COURT OF APPEAL

de JERSEY CJ
HELMAN J
JONES J

CA No 145 of 2002

THE QUEEN

v.

ANDREW JOHN VON PEIN (Applicant)

BRISBANE

..DATE 25/09/2002

JUDGMENT

THE CHIEF JUSTICE: I will invite Justice Jones to deliver the first judgment.

JONES J: The applicant seeks leave to appeal against sentences imposed by the District Court after a trial, in respect of convictions on one count of assault occasioning bodily harm whilst armed, one count of common assault and two counts of a serious assault on a police officer, in the execution of the officer's duty. In respect of each conviction, the penalty was 18 months' imprisonment, with all sentences to be served concurrently.

The offences occurred at the applicant's residence on the evening of 19/20 April 2001. The applicant was then 36 years of age. The complainant in respect of the first two counts had, until August 2000, lived in a de facto relationship with the applicant for five to six years.

At the time of these incidents she was 29 years of age. The complainant had returned to the residence during the Easter school holidays to care for the applicant's two children, while the applicant was at work. The children were aged 12 years and 10 years.

During this period she slept in the applicant's bed. On the night in question, the applicant asked her to resume living with him, but the complainant refused. This led to an argument developing, which continued until the complainant went to bed, following the arrival of a friend of the

applicant, with whom he commenced drinking. It appears from the evidence that a substantial amount of drink was taken by the applicant. It included beer and a half a cask of port wine.

After the friend left, the applicant went to bed. During the course of the evening, the complainant woke the applicant, to continue with the earlier argument. In the course of waking him, she shook him and it seems she also struck him a few times.

Once aroused in this way, the applicant launched into an episode of verbal and physical abuse of the complainant, which commenced with an assault of her in the bedroom, which then moved to the lounge room. The applicant struck the complainant with a belt on approximately six occasions, as a result of which she sustained contusions on her left leg. That was the substance of the offence of the assault occasioning bodily harm whilst armed.

The offence of common assault occurred when the complainant went to a public telephone box to call the police. The applicant followed her, grabbed the complainant by the hair, pushed her face against the telephone box two or three times and then pulled her from the telephone box by the hair.

The two offences of serious assault occurred when police officers arrived at the applicant's home and sought to question him. The applicant initially slammed the door closed

and then re-opened it. He took off the singlet he was wearing and holding his fists in a fighting stance, threatened the police officers with the words, "You want to bring it on, you copper cunts?"

This assault was the threatened application of force. The police officers warned the applicant about his actions and of their intention to use capsicum spray. Constable O'Brien, who was holding the can of spray in his left hand, had both his hands up in a defensive manner, when the applicant slammed the door again.

The police officer was unable to move his right hand in time and the door caught it, causing a little cut in the webbing between his thumb and forefinger. The applicant opened the door again and the police officers used the spray to subdue him.

When sentencing, the learned sentencing Judge noted particularly the adverse criminal history of the applicant, which included prior acts of violence against the complainant and the same police officer. He had been sentenced to six months' imprisonment in respect of the earlier assault on the complainant, cumulative upon his serving an earlier term of imprisonment which had been suspended.

Other convictions related mainly to offences of dishonesty and of drug use. They, however, resulted in his being imprisoned for short periods on six prior occasions. The fact that the

applicant tested the charges against him on a two day trial, without any discernible defence, was held to be indicative of his lack of remorse and it of course denied the applicant any concessions with respect to penalty.

The factors which the learned Judge took into account in the applicant's favour were that he had a stable job, that he had two children for whom he was the sole carer and that the complainant's own conduct precipitated the first assault, by waking the applicant from sleep to continue an argument, which had ended when she first went to bed.

Counsel for the applicant now argues that insufficient allowance has been made for the effect of the complainant's action in precipitating an assault and also on the basis that the penalty is out of line with a number of comparable decisions.

The complainant admitted that she had awakened the applicant by hitting him and shaking him. She described herself as being "out of control" that evening. She also acknowledged that she had assaulted the applicant on a prior occasion. Their association, it appears, was one that included violence each to the other.

At the trial, giving evidence on voir dire, she expressed the wish that the applicant not be gaoled. She showed support for the applicant and, indeed, was ultimately declared to be a hostile witness. The nature of the assault was such that no

serious injury was caused to the complainant or the police officer, but again, the circumstances showed that more serious injuries could have been caused and it showed further that the applicant had a propensity towards violence.

On behalf of the applicant, we have been referred to a number of decisions of this Court, which dealt with assaults occurring in a domestic setting. In Reynolds v. Hobson, CA 219 of 1994, the offender assaulted his de facto wife, firstly with a butter knife, then with a chair, causing a large laceration to her hand. That offender had previous convictions for violence, one for an aggravated assault of a sexual nature for which he had received three months' imprisonment. The penalty imposed by the Stipendiary Magistrate, was for imprisonment for 12 months, with a recommendation for parole after six months. The Court of Appeal varied that penalty by suspending the sentence after three months' imprisonment and in the circumstances there, entitled the defendant to be released forthwith.

In The Queen v. Caddy, CA 193 of 1994, two offenders were convicted of assaults committed jointly on the de facto wife of one of them. The assault included the pulling of the complainant by her hair, pushing her against a wall, dragging her down the front stairs and continuing the assault on the front lawn by kicking her on a number of occasions. The de facto husband was sentenced