IN THE COURT OF APPEAL [1996] QCA 113

SUPREME COURT OF QUEENSLAND C.A. No. 15 of 1996

Brisbane

Before Fitzgerald P.
McPherson J.A.
Helman J.

[R. v. Furness]

THE QUEEN

v.

DAVID GEOFFREY FURNESS (Applicant)

FITZGERALD P.
MCPHERSON J.A.
HELMAN J.

Judgment delivered 03/05/1996

SEPARATE REASONS FOR JUDGMENT OF FITZGERALD P., JOINT REASONS OF MCPHERSON J.A. AND HELMAN J., CONCURRING AS TO THE ORDERS MADE.

APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCES REFUSED.

CATCHWORDS: **SENTENCE - two counts of assault occasioning bodily harm whilst armed with a dangerous weapon (loaded firearm) - whether the imposition of the three year sentence on each count to be served concurrently was manifestly excessive - victims included the applicant's estranged wife and mother-in-law - applicant has a good work history, surrendered himself to police, timely pleas of guilty, has undergone psychiatric counselling, remorseful - applicant is possessive by nature and experiences difficulties with his interpersonal skills.**
Brockfield (C.A. 229 of 1993, 21 September 1993)

Counsel: C. Callaghan for the Applicant
J. Hunter for the Crown

Solicitors: Boe & Callaghan for the Applicant
Queensland Director of Public Prosecutions for the Crown

Date(s) of Hearing: 14 March 1996

REASONS FOR JUDGMENT - FITZGERALD P.

Judgment delivered 03/05/1996

This is an application for leave to appeal against sentences imposed in the Supreme Court of Queensland on 15 December 1995. The applicant pleaded guilty to and was accordingly convicted of two counts of assault occasioning bodily harm whilst armed with a dangerous weapon, with both counts committed on 17 May 1995.

The 27 year old applicant and his 20 year old wife, the first complainant (Emma Furness), separated in April 1995. The applicant continued to reside in the rented matrimonial premises with a male companion. On 17 May 1995 the first complainant and her 44 year old mother, Mrs Skelton (the second complainant) attended at the applicant's residence at about 6:00 am to collect the balance of the first complainant's belongings. The first complainant had been telephoned the previous day by the applicant and advised that the lease of the premises was to expire the following day.

Upon the arrival of the two complainants at the house an argument ensued concerning financial matters, which resulted in the applicant walking out of the house. The applicant then requested the first complainant's assistance in getting some property from under the rear of the house. Once under the house with the first complainant the applicant produced a loaded shot-gun and aimed it at her head. When she tried to avoid the weapon, the applicant punched her with a closed fist. The first complainant grappled with the applicant when the

applicant dragged her to the ground, and proceeded to drag her on the ground by her hair and punch and kick her. Eventually the gun discharged its shot into the wall of that room approximately 8 inches from the first complainant's head.

The second complainant at that stage was standing at the doorway of the room. She grabbed the applicant and he threw her against a wall. The second complainant was then punched by the applicant with a closed fist to the jaw causing her to fall to the ground where she was kicked in the chest. The first complainant tried to restrain the applicant at this point in time, when the applicant responded by attempting to hit her over the head with the butt of the firearm.

The applicant then went outside to remove the cartridge from the firearm. The two complainants whilst attempting to make their escape were stopped by the applicant and again assaulted. The first complainant was punched in the face and kicked and the second complainant was again punched to the ground. The applicant's flatmate who had been present at the time of the second assaults then intervened, and the complainants made their escape.

The first complainant suffered bruising to her left forearm and right temple, scratching to both her arms and a scratch approximately 15 cm down her back, a graze to her forehead and a stiff neck.

The second complainant suffered from a bruise over her left ear, tenderness to her lower sternum, a laceration on her upper lip requiring one suture, tenderness to the muscle of the neck and superficial grazing to her left foot.

The applicant had a minor criminal history prior to the present offences, although one, described as "intentionally/recklessly cause injury" occurred in the course of a dispute with the then boyfriend of an ex-girlfriend. On the present occasion, he was sentenced to imprisonment for three years on each count to be served concurrently and to take effect from 18 May 1995 to give him credit for 212 days which he had spent in pre-sentence custody in relation to these offences and no others.

A pre-sentence report which was obtained by the sentencing judge contained information from the applicant's estranged wife, Emma, to the effect that he was possessive, had assaulted her on prior occasions and, since his arrest, had written letters to her from jail in terms which "tended to minimise his actions from which these charges arise".

