, the sentence imposed in that case was found to be at the lower end of the sentences to be imposed for sustained, deliberate dangerous conduct during a high speed police pursuit over a significant distance, and the discharging of a firearm with the intent of evading arrest.

[31] Whilst the sentencing judge did not place particular emphasis on the Appellant's personal circumstances, nothing in those personal circumstances warranted tempering the sentence of imprisonment to be imposed for the most serious offence, malicious act with intent. The fact the Appellant will, by reason of the declaration he was convicted of a serious violent offence, once again serve a very lengthy period of imprisonment when he has spent most of his adult life in custody cannot detract from the seriousness of his conduct. The need for deterrence, both general and personal, far outweighed any considerations of rehabilitation.

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3 [2001] QCA 480.

4 [2001] QCA 480.

Conclusion

[32] The verdicts of the jury were neither inconsistent nor unreasonable. They were also not against the weight of the evidence. The effective sentence of imprisonment was not manifestly excessive.

[33] I would order:

1. The appeal against conviction be dismissed;
2. Leave to appeal against sentence be refused.