

COURT OF APPEAL

WILLIAMS JA
HELMAN J
JONES J

CA No 135 of 2002

THE QUEEN

v.

MICHAEL TIMOTHY BRIODY

Applicant

BRISBANE

..DATE 17/09/2002

JUDGMENT AND BENCH WARRANT

WILLIAMS JA: The applicant, Michael Timothy Briody, pleaded guilty to an offence of armed robbery in company with personal violence. He was sentenced to imprisonment for a period of three years that was ordered to be suspended after serving nine months' imprisonment with an operational period of three years. He seeks leave to appeal against that sentence on the ground that it was manifestly excessive. In the course of argument his counsel submitted that there was also an error made by the sentencing Judge which would entitle this Court to look at the sentence afresh.

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The offence occurred on the 26th of December 2001 at approximately 9 p.m. The complainant was a taxi driver who was operating in the Townsville area. The complainant was aged 55. He picked up from a shopping centre three young males. Each of them had a can of beer in hand at the time. The three were the applicant, Michael Briody, who was then aged 18 years, his brother Ben, who was then aged 17 years and another young person by the name of Benson. It should be noted that Ben also pleaded guilty to the charge and was dealt with at the same time as the present applicant.

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The three offenders gave various directions to the complainant and ultimately it was the applicant, Michael Briody, who told the complainant to drive down a particular road for the purpose of picking up a friend. As the complainant was slowing down along that road he felt an arm around his neck and something sharp press against the side of his neck. It was the applicant, Michael Briody, who was armed with a knife

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and had his arm around the complainant's neck. He said, "Give me your money," and then also said, "I didn't cut the other guy, but I will cut you."

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After the taxi came to a halt a number of blows were struck in the course of which the applicant was saying, "Give me the money." The complainant tried to pull the knife away from his neck and in the course of doing so sustained a cut on his right index finger.

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Michael Briody got out of the taxi and opened the driver's door. He stood in front of the complainant with the knife pointed at the complainant. The other males also alighted. It is sufficient to say that ultimately the offenders took approximately \$100 in notes from the shirt pocket of the complainant. After the incident the Briody brothers travelled to Brisbane where their mother resided and they were apprehended by police when the bus arrived in Brisbane. Those facts were substantially accepted by the learned sentencing Judge as the basis on which each was to be sentenced.

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It was put to the sentencing Judge that the Briody boys had been involved in a traumatic domestic situation and that can be accepted. However, each had been drinking alcohol on the night in question and the learned sentencing Judge noted that each had been encouraged by their father to drink to excess.

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A letter from the boys' mother was placed before the sentencing Judge, which again confirmed that the boys had been

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living in an unfortunate domestic environment for some time prior to the incident in question.

Michael Briody had a minor criminal history. The only conviction was for behaving in a disorderly manner and the learned sentencing Judge regarded that as irrelevant for the purposes of sentencing for this particular offence.

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In the course of submissions counsel referred the sentencing Judge to the decision of this Court in Taylor v. Napatali (1999) 106 Australian Criminal Reports 578 and it was submitted that the reasoning in that case supported a non-custodial sentence here.

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The learned sentencing Judge made the observation that there was "No personal violence done" in Taylor v. Napatali. It is submitted now that his Honour was in error in distinguishing Taylor v. Napatali on that basis. A perusal of the reasoning in that case shows that Napatali pointed a rifle in the direction of one complainant and then jammed it into the back of another complainant's head. So to that extent there was some personal violence, though no actual injury was apparently sustained.

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In the circumstances, I am not persuaded that the statement in question made by the learned sentencing Judge in the course of discussion with counsel constituted such an error as would entitle this Court to sentence afresh. The question becomes whether or not the sentence in fact imposed on a youthful

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offender with no relevant previous convictions was manifestly excessive.

The respondent has placed before this Court a schedule of sentences dealing with the robbery of a taxi driver. In my view, a perusal of that schedule is helpful for present purposes. I would refer, in particular, to the following sentences. In Bowen CA 249 of 1998 a 19 year old who pleaded guilty to robbery in company with personal violence and who had some prior offences but not a serious criminal history, and was also intellectually disadvantaged, was sentenced by this Court to four and a-half years' imprisonment. He had initially been sentenced to six years' imprisonment, but that was reduced. The violence there involved pulling a T-shirt around the neck of the complainant and pulling it tight. No weapon was involved.

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Cox CA 361 of 1991 is also helpful. There a 19 year old pleaded guilty to armed robbery in company. He had what was described as an extensive criminal history as a child, but only minor street offences as an adult.

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There, a co-offender had produced a piece of jagged glass which was pointed to the chest of the taxi driver. The original sentence was four years' imprisonment. This Court allowed the appeal to the extent of attaching a recommendation for eligibility for parole after 10 months.

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The next relevant case is El Hassan, CA 401 of 1994. There, a 20 year old pleaded guilty to an ex officio indictment including a charge of armed robbery with actual violence. A broken bottle was used on that occasion. The offender had a previous conviction for assault, and also for breach of a recognisance.

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Initially, he was sentenced to four and a-half years' imprisonment, with a parole recommendation after 15 months. The appeal to this Court was allowed, and a sentence of three years' imprisonment with a recommendation for parole after 12 months' was substituted.

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The next case is Bush, CA 71 of 1996. The offender there was 19 year old who pleaded guilty to robbery in company with actual violence. He had one prior conviction for stealing. There was no weapon involved in that case. The offender and another grabbed the taxi driver around the neck. The taxi driver was punched and was also kicked. Approximately \$80 was stolen.

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The initial sentence was four years' imprisonment, with a recommendation for parole after 12 months. The appeal was allowed and a sentence of three years' imprisonment substituted.

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Then there is the matter of Monday, CA 234 of 2000. He was a 22 year old who pleaded guilty to attempted robbery. It was a not guilty plea, but the trial was very short. He only had

minor previous. No weapon was involved. This Court did not disturb a sentence of three years' imprisonment, suspended after six months.

In my view, those sentences demonstrate that in a case such as this the offender who actually was armed and used the weapon in the course of the robbery ought be required to serve a term of actual imprisonment.

A taxi driver is in a particularly vulnerable situation, and that is something which was recognised by the sentencing Judge in this case.

In my view the sentencing Judge appropriately distinguished between Michael and Ben. The sentence imposed on Ben was 18 months' imprisonment, totally suspended, with an operational period of two years.

It was the circumstance that the present applicant used the knife, delivered actual violence, and was slightly older than Ben, which required the imposition of a custodial sentence.

In my view, the sentencing Judge gave due weight to the mitigating factors, including the plea of guilty. It is unfortunate that the applicant came from a traumatic domestic background, but that is no excuse for committing a crime of such seriousness as this. In all the circumstances, I am unable to come to the conclusion that the sentence in fact imposed was manifestly excessive.

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It appears that the present applicant was granted bail on the 13th of May 2002 which means that he has served only 13 days in actual custody to date. In the circumstances, a warrant should issue for his arrest, so that he is taken into custody to serve the balance of his sentence.

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In the circumstances, I would dismiss the application for leave to appeal against sentence and order that a warrant issue for the arrest of Michael Timothy Briody.

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HELMAN J: I agree.

JONES J: I agree.

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