[2002] QCA 376

COURT OF APPEAL

de JERSEY CJ
DAVIES JA
JONES J

CA Nos 127 of 2002
128 of 2002

THE QUEEN

v.

MICHAEL ANDREW KING
and DENE WYNTER MORGAN Respondents

and

ATTORNEY-GENERAL OF QUEENSLAND Appellant

BRISBANE

..DATE 23/09/2002

JUDGMENT

THE CHIEF JUSTICE: The Honourable the Attorney-General appeals against a sentence of six years imprisonment imposed on each of the respondents for the offence of doing grievous bodily harm. They pleaded guilty to that and other offences: in the case of King, assault occasioning bodily harm, deprivation of liberty, assault occasioning bodily harm in company and two instances of burglary; and in the case of Morgan, deprivation of liberty and assault occasioning bodily harm in company, nine instances of breaking, entering and stealing, one of receiving and five of entering premises and committing indictable offences. The property offences were in each case committed on another occasion or other occasions from the offences in relation to grievous bodily harm. All terms are to be served concurrently.

It is sufficient to focus now on the grievous bodily harm offence which attracted the six year term without any added serious violent offence declaration. That offence was committed at Cairns on 12th April 2001 upon a 40 year old female complainant. At the time King was 28 years old. He had an extensive criminal history including crimes of violence, particularly rape and assault occasioning bodily harm, committed in 1996 for which in July 1998 he was sentenced to five and a half years imprisonment

At the time he committed these offences he was on parole. Morgan was then 23 years old. He had a considerable prior criminal history for drug and dishonesty offences although no violence. He had previously been imprisoned for nine months

for breaches of probation. The learned sentencing Judge sentenced the offenders to the same term. That was justified. Although King was older and had a more extensive relevant criminal history and initiated the attack, Morgan carried out more of the serious assaults on the complainant and was concurrently being sentenced for a wider gamut of dishonesty offences.

The respondent's attack on the complainant was irrationally motivated and prolonged and brutal in execution. It was torturous in character. At the time the respondents were intoxicated by alcohol and drugs although that, of course, is not a mitigating feature when it comes to sentence. The assault upon the complainant included a threat that she would be killed by someone or other and it ended in her being left unconscious and naked within a car by a public road, likely to die if not rescued. The respondents severely bashed her and beat her variously with metal torches and a small axe or hammer. She required considerable subsequent medical treatment, suturing, as well as an operation to repair damage done to the tendons in her leg. Her ear was partially severed. She is left with cosmetic disfigurement. Three teeth needed replacing. She endures substantial consequential psychological problems.

I must now come to the circumstances of the offences in a little more detail. Early in the morning the complainant was walking along a public road. She had argued with her de facto husband. She came across the respondents. They spoke for a

time and she agreed to go with them first to a service station where there was some difficulty over a missing ATM card and then to a lookout. They drank some alcohol together. King made sexual approaches which the complainant resisted. He then accused her of stealing the ATM card which she denied. Apparently by way of response King punched her in the nose. She bled profusely onto a seat of the car. They were outside the car at that stage. King became angry. The complainant unsuccessfully sought assistance from an early morning jogger who was passing by.

The respondents then both grabbed the complainant from behind and forced her into the car with threats. They drove off. Passing the jogger, they told the jogger not to pay attention to the complainant as she was mad. Some time later Morgan put the complainant into a headlock inhibiting her breathing. He punched her about 20 times in the face. She complained of thirst and difficulty breathing. Morgan responded by punching her. King was driving. He turned around and struck her. She faded in and out of consciousness. One of the respondents told her that she would be finished off at the Bandido's Clubhouse.

At one stage she opened the door but Morgan restrained her, choking her. The car eventually ran out of petrol and stopped. Morgan subsequently told the police that at that stage the complainant screamed to be released. Morgan responded by hitting her in the face, torso and limbs with a metal torch. As she sought to escape King hit her about the

legs with a small axe or hammer. He also hit her with another small torch. King set off to secure some petrol leaving Morgan to restrain the complainant. He was away for a substantial period and Morgan apparently became frustrated. He manifested that by again bashing the complainant over a period of about one and a-half hours, he said, in what he termed a mad panic attack. He conceded the blows were in his terms quite hard and he said that she would, if left, have bled to death. King also considered that the complainant was going to die.

Hence the earlier description of the onslaught, which persisted over up to about six hours, as brutal and prolonged with potentially terminal consequences for the complainant. The only substantial points of mitigation for the respondents in relation to the sentencing process were their timely pleas of guilty, their remorse, cooperation with the police and their unfortunate life histories.