In his sentencing remarks, the judge described the applicant as very possessive of his wife and noted that he experiences difficulties at the point of termination of relationships. Reference was made to the assaults upon the applicant's wife at different times during the marriage and to the applicant's displays of temper, as well as the extreme terror and anguish which the applicant's wife had suffered during the incident involving the shotgun. His Honour, quite correctly in my view, saw the applicant's handling of the loaded shotgun, possibly with his finger on the trigger at one point, as a matter of serious consequence which could have lead to a tragic outcome. Not surprisingly, there have been some tragedies in the applicant's youth, including the death of a younger brother, which greatly upset the applicant.

Although a report from a psychiatrist, Dr Peter Mulholland, was apparently available to a

counsellor from the Department of Family Services who provided a pre-sentence report to the judge, she either overlooked, ignored or placed little weight upon it. In her opinion, a community based order was of doubtful utility and involved the risk that the applicant would again contact his wife. She considered that he definitely required some form of close supervision.

Submissions made on behalf of the applicant were to the effect that he presents no actual on-going risk to his wife or any other member of her family and that there are a range of programmes available both within custodial institutions and community-based organisations which could greatly assist the applicant in dealing with jealousy, disappointment, anger and other negative sentiments. It was pointed out that far from the applicant attempting to blame his ex-wife for what had occurred, he acknowledged that it was not her fault and expressed gratitude that she had saved his life. It was said that the applicant was depressed at the time of the offences and that the last letter which he had written to his ex-wife was after his last bail application to assure her that he was not a threat to her. He has come to the realisation that the relationship has terminated and that there is nothing he can do about it, and that he wishes to "get on with" his life. He does not wish to have any further contact with his ex-wife or her family, but would prefer to move to another State to avoid such a risk. In case I have not already mentioned it in favour of the applicant, his pleas of guilty were timely and he spent a month in a psychiatric institution undergoing counselling. He had voluntarily surrendered himself to the police and has a good work record.

Counsel for the applicant submitted in the first place that the sentences imposed upon the applicant were manifestly excessive, but such a submission seems to me to be quite

impossible to sustain, particularly in the context of the use of a loaded firearm. It was also submitted that his Honour might have over-emphasised the extent of the violence of the applicant towards his ex-wife during their marriage, although this certainly does not clearly appear, and further that his needs for counselling can be best catered for in community-based orders with appropriate special conditions.

In summary, it was submitted that the applicant should have been sentenced to imprisonment for two years with a recommendation for early release on parole.

I have been unable to find force in these submissions, and there is only one part of his Honour's judgment on which I wish to comment. I am prepared to assume that his Honour gave the applicant appropriate credit for his early pleas, cooperation and remorse in the head sentences which were imposed. On that basis, there was no requirement of a further recommendation that the applicant be considered eligible for early parole. However, his Honour made remarks in that context which trouble me to some extent. He said:

> "I have made due allowance for your early plea of guilty and mitigating factors in the head sentence that I have imposed. I do not propose to make any recommendation as to early parole. I do accede however, to the submission of counsel for the Crown and make a recommendation that the Community Correctional Service authorities ensure that you undertake anger management programs, interpersonal counselling and such other programs as the Community Correctional Service considers necessary to hopefully allow you to fully adjust and to overcome the tendencies that you have shown in the past. I also recommend to those authorities that they take into account fully the question of your rehabilitation before they consider you for parole, and also, whether or not you are likely to be of any risk to your former wife or her mother thereafter."

I am unclear what purpose the final sentence in that passage is intended to serve. On one view, it adds nothing, merely operating as a reminder to the appropriate Board of factors

which would routinely be material to parole decisions with respect to prisoners who have committed violent offences; if so, it seems potentially confusing to make such observations in some cases but not others of equal or greater gravity. The other possible purpose, which seems more likely to be inferred by the Board in such circumstances, is to delay or qualify eligibility for parole: cf. Brockfield (C.A. 229 of 1993, 21 September 1993). In Brockfield, the Court warned against the use of such remarks by sentencing judges without an appropriate evidentiary basis and careful consideration. Further, if a sentencing judge considers that the circumstances are such that a convicted offender who is to be imprisoned should not have the full benefit of the statutory scheme in relation to eligibility for parole, in my opinion an opportunity to be heard in opposition to what is contemplated should be provided.

There were no particular features of these offences which distinguish them from other broadly comparable offences, and called for the sentencing judge's remarks, and I would disassociate myself from them.

However, for reasons previously indicated I would refuse the application for leave to appeal.

JOINT REASONS - MCPHERSON J.A. and HELMAN J.

Delivered the 3rd day of May, 1996

We agree with the order proposed by the President and with his reasons.

We wish to add, however, that we do not altogether share the President's views about the recommendation made by the learned sentencing judge. Such recommendations are best

reserved for those few cases in which it appears that they are called for in the public interest or with the welfare of the offender and his or her family in mind. We see no reason to doubt the wisdom of his Honour's making the recommendation he did in this case.