IN THE COURT OF APPEAL [1994] QCA 523

SUPREME COURT OF QUEENSLAND C.A. No. 393 of 1994

Brisbane

BeforeFitzgerald P.
Davies J.A.
Lee J.

[R. v. Melano]

T H E Q U E E N

v.

PETER JOSEPH MELANO Respondent

ATTORNEY-GENERAL OF QUEENSLAND Appellant

REASONS FOR JUDGMENT - THE COURT

Judgment delivered 01/12/1994

The Attorney-General has appealed against a sentence imposed on the respondent in the District Court at Charleville on 8 September 1994. The respondent was found guilty of a charge of unlawful wounding and was sentenced to imprisonment for fifteen months, suspended after three months on condition that he does not commit another offence punishable by imprisonment within a period of three years from the date of sentence.

On Friday, 8 April 1994, the respondent was at the Charleville RSL Club. He had arrived there at about 10.30 pm after drinking elsewhere, but, when the offence was committed, was not drunk.

Sometime around midnight, the complainant, who was affected by alcohol, arrived with a group of people with whom he had been celebrating his 21st birthday.

When the complainant arrived, the respondent was standing near the bar. There had been ill-feeling between the two men previously, and they called each other offensive names and traded insults. A short scuffle resulted, during the course of which the complainant attempted to headbutt the respondent. Friends separated them.

Shortly afterwards, the respondent blew the complainant a kiss and intimated by gestures a desire to fight. The complainant replied by pointing to the door and saying: "Come on we will go outside to sort the argument out.".

The two men then moved off towards the door, with the respondent leading. However, before they got outside, the respondent turned around to face the complainant and pushed him in the chest, to which the complainant responded in like kind. As he did so, the respondent struck the complainant on the right side of the head with a 7oz beer glass that he was holding in his left hand. The glass shattered on impact, causing serious lacerations to the side of the complainant's head, who then attempted to pull the respondent towards him, apparently in an effort to prevent the respondent from striking again. The respondent then struck a second, less forceful blow, to the complainant's head. The two men were then separated, once more.

The complainant was taken to hospital by ambulance and he was found to have three lacerations to the right side of the head, one above the eye, one on the right temple and one in the right ear. The largest laceration, that on the temple, involved a large dependent flap of skin exposing the bone of the skull and three spurting arterial wounds. In all, the injuries required 38 stitches and left an unsightly scar.

At the trial, the respondent's version of events indicated that he was the innocent victim of aggression from the complainant who, after acting aggressively towards some others in the bar, directed his anger at him. The respondent said that the wounding occurred when the complainant came up behind him, grabbed him by the hair and then punched him in the mouth, thereby causing him to defend himself by raising his arm in a blocking motion. He stated that he was not aware that he had made any contact with the complainant, although he said that the glass in his hand must have done so at that time.

It is not disputed that the jury rejected the respondent's account. However, there was some independent evidence that the complainant was the aggressor.

The respondent was aged 26 years when the offence occurred and when he was sentenced. He has only a minor criminal history, which is of no present relevance. He is single, works as a shearer and kangaroo shooter, has a good work record and general

reputation, both in Charleville and Morven, where his parents reside, as was demonstrated by a considerable number of supporting references.

Although he referred to the respondent's use of the beer glass to assault the complainant (twice) as deliberate and out of proportion to the situation which existed, the respondent's lack of remorse and the need for a significant deterrent sentence, the trial judge appears to have been generally favourably disposed to the respondent, and to have treated the offence as a dispute between aggressive young males who had been drinking, and between whom there had previously been ill-will, which got out of control. His Honour was also obviously influenced by the decision of this Court in R.v. Vickery ex p Attorney-General (C.A. No. 62 of 1992, judgment delivered 12 June 1992). In that matter, in which the facts are somewhat briefly stated but it was accepted for the Attorney-General were somewhat worse than the present matter, the Court said:

> "A sentence of at least 18 months' imprisonment was warranted, despite the circumstances that the act was spontaneous, and that Vickery cooperated with the police, pleaded guilty at an early time, and gave clear signs of contrition and remorse. Deterrence is an important factor in relation to injuries involving brutal violence in which serious injuries are inflicted on the victim."

