SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cheng* [2016] QCA 193
PARTIES:	**R** **v** **CHENG, Saul Matthew** (applicant)
FILE NO/S:	CA No 290 of 2015 SC No 104 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 5 November 2015
DELIVERED ON:	2 August 2016
DELIVERED AT:	Brisbane
HEARING DATE:	23 June 2016
JUDGES:	Holmes CJ and Fraser and Philip McMurdo JJA 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 the applicant was convicted on his own pleas of attempted murder and serious assault – where the applicant was sentenced to concurrent terms of 12 years imprisonment for attempted murder and two years imprisonment for serious assault – where the applicant shot the complainant with a homemade pipe gun – where the complainant was hospitalised for injuries which would have compromised her life – where the complainant continues to suffer significant psychological injuries and constant pain – where the applicant bit a police officer causing him to bleed – where the police officer was emotionally affected by the offence – where the applicant had an extensive, violent criminal history – where the applicant had chronic post-traumatic stress disorder and a significant mixed personality disorder – where the evidence of the applicant's mental health did not suggest that the applicant lacked any relevant capacity to commit the offences – where the medical evidence was guarded about the prospects of the applicant's rehabilitation – where, in sentencing the applicant, the sentencing judge took into account the applicant's pleas of guilty, the

circumstances of the offence and the applicant's personal circumstances – where the sentencing judge considered the protection of the community from the risk of physical harm as a relevant sentencing consideration – whether the sentence was manifestly excessive

Penalties and Sentences Act 1992 (Qld), s 9

Channon v The Queen (1978) 33 FLR 433; [1978] FCA 16, considered
R v Forster [2002] QCA 495, considered
R v Goodger [2009] QCA 377, cited
R v Graham [2015] QCA 137, considered
R v Neumann; Ex parte Attorney-General (Qld) [2007] 1 Qd R 53; [2005] QCA 362, cited
R v Reeves [2001] QCA 91, cited

COUNSEL: The applicant appeared on his own behalf
D C Boyle for the respondent

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

[1] **HOLMES CJ:** I agree with the reasons of Fraser JA and the order he proposes.

[2] **FRASER JA:** The applicant was convicted on his pleas of guilty and sentenced to concurrent terms of 12 years imprisonment for attempted murder and two years imprisonment for serious assault. He has applied for leave to appeal against sentence on the ground that the sentence is manifestly excessive.

[3] The circumstances of each offence were set out in agreed statements of facts. The complainant in the attempted murder offence was a friend of the applicant at whose house the applicant stayed for a week or so whilst he sought new accommodation. The complainant asked the accused to leave her house after he punched one of the neighbours. The applicant refused to leave and stabbed a coffee table with a steak knife when the complainant attempted to telephone police. The applicant eventually left after the complainant screamed at him for using the knife in that way. A few days later the applicant returned to the house. The applicant asked the complainant for money which she owed him. The complainant explained that she did not have the money but would start paying him back as soon as she did. The applicant asked for a table he had purchased and the complainant gave it to him. The complainant told the applicant that she did not want him to come to her house again and that there was no place in her life for him. He responded "that's okay, you won't be in my life much longer". He produced a crude, homemade pipe gun similar to a .22 calibre firearm. The applicant held the weapon against his right hip and fired it towards the complainant. She was shot in the left side of her chest near the midline. The applicant ran from the house, disposed of the weapon, and was located by police at a friend's house the following day. Friends of the complainant who were present at her house provided first aid. The complainant was hospitalised for eight days and treated to prevent the injuries to her lungs causing respiratory compromise which would have endangered her life. She suffered, and continues to suffer, significant psychological injuries and has shrapnel lodged in her body which causes her to experience constant pain.

[4] A few days before committing the offence the applicant had shown a friend how to operate the firearm. On the day of the offence the applicant had visited friends who lived around the corner from the complainant's house and they saw him load the firearm with a .22 calibre bullet and demonstrate how it worked. After the applicant committed the offence, the applicant told one of his friends that he shot the complainant because he was "pissed off". On the following day other friends described the applicant as panicked and distressed. He surrendered to police without incident and declined to be interviewed. The Crown accepted that the applicant did not form an intent to kill the complainant until he removed the weapon from his pocket and shot her.

