IN THE COURT OF APPEAL [1994] QCA 161

SUPREME COURT OF QUEENSLAND

C.A. No. 78 of 1994

Brisbane

[R. v. Marshall]

THE QUEEN

v.

WARREN KEVIN MARSHALL

Applicant

The President
Mr Justice Pincus
Mr Justice Byrne

Judgment delivered 20/05/1994

Separate reasons for judgment delivered by the President, Mr Justice Pincus and Mr Justice Byrne. The President agreeing with the orders proposed by Mr Justice Pincus. Mr Justice Byrne dissenting.

1.Application for leave to appeal against sentence granted.
2.Appeal allowed.
3.Sentence imposed below is set aside and in lieu thereof substitute a sentence of 2 years imprisonment to take effect from 28 February 1994, with a recommendation that the applicant be considered for parole after 9 months subject to the conditions imposed by the primary Judge below, namely:

(a) that the applicant refrain from being in possession of any dangerous drugs specified in the *Drugs Misuse Act* except such as may have been lawfully prescribed for the applicant's use by a legally qualified medical practitioner;

(b) that the applicant undergo during the period of his parole such medical, psychological and psychiatric examination, treatment, counselling and advice, in respect of the use of any dangerous drug specified in the *Drugs Misuse Act* as may reasonably be required by the applicant's community correctional officer; and

(c) that the applicant undergo any random test for the presence of drugs ordered by his community correctional officer.

4.The time the applicant spent in custody prior to 28 February 1994 is not to be taken to be imprisonment already served under his sentence.

CATCHWORDS:**CRIMINAL LAW - sentence - whether manifestly excessive - whether significance in failure to allow for last minute offer of plea of guilty to a lesser charge not mentioned in the indictment -application of s. 13 of the *Penalties and Sentences Act* 1992.**

Counsel: Mr G P Long for applicant

Mr P Callaghan for Crown

Solicitors: Legal Aid Office for applicant

Director of Prosecutions for Crown

Hearing Date:11/05/1994

REASONS FOR JUDGMENT - FITZGERALD P.

Judgment delivered 20/05/94

The circumstances giving rise to this application are set out in the judgment of Byrne J.. I agree with his Honour's remarks, subject to one significant qualification.

In my opinion, the appellant's offer to plead guilty to the only offence of which he was convicted was a relevant matter to be brought to account in the exercise of the sentencing discretion. Such a conclusion is clearly consistent with the policy enunciated in section 13 of the Penalties and Sentences Act 1992. What weight is given to the offer may depend upon a variety of other circumstances, including any terms attached to the offer and the time at which it is made.

It follows that the sentencing discretion miscarried, which is confirmed to some extent by the imposition of a head sentence at, or near, the top of the range. The circumstances, including considerations personal to the appellant, do not warrant such a sentence.

I am content to join in the orders proposed by Pincus JA.

REASONS FOR JUDGMENT - PINCUS J.A.

Judgment delivered 20/05/1994

I have read the reasons of Byrne J. in which the facts of the matter are to be found.

As his Honour points out, the applicant had a substantial criminal history; he had been sent to prison on a number of occasions, most recently in 1991. The offences of which he was convicted, prior to that with which the Court is presently concerned, were principally offences of dishonesty and there were also some driving offences. So far as one can tell this stabbing is uncharacteristic, there being no recorded history of violence.

The reports which were obtained by direction of the court below show that the applicant had a very unfortunate childhood and lead to the inference that the life into which he has drifted - that of a heavy user of alcohol and other drugs and a persistent thief - appears to be attributable, in part at least, to the circumstances of his upbringing. It should also be noted that the Community Correctional Officer who reported to the primary judge, and whose report I have found enlightening, appears to think that the applicant might respond to proper supervision and some counselling. The applicant has not impressed those who have reported on him as an irredeemable villain.

Nevertheless, were it not for a circumstance I shall

mention, I would be disinclined to interfere with the sentence imposed by the learned primary judge. His Honour emphasised the importance of discouraging stabbing offences. In this instance, although the wound was a serious one, it did not, it appears, cause any disability; but such was the drunken and drugged state of the applicant that he could not have had much bodily control and might well have injured his victim much more seriously than he did.

The circumstance I have referred to is that, as Mr Long who appeared for the applicant submitted, it does not appear that the judge gave any credit for an offer which the applicant made to plead guilty to the offence of which he was ultimately convicted. When the matter was raised by counsel for the applicant below, there was a discussion at the end of which the judge said in effect that he could understand the Crown rejecting the offer to plead guilty to unlawful wounding. In his Honour's remarks on sentence, which have an appearance of comprehensiveness, no reference is made to the offer to plead guilty. The inference should be drawn, in my opinion, that his Honour did not treat that offer as having any significance; the correctness of the inference is to some extent supported by the fact that the head sentence imposed was towards the top of the range.

Mr Callaghan for the respondent has directed our attention to s. 598(1) of the Code; under that provision it would have been possible for the applicant to plead guilty to unlawful wounding, but only with the Crown's consent, and that was not to

be had. Byrne J has referred to the possibility of the applicant making formal admissions; had he done so, that might have strengthened the case for making an allowance in his favour; however, it does not appear that it would have made any real difference to the volume of evidence called.