There are two aspects of the learned sentencing Judge's remarks which I think bear mention. First her Honour observed that the complainant's injuries were not of the worst sort of grievous bodily harm possible. That is, of course, factually correct but it is not a point of great significance in relation to determining the sentence to be applied here. She suffered severe psychological damage in particular quite apart from the substantial physical injuries inflicted upon her. There is no permanent consequent physical disability, it is true, but psychological disability persists and the relevant

point to my mind is that the complainant was substantially injured and continues to suffer from serious psychological adverse consequences. That she is not left with a serious continuing physical disability is really by the way in the overall context of this obviously very serious case. It may stand against imposition of the maximum in an otherwise very serious case, but little more.

Secondly, the learned Judge suggested as significant that the attack was not coldly premeditated but the result of a drug-induced frenzy. The respondents were intoxicated, which no doubt explains the charge and the plea to grievous bodily harm simpliciter. But the circumstances of the offence nevertheless indisputably suggest a measure of calculation. While the first blow in anger may have been spontaneous that did not characterise what transpired over the following few hours, the prolonged beatings, the attempt to put the female jogger off the scent as it were, recapturing and restraining the complainant as she sought to escape from time to time.

The respondents were not to be sentenced for intentionally doing grievous bodily harm. On the other hand their having done grievous bodily harm is not to be seen as if it were some sort of unconscious out of body event. It was deliberate although as the Court must accept not intentional.

It was the considerable length of the attack which particularly distinguished it. The use of weapons is obviously also of significance but weapons are often a feature

of these dreadful crimes. It is in my view the protracted nature of the onslaught which particularly characterised this crime putting it into a serious category.

Before the learned sentencing Judge the Crown Prosecutor sought the imposition of the maximum penalty of imprisonment for 14 years. The Judge considered the previous decisions and suggested a range of four to six years in sentencing, as she saw it, at the top of that range. The learned Judge considered it inappropriate to add a serious violent offence declaration, influenced by the reasoning in Bojovic [2000] 2 Queensland Reports 183. It must be said that the learned Judge was given little assistance by the Crown Prosecutor. She should have been taken through a careful examination of relevant past decisions. It was not helpful for the Crown simply to have pointed to the maximum penalty. Doing so, apart from anything else, unreasonably raised expectations as what could occur in the determination of the case.

As to an applicable range we have received submissions on a number of previous cases which I should now mention, concerning doing grievous bodily harm or doing grievous bodily harm with intent.

I will begin with the observation that, while in principle doing grievous bodily harm with intent should ordinarily attract a more severe penalty than doing grievous bodily harm simpliciter, that principle should not be lifted to a level of inflexibility.

The circumstances of an offence of doing grievous bodily harm simpliciter may be so serious as to warrant severe punishment, even absent the element of intent.

I turn now to the particular cases to which we have been referred or some of them. Sielaff, CA 349 of 1995, was sentenced to 10 years for grievous bodily harm with intent, parole recommended after three.

In conjunction with two women, the male, Sielaff, picked up a drunken mentally retarded man, took him to a remote location and beat him about the head and body with an iron bar, leaving him for dead. He was convicted by a jury. Subsequent events confirmed the callousness of the particular attack. This offence pre-dated the serious violent offender regime.

Although Sielaff was convicted of the more serious offence of doing grievous bodily harm with intent, by contrast with these respondents, he was only 18 years old at the time and had no prior criminal history.

Further, the actual attack was of much shorter duration, although its callousness was, as I say, confirmed by Sielaff's subsequent conduct. The parole recommendation no doubt reflected his youth and lack of prior criminal history. It is important to note that he was convicted by a jury.

Perussich [2001] QCA 557 was another case of grievous bodily harm with intent, where the offender again was convicted by a

jury. On appeal, a sentence was substituted of nine years' imprisonment, without a serious violent offender declaration, for an attack inspired by alcohol which an offender with three prior convictions for assault hit the complainant about the head with a gun and shot him in the leg. The complainant was left seriously disabled. That was a brief though violent episode, not in company, although, it must be noted, with the element of intent which is absent here.

Worland [2002] QCA 123 was one of a number of men involved in a gangland style attack in a drugs context. It was a very serious case of grievous bodily harm simpliciter. Worland was sentenced to six years, with a serious violent offender declaration. He was convicted by a jury. That victim's throat was cut and two fingers were chopped off. Worland, it may be noted, did not, however, participate in those violent responses. He was 22 years old, with a significant prior criminal history. Worland's role was, in nature, preparatory to what was done by the other offenders. That case would, in my view here, have supported making the declaration in the context of the six year term selected by the Judge.