[5] After the applicant was taken to the watch house and charged with attempted murder a police officer escorted the applicant to the observation cell. The applicant immediately began to punch the wall with his fists. The police officer yelled at the applicant to stop, entered the cell, and forced the applicant up against the wall in an effort to stop the applicant injuring himself. The applicant violently wrestled with the police officer. Other officers assisted to restrain the applicant, but he struggled, broke free and bit the police officer's right bicep, causing it to bleed and bruise. The applicant continued to struggle before being placed on the ground and handcuffed. He said that he bit the police officer because he wanted the police officer to shoot him. The police officer was emotionally affected by the offence. He feared that he might have contracted a communicable disease in the period before the diagnosis was made. He received treatment from psychologists. The offence and its consequences also placed significant stress on his personal relationships and negatively affected his career and finances.

[6] The applicant was 44 years old when he committed the offences and 46 years old when he was sentenced. He had a concerning criminal history. The first entry was a conviction in 1990, when the applicant was 21 years of age, for which he was sentenced to probation and community service for offences involving damage to property. He had five convictions for similar offences up until 2007. The applicant was convicted in 1992 of grievous bodily harm with intent to do grievous bodily harm, for which he was sentenced to six months imprisonment with 18 months' probation; since the applicant had spent approximately 15 months in presentence custody, the effective sentence was 21 months imprisonment and 18 months' probation. The circumstances of that offence were that after the complainant (in that offence) refused to resume a previous relationship with the applicant, the applicant strangled her to the point of unconsciousness. In 2002, the applicant was given a suspended term of imprisonment of three years for assault occasioning bodily harm and breach of a domestic violence order. In that offence he punched his recently estranged wife in the face, causing her to fall to the floor, after arguing with her. The applicant committed many other offences: assault occasioning bodily harm in 2005 upon a man who had made a comment about the applicant's aggressive behaviour at a petrol station; three counts of indecent treatment of a child under 16 years of age, for which he was sentenced to a suspended term of three years imprisonment after serving 12 months; two counts of threatening violence and two counts of assaulting or obstructing a police officer in 2009, for which 12 months' probation was imposed; assault occasioning bodily harm in 2009, which commenced with the applicant punching someone in the nose because that person did not have his dog on a leash; assault occasioning bodily harm in 2010 (the applicant argued with someone he was with at the movies and then punched that person in the nose) for which the applicant was sentenced to six months imprisonment with a parole release date after three months; assaulting or obstructing a police officer in 2011 (the police officer had intervened when the applicant began to threaten adults and children); assault

occasioning bodily harm in January 2012, breach of a domestic violence order on 9 February 2012, and two counts of assaulting or obstructing police officers on the same date (the applicant violently resisted when police attempted to restrain him after he had breached a domestic violence order by threatening to kill the aggrieved and smashing her pot plants), for which the applicant was sentenced to six months imprisonment suspended for 12 months and 12 months' probation.

[7] A report by a psychiatrist, Dr Beech, referred to the applicant having a history of significant child abuse and trauma aggravated by parental separation and foster care placement before an eventual placement with the applicant's maternal grandmother. He had significant behavioural disturbances as a child and was expelled from school. Dr Beech considered that the applicant had a complex chronic post-traumatic stress disorder which had arisen from severe childhood abuse and trauma. This had made him vulnerable to affective instability, anger and episodes of rage. He had borderline intellectual functioning and his history indicated that he also had significant mixed personality disorder with anti-social and borderline traits of affective instability, anger, recurrent thoughts of self-harm, interpersonal conflict, and criminal activity. The applicant recounted to Dr Beech that in the period leading up to the offences the applicant had ceased medication and his mental state had deteriorated with resulting volatility, a sense of stress and exacerbation of the post traumatic phenomena. The applicant described hearing voices, which Dr Beech considered likely reflected pseudo-psychotic dissociative hallucinations. Dr Beech considered that the applicant was not deprived by any mental illness or any capacity that would have rendered him of unsound mind and there was nothing to indicate he was affected by psychosis at the time of the offending. The applicant's mental state probably deteriorated following his arrest and again in prison.

[8] Another psychiatrist, Dr Butler, referred to the applicant having displayed a longstanding pattern of poor adaptation to interpersonal, social and occupational stressors, manifested by conflict in the workplace, with intimate partners, and with strangers when the applicant perceived a threat; the applicant displayed a rapid escalation of rage and committed physical assaults. Dr Butler considered that the applicant's personality disturbance and depressive phenomena were likely to persist, they could be partially ameliorated by appropriate treatment, and if the applicant were in the community he would require close monitoring of his mental state, regular support of psychotherapy, anger management training, and the continued use of appropriate medications.