That the Crown acted reasonably in refusing it did not, in my opinion, deprive the offer to plead guilty to the offence of which the applicant was ultimately convicted of all weight. The Crown rejected the offer, no doubt, because of its assessment of the prospects of success on one of the counts in the indictment: attempted unlawful killing and unlawful wounding with intent to do grievous bodily harm. But since the jury was not satisfied that either of those offences was committed, it is not clear to me how the reasonableness or otherwise of the Crown's decision to attempt to prove one of those offences can affect the level of sentence. To put that more simply, I find it difficult to see why the applicant's position should be worse than if the Crown had charged him with, and he had pleaded guilty to, unlawful wounding. As Mr Long has pointed out, it is implicit in a remark made in the principal judgment in Winston (Court of Appeal, unreported, 11 May 1994) that an offer to plead guilty to an offence of which an accused is ultimately convicted is relevant when considering sentence.

I respectfully agree with Byrne J that because the primary judge decided that credit should not be given for the substantial period of pre-trial detention, the head sentence of 2 years 6 months may be treated as equivalent to one of almost 2

years and 10 months. I would reduce the head sentence to 2 years (equivalent to 2 years and 4 months) and would recommend parole after 9 months.

REASONS FOR JUDGMENT - BYRNE J.

Judgment delivered 20/05/1994.

The applicant was convicted of unlawful wounding and sentenced to imprisonment for two years and six months. He received a recommendation for parole after serving one year of that sentence. The applicant, in an argument which focused on the head sentence, contends that the sentence is manifestly excessive.

The applicant is 28. His victim was a 23 year old man. They first met late at night in Fortitude Valley. At the time, the applicant, who was affected by alcohol, was seated at a bus shelter, drinking with acquaintances. The complainant, who had been consuming alcohol for a few hours, came upon the group and pressed the applicant to drink from a beer bottle. The offer was twice declined. Tempers flared and angry words were exchanged.

As the complainant stood nearby, the applicant went to the end of the seat where he opened his bag, rummaged inside and located his knife. It was in its sheath. He took the knife out and moved towards the complainant. The complainant ran away, but the applicant caught up with him and stabbed him once in the left side near the pelvic bone. The complainant ran on. The applicant gave pursuit, brandishing the weapon. Fortunately, a police car arrived moments later. The complainant ran onto the road and fell down near that vehicle. The police calmed the applicant, but not before he yelled out to the complainant threatening to kill him.

The complainant spent three days in hospital recovering from the stabbing. The surface of his skin had been cut along 7 cm. The injury, however, was more extensive. As the treating medical practitioner described the wound, the knife had "tunnelled under the skin" for a distance of 13 cm. The wound was not life- threatening, although it caused discomfort. Some sutures were necessary.

When the attack occurred, the applicant was affected by alcohol and, it seems, by Rohynpol - medication taken by heroin addicts because it often reduces anxiety. With alcohol, Rohynpol depresses mental functions, and its rare side-effects include uninhibited behaviour and rage. The applicant had a long-standing drug problem which had contributed to his many years in custody for a variety of offences. Yet he had no history of violent crime.

The applicant was detained for 54 days before sentencing. The judge decided that that period should neither be taken to be imprisonment already served under the sentence nor reflected in his recommendation for early parole. The practical effect of his approach is that the sentence may fairly be regarded as equivalent to imprisonment for almost two years and ten months with a recommendation for parole after a little less than one year and two months imprisonment. So understood, the sentence is a weighty one, much towards the top of the range.

The judge, appropriately enough, remarked on the importance of deterrence in cases where a knife is carried about by an offender who uses it to wound, referring to R. v. Service, C.A. No. 280 of 1985, 4 December, 1985. Such conduct "deserves the utmost discouragement": R. v. Savage, C.A. 369 of 1990, 27 March, 1991, per Thomas J, Ambrose and Lee JJ concurring; see also R. v. Dench, C.A. No. 53 of 1992, 9 June, 1992. Moreover, the circumstances surrounding the case were quite serious. Of course, the applicant's personal circumstances were deserving of sympathy, but they received due consideration and were influential in the recommendation for parole. That recommendation was based on a concern that a lengthy incarceration might worsen the applicant's troubles with drugs.

Apart from arguing that the sentence was manifestly excessive, the applicant has submitted that the judge ignored a material consideration in declining to allow credit for a pre-trial indication of a willingness to avoid what proved to be a four day trial.

The indictment charged two alternative counts: attempted murder and wounding with intent to cause grievous bodily harm. The day before the trial began, the applicant offered to plead guilty to unlawful wounding. The judge made no allowance for that intimation.

No doubt there will be cases where an offer of the kind made by the applicant should be reflected in a reduction of the head sentence or in earlier than usual parole. Here, however, the intimation was very late. Moreover, it was not translated into formal admissions calculated to narrow the extent of the contest: admissions which might have lead to savings in resources or reduced inconvenience to witnesses. All considered, in this particular case, in my opinion the Judge did not err in recommending the applicant for parole after serving one year of his sentence.

In my opinion, the sentence is not shown to be so burdensome as to warrant intervention. I would refuse the application.