(The actual sentence in that case was reduced to 12 months' imprisonment by reference to special considerations which are of no present relevance.)

Here, the sentencing judge said:

> "It may be that in particular circumstances a custodial sentence might conceivably be able to be avoided. Regrettably, I take the view that it is not appropriate in this case. Judges in my position are not free agents. We are bound by the decisions of the Court of Appeal and although there has been a new Penalties and Sentences Act come into force since the decision of Vickery, it seems that a custodial sentence is called for in the present instance if I am to follow the reasoning of the Court of Appeal which binds me. I do, though, intend to suspend a significant part of this sentence. I do that for the reasons that your counsel ... has advanced."

Those "reasons" appear to be the references favourable to the respondent, his work history, the fact that there was a permanent job immediately available to him, and that "[from] people in the Court who have been here this morning he obviously does stand well in this community and has a lot of support".

The appellant has appealed on the grounds that (i) the sentencing judge "gave too much weight to the personal circumstances of the [respondent] and too little weight to the need to discourage the [respondent] or other persons from committing the same or a similar offence", and (ii) the sentence is "manifestly inadequate" and "fails to punish the [respondent] to an extent that is just in all the circumstances and fails to make it clear that the community, acting through the Court, does not approve of the sort of conduct in which the [respondent] was involved".

An appeal against sentence by the Attorney-General is provided for in sub-s. 669A(1) of the Criminal Code, which states:

"(1) The Attorney-General may appeal to the Court against

> any sentence pronounced ... and the Court may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper."

Both parties made submissions with respect to the operation of that provision following the recent judgment of the High Court in Everett v. R. (No. H8 of 1994) and Phillips v. R. (No. H9 of 1994), which was delivered on 26 October 1994.

The operation of sub-s. 669A(1) of the Code was considered by the Court of Criminal Appeal on a number of occasions, with some differences of opinion apparent: see R. v. Osmond ex p Attorney-General (1987) 1 Qd.R. 429, 433-434, 435-436. To some extent, these differences are affected by the history of the legislation, including the insertion of the word "unfettered" in 1975; prior to that, it had been decided in R. v. Liekefett ex p Attorney-General (1973) Qd.R. 355 that the discretion under sub-s. 669A(1) was not "unfettered". While the present power of the Court on an appeal by the Attorney-General is very widely expressed, it must be borne in mind that an "unfettered discretion [to] vary" is an unfettered discretion either to do so or to decline to do so.

Further, like every statutory power or discretion, the Court's discretion under sub-s. 669A(1) of the Code is subject to inherent limitations; it cannot be exercised for a purpose other than that for which it is given, or by reference to extraneous considerations, and material considerations must be taken into account. And, of course, sentencing principles must be applied;

for example, those derived from the Penalties and Sentences Act 1990, or established by judicial decision as, for example, in Lowe v. R (1984) 154 C.L.R. 606, and R.v. Tricklebank (1994) 1 Qd.R. 330, 338; see also Phillips and Everett at pp. 4 ff.

Additionally, the subsection itself expressly qualifies the discretion to "vary"; variation is permissible only to impose another sentence which "to the Court seems proper". Implicitly, the discretion does not ordinarily extend to varying a sentence which itself "to the Court seems proper", i.e., in accordance with sentencing principles, policies and practices, statutory and other.

The particular importance of that qualification lies in the circumstance that a sentencing judge also has an extremely wide discretion to be exercised within the limits of the principles which are applicable: "As the ascertainment and imposition of an appropriate sentence involve the exercise of judicial discretion based on an assessment of various factors it is not possible to say that a sentence of a particular duration is the only correct or appropriate penalty to the exclusion of any other penalty" - Lowe, at p. 612 per Mason J. Unless the sentencing judge has erred in principle, either because an error is discernible or demonstrated by a manifest inadequacy or inconsistency, the sentence he or she has imposed will be "proper": cf. Griffiths v. R. (1977) 137 C.L.R. 293, 310, 327, 329-330; Everett and Phillips, per Brennan, Deane, Dawson and Gaudron JJ. at p. 3. Variation by this Court will not be justified in such

circumstances, unless, perhaps, in exceptional circumstances; for example, to establish or alter a matter of principle or the sentencing range which is appropriate: cf. Everett and Phillips per McHugh J. at p. 9.