McGrady, CA 44 and 45 of 2001, concerned the conviction of two brothers for doing grievous bodily harm simpliciter. One pleaded guilty and the other was convicted by a jury. Each was sentenced to six years' imprisonment. They had prior histories. There was no evidence of any substantial residual consequence of what amounted to a severe beating while the offenders had in their possession an iron bar and a knife, but

the assault was not prolonged as here and that case, in my view, like Sielaff, is inconsistent with an upper limit, as suggested here, in relation to the relevant range of six years' imprisonment.

It is in my view inappropriate for sentencing Courts to feel hide-bound by a range said to be drawn through minute case by case comparisons. Opinions as to the significance of differences between cases may reasonably differ.

Sentencing Judges must be allowed reasonable latitude. That is the point of the important stipulation that just sentencing is assured, and only assured, by the exercise of a fully informed judicial discretion, subject to the safeguard of appeal being exercised here.

The other matter of considerable importance is the statutory maximum prescribed by the legislature. Courts may run a risk through undue concentration on the results of other cases of overlooking the prima facie importance of that ultimate delimitation.

I respectfully consider that the learned Judge erred in two respects in her otherwise well considered and conscientious approach to this case. The first concerns the issue of making a declaration. It is difficult to see how a sentencing Court could reasonably, in a case like this, have avoided making a declaration that the offenders had been convicted of a serious violent offence.

By its nature, this offence of doing grievous bodily harm was undoubtedly serious and violent. It was brutal, involved the use of weapons, was committed while the complainant was restrained over a lengthy period - some hours - involved injuries which would without more have led to her death and have left her with a substantial residual disability.

It was committed by two men in company, each of whom had a substantial prior history and had previously been in prison. Surely that aggregation of circumstances virtually compelled the making of a declaration and surely that is what the legislature would have intended.

The obvious purpose of the serious violent offender regime is to strengthen the sentences to be served by serious violent offenders. That purpose is subverted if in cases obviously calling for a declaration, it is not made.

The learned Judge, relying on Bojovic, declined to make the declaration because she considered that six years was the top of the relevant range. In my view, her second error was to consider that she should not sentence beyond six years for this offending. No doubt the overall effect of the imprisonment, together with the declaration, must be taken into account. Accepting that a declaration was patently warranted in this case, one turns to the question, to what head sentence it should have been appended.

As I have said, Worland would, in my view, sit consistently with six years, with a declaration here. Sielaff especially and also Perussich, even allowing for their concerning convictions for grievous bodily harm with intent and McGrady, would, however, suggest that for grievous bodily harm simpliciter of this gravity, six years would not delimit the applicable range, even allowing for the plea of guilty.

As I have suggested, sight must not be lost of the maximum of 14 years' imprisonment, with its particular features, its duration, her being in company, the frequency of the beatings, the use of weapons, effectively leaving a vulnerable complainant as for dead, their prior criminal histories, her residual disability - this case of grievous bodily harm fell into a very bad category.

The notion that an offender could be eligible for post-prison community based release, that is parole, after serving no more than three years for a crime of this magnitude, even after the plea of guilty, is intolerable and would not meet reasonable community expectations.

I agree with counsel for the appellant that, in the context of the maximum, the range for this offending would extend substantially beyond six years, with a declaration. In my view, but for the pleas of guilty, each respondent should have been imprisoned for at least eight years, after all mitigating features were taken into account, with a declaration that he

had been convicted of a serious violent offence, but two circumstances warrant moderating that back.

First, the pleas of guilty and second, the moderate approach which is appropriate for reasons which have been explained in many cases, where the Court is dealing with an appeal by the Honourable the Attorney-General.

In my view, what the Court should now do is to add to the sentence of six years' imprisonment, in respect of each conviction for grievous bodily harm, a declaration that the offender has been convicted of a serious violent offence.

What that will mean is this: rather than the current position, where each respondent may have to serve no more than three years' imprisonment for that offence, each respondent would, under my approach, necessarily have to serve at least 4.8 years, which involves a substantial stiffening of the penalty imposed upon him.

I would order that the appeal be allowed and that to the sentence of six years' imprisonment in respect of each respondent for the offence of doing grievous bodily harm, there be added a declaration in each case that the respondent has been convicted of a serious violent offence.

I would add this: the circumstance that we are dealing with this, on an Attorney's appeal, must carefully be taken into

account when this decision is examined by sentencing Judges in the future.

In other words, the six years with a declaration for offending of this gravity must hereafter, in my respectful view, be seen as moderate.

DAVIES JA: I agree.

JONES J: And I agree.

THE CHIEF JUSTICE: The order is as I have indicated.