[9] The maximum penalties for the attempted murder offence and the offence of serious assault of police officers are life imprisonment and 14 years imprisonment respectively. The sentencing judge took into account the circumstances of the offences and the applicant's personal circumstances which I have summarised. The sentencing judge also took into account the applicant's pleas of guilty to the charges the day before the trial was scheduled to commence, thereby allowing for savings in the administration of justice and, more significantly, dispensing with any requirement for the complainants to give evidence. The sentencing judge accepted that the applicant had a very deprived upbringing. Prior to his arrest he was living in an unstable accommodation situation. He had experienced abuse and neglect. He had a limited capacity to trust other people and harboured latent grievances about authority figures and women in particular. The sentencing judge referred to the medical evidence and remarked that, whilst the applicant's mental illness arising from his very disadvantaged childhood was at the base of some of his offending, his traits of violence were concerning and the protection of the community was a factor which must be taken into account.

[10] At the hearing of the application for leave to appeal against sentence the applicant referred to his written submission. I will discuss the points made in that submission.

[11] The applicant referred to his completion of many programs in prison, including self-education. This was taken into account; the sentencing judge referred to the applicant having taken "a good step" towards rehabilitating himself by completing courses.

[12] The applicant submitted that he was not well at the time of the offences and that it was not taken into account that he was not of sound mind at the time of the offences. The sentencing judge appropriately took into account the evidence of the applicant's mental health in the way already described. That evidence did not suggest that the applicant lacked any relevant capacity to commit the offences to which he pleaded guilty. The doctors' prognoses are guarded, at best, about the prospects of the applicant's rehabilitation. The relevant principles in such a case are discussed in some detail in *R v Neumann; Ex parte Attorney-General (Qld)*[1] and *R v Goodger*,[2] but for present purposes it is sufficient to refer to the following passage in Brennan J's judgment in *Channon v The Queen*:[3]

> "Psychiatric abnormality falling short of insanity is frequently found to be a cause of, or a factor contributing to, criminal conduct. The sentencing of an offender in cases of that kind is inevitably difficult. The difficulty arises in part because the factors which affect the sentence give differing significance to an offender's psychiatric abnormality. An abnormality may reduce the moral culpability of the offender and the deliberation which attended his criminal conduct; yet it may mark him as a more intractable subject for reform than one who is not so affected, or even as one who is so likely to offend again that he should be removed from society for a lengthy or indeterminate period. The abnormality may seem on one view to lead towards a lenient sentence, and on another to a sentence which is severe. That is not an unusual phenomenon in sentencing, where the court must fashion a sentence which either reconciles or balances the various objectives of sentencing, sometimes giving emphasis to one of the objectives of sentencing, sometimes giving emphasis to another."

[13] In light of the evidence, especially the medical evidence, the very violent character of the attempted murder offence, and the applicant's long history of offences of violence, the sentencing judge did not err by regarding the protection of the community from the risk of physical harm as a relevant sentencing consideration. In those circumstances, that was one of the factors which s 9(3) of the *Penalties and Sentences Act* 1992 obliged the sentencing judge to have primary regard in sentencing the applicant.

[14] The applicant submitted that he could not remember what happened. The sentencing judge was not obliged to mitigate the sentence in any material way on that account. Defence counsel submitted to the sentencing judge that the applicant had reported at different times that he was either unable to recall the incident or that he recalled the incident as having occurred in different ways but that by the applicant's plea of guilty he accepted that he had the intent to murder the complainant at the relevant time. Defence counsel also submitted that the various accounts given by the applicant concerning his recollection were not consistent with his plea to the extent that those

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1 [2007] 1 Qd R 53 at [27]-[30].
2 [2009] QCA 377 at [18]-[21], [24]-[25].
3 (1978) 33 FLR 433 at 436-437.

accounts were exculpatory of the offences, but those accounts perhaps reflected a tumultuous state of mind whilst his mental health problems were increasing. The applicant's state of mind when he committed the offences and his mental health generally were taken into account.

[15] The applicant submitted that the sentencing judge did not take into account that his early plea of guilty saved court time and the need for the complainants to give evidence. The applicant entered a late plea of guilty on the day before the scheduled day for the commencement of the trial. The sentencing judge took into account the savings to the community of that plea and also that it dispensed with the need for the complainants to give evidence.

[16] The applicant submitted that he "asked for 10 to 8. But he did not say that". That apparently referred to a request by the applicant to defence counsel to seek a sentence of imprisonment between eight and ten years. Defence counsel submitted that the sentence should be imposed in the range of ten to 12 years. That was an unexceptionable forensic decision by defence counsel.