The operation thus accorded to sub-s. 669A(1) of the Code is generally consistent with the established principles relating to appeals against discretion. House v. R. (1936) 55 C.L.R. 499, which is commonly referred to for the statement of those principles contained in the joint judgment of Dixon, Evatt and McTiernan JJ. at pp. 504-505, was itself a case involving an appeal against a sentence; although there was a "full" appeal to the High Court "on law and fact", it was held that the "manner in which an appeal against an exercise of discretion should be determined is governed by established principles" (p. 504) which were then stated. Read as a whole, including both the "unfettered discretion [to] vary" and the requirement that the sentence imposed be "proper", sub-s. 669A(1) of the Code does not provide for a different course, unless, perhaps, in exceptional circumstances.

Support for the view that, ordinarily, this Court should not allow an appeal under sub-s. 669A(1) unless the sentence is outside the sound exercise of the sentencing judge's discretion is to be found in factors that are material to the exercise of the Court's discretion. For example, an appeal against sentence by the Attorney-General "has long been accepted in this country as cutting across the time-honoured concepts of criminal

administration by putting in jeopardy for the second time the freedom beyond the sentence imposed": Everett and Phillips at p. 3. Cf. Bropho v. Western Australia (1990) 171 C.L.R. 1, 17-18; Wentworth v. N.S.W. Bar Association (1992) 176 C.L.R. 239, 252; Coco v. R. (1994) 179 C.L.R. 427, 436-437, 446. And a sentencing judge, who has seen the accused and perhaps witnesses and heard oral evidence, "is uniquely well placed ... to exercise a discretion": cf. R. v. Holder (1983) 3 N.S.W.L.R. 245, 254. The latter, but not the former, consideration also applies to applications for leave to appeal, and appeals, against sentence by convicted persons: Code ss. 668D and 668E(3). The language used in these provisions differs from sub-sec. 669A(1), but the practical effect of this difference is not great. There are again limits upon an appellate court's intervention because of the discretionary considerations involved in sentencing. But, in proceedings by a convicted person, especially if liberty is at stake, the Court is sometimes less reluctant to alter the sentence imposed.

There is nothing exceptional in this case. Accordingly, the question for this Court is whether the sentence imposed is outside the scope of a proper sentencing discretion. This approach generally accords with the opinion of Macrossan J., as the Chief Justice then was, in Osmond at pp. 435-436.

In Vickery, the Court allowed the Attorney-General's appeal. The original sentence, 200 hours of community service, was manifestly inadequate, and, once it was set aside, the Court was

required to impose the sentence which to it seemed proper. Emphasis was given to the importance of deterrence "in relation to offences involving brutal violence in which serious injuries are inflicted on the victim". While this is a point of general application, it does not follow that there must, in all circumstances, no matter how exceptional, be a period of actual incarceration; i.e., even for young first offenders with excellent prospects of rehabilitation. In particular circumstances, that might not be in the interests of anyone.

As the Attorney-General accepted, Vickery involved a more serious offence. The complainant in Vickery was not the aggressor, and Vickery's conduct was premeditated; he broke the glass he was holding before using it to strike the complainant in the face. Here, the respondent seems to have acted on the spur of the moment. On the other hand, Vickery exhibited remorse and pleaded guilty. While there is little to choose between the respondent and Vickery, it could not be said that the difference in terms of imprisonment shows any error of principle.

The suspension of the respondent's imprisonment after three months makes a significant difference between his punishment and that imposed on Vickery. However, Vickery was considerably older, although a family man with the good work record. The respondent is younger, well-respected, a good worker and apparently with excellent prospects of rehabilitation. Although close to the border-line, we are not persuaded that the sentence

imposed was not, in all the circumstances, proper.

The appeal should be dismissed.