[2001] QCA 89

COURT OF APPEAL

McPHERSON JA
MOYNIHAN J
BYRNE J

CA No 313 of 2000

THE QUEEN

v.

SENAD ARNOUTOVIC Applicant

BRISBANE

..DATE 12/03/2001

JUDGMENT

12032001 T6/FF4 M/T COA57/2001

McPHERSON JA: I will ask Mr Justice Moynihan to give the first judgment in this matter.

MOYNIHAN J: This is an application for leave to appeal against a sentence of nine years' imprisonment with 395 days declared as time served in pre-sentence custody. The applicant was convicted of manslaughter after a trial by a jury on a count of murder.

The verdict of manslaughter is explicable in terms of the jury either not being satisfied of intent to kill or cause grievous bodily harm or provocation not having been excluded. As the sentencing Judge remarked, the distinction is of little consequence in terms of the sentencing considerations which arise.

There was no issue that the events which gave rise to the killing were instigated by the deceased man, who burst into a flat where the applicant, a woman and another man were. He was apparently intoxicated and affected by drugs and behaving in an aggressive way, making threats of physical violence and actually inflicting violence.

The events are described in detail in the reasons of the sentencing Judge and there is no need for me to go to the elaboration that is there set out. The significant fact though is that the deceased man left the flat and the yard

and, as the learned sentencing Judge remarked, that is where the applicant showed a complete lack of judgment.

He picked up a large hunting knife approximately 21 centimetres long and ran out and followed the other man.

He appears for himself and he assures us that his intention was to deter the other man from returning to carry out threats which were made. Those were, of course, considerations which were before the jury in the evidence and a view of them is reflected in the verdict. There was a confrontation and it seems that a fight developed. Ultimately, the fatal wound was inflicted. The applicant then left the scene, buried the knife, disposed of his clothing and eventually giving himself up to police a day or two later.

The record of interview which was before the jury was consistent with the account of events to which I have referred. The sentencing Judge took into account the fact that the confrontation was initiated by the deceased.

The Judge proceeded on the basis that the applicant picked up the knife with the intention to scare and that he had shown remorse by ultimately turning himself in to the police in the circumstances which were revealed by the evidence, and corroborated by the record of interview. There was an issue canvassed before the sentencing Judge as to whether or not an

offer of a plea of guilty to manslaughter in discharge of the indictment was relevant to the consideration of remorse. The sentencing Judge concluded that it was not to be taken adversely to the applicant that the trial proceed and that she took into account remorse in the circumstances to which I have referred.

The Judge below was referred to a number of comparative sentences in circumstances where the prosecution was contending for a range from eight to 11 years and counsel for the defence had contended for a range of seven to eight, with an early recommendation and no declaration of serious violent offender. No declaration was made.

The applicant has drawn our attention to other decisions which might be described as comparative. Some of them were clearly among those referred to before the judge below. Some of the sentences may appear more lenient than that imposed here. In the end, however, comparability breaks down having regard to the different balance to be given to the considerations which are peculiar to each case.

There is no doubt that the applicant, and the sentencing Judge referred to it, had a difficult childhood in circumstances of coming here from another country. A relevant consideration that deserves to be remarked on is the criminal history of the applicant. He had had convictions, admittedly some time

previously, for assault occasioning bodily harm, unlawful assault and breaches of domestic violence orders.

He obviously had a significant drug problem at the time of this offence. On 28 June 1999 he had been sentenced in the District Court to an intensive correctional order in respect of a number of property offences and he had been released from the effect of that order 25 days before the offence which was committed here.

The circumstances of the offence in the present case have in the applicant's favour the fact that the confrontation had its origins in the actions of the deceased. But the fact is, as the sentencing Judge remarked, that the accused took up the knife and left the house to pursue the deceased.

That obviously is a consideration, very different from what might have occurred had the knife been involved in the earlier assaults in the house, for example, in some other way. The other material consideration which cannot be ignored is the criminal history to which I have referred.
The sentence, in my view, is within the range which was applicable to the circumstances of the case. It has not been shown that there was a departure from the exercise of a sound sentencing discretion and no error has been demonstrated in the application of that discretion. I would therefore refuse leave to appeal.

McPHERSON JA: I agree.

BYRNE J: The only matter which has troubled me concerning the sentence is the question of whether some, or some additional, allowance ought to have been made for the resource savings which would have been associated with the offer of the plea of guilty had it been accepted by the prosecution.

On balance, however, having regard to the factual and other considerations mentioned by Justice Moynihan, I am not in the result persuaded in all the circumstances that the sentence is beyond the range of a sound sentencing discretion, even assuming that some or some additional allowance ought to have been made for those resource savings.

McPHERSON JA: The order is that the application for leave to appeal against sentence is dismissed.