[17] The applicant submitted that his apology to the court and the victims of his offences was not taken into account. That appears to be a reference to the apology the applicant made immediately before the sentence was imposed. That apology immediately preceded an expression of hope that the applicant would be given a "good sentence where I can get back out there and join the community…". The sentencing judge was not obliged to find that this last minute apology evidenced remorse or that it should be reflected in any mitigation of a sentence in which deterrence and the protection of the community were substantial considerations.

[18] The respondent referred to *R v Graham* [2015] QCA 137, *R v Forster* [2002] QCA 495, and *R v Reeves* [2001] QCA 91 and argued that the applicant's sentence was not manifestly excessive. It is necessary to discuss only *Graham* (which analyses the other two cases) and *Forster*.

[19] In *Graham* the Court found that a sentence of 12 years and three month's imprisonment with a serious violent offence declaration for an attempted murder offence was not manifestly excessive.[4] The offender spent 17 months in pre-sentence custody in what were found to be excessively stringent and unpleasant conditions, in respect of which the sentencing judge reduced the sentence which otherwise would have been imposed by 21 months. Accordingly, as was mentioned by Atkinson J with whose reasons Morrison JA and Applegarth J agreed, the sentence imposed reflected a notional head sentence of 14 years imprisonment. The offender was convicted after a trial. The sentence took into account the criminality in one count of unlawful wounding with intent to cause grievous bodily harm, and it also took into account one count of unlawful possession of a category H weapon to which the offender pleaded guilty. The offender used a gun in a crowded shopping centre so that he was likely to kill or injure not only the intended target, but also members of the public. He had entered the shopping centre armed with a concealed, loaded handgun. He chose to engage in a confrontation with the complainant, who was struck by a bullet in his arm and not seriously injured. The complainant in the unlawful wounding offence was injured by bullet fragments being lodged in her hip. If there was any element of self-defence, the offender's response was grossly disproportionate, excessive, unjustified, and unwarranted. At the time of the shooting the complainant was retreating. The

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[4] The High Court dismissed an appeal from the Court's order dismissing an appeal against conviction.

offender had a criminal history for minor drug offences and was on bail for possession of an unlawful handgun and body armour, offences which he had committed about four months earlier. He was convicted of those offences and sentenced for them after he committed the attempted murder offence. That offender conducted a business which employed various people, he was in a stable relationship at the time of sentence, and there were suggestions that he had reasonable prospects of rehabilitation.

[20] Whilst the applicant pleaded guilty it was a late plea which was not found to evidence remorse, so that mitigation on that account reflected only its utilitarian value and avoiding the ordeal of the complainants giving evidence. The offence in *Graham* was objectively more serious in so far as it involved risks to members of the public other than the complainant. In other respects the applicant's offending was more serious; the complainant in the attempted murder offence was struck by a bullet in her chest, she suffered a more serious injury than was suffered by the complainant in *Graham*, and the applicant's much worse criminal history and aspects of the medical evidence rendered protection of the community a significant factor in his sentence. The sentence in *Graham* does not indicate that the applicant's sentence is excessive.

[21] In *Forster* the offender pleaded guilty at the earliest possible opportunity to charges of attempted murder and unlawfully doing grievous bodily harm. He was sentenced to 12 years imprisonment for attempted murder and a concurrent term of one year's imprisonment on the other count. The complainant in the first offence was the offender's ex-wife. That offence was pre-meditated and murder was avoided by the intervention of the complainant in the second offence. The offender's ex-wife required surgery to remove a bullet and was left with severe scarring and impairment of one arm. She suffered financial difficulties as a result of having to close her business. That offender had a history of depression, anxiety, and alcohol abuse. He was unemployed and had separated from his wife not long before the offences. His mental state had deteriorated then. His intention was to kill his ex-wife and then commit suicide. He had a good work record and was aged 62 at the time of the offences.

[22] *Forster* may be seen as a more serious case in some respects, particularly in so far as it involved a pre-meditated attempted murder and grievous bodily harm in the second offence, but there were also very concerning aspects of the applicant's offence and his personal circumstances, particularly his criminal history and the medical evidence which made protection of the community a significant factor in the sentence. Also, the applicant's plea of guilty came very much later than the plea in *Forster*. The refusal of the application for leave to appeal against sentence in *Forster* supplies substantial support for the respondent's submission that the applicant's sentence is not manifestly excessive.

[23] The sentence imposed upon the applicant was not manifestly excessive. I would refuse the application for leave to appeal against sentence.

[24] **PHILIP McMURDO JA:** I agree with Fraser JA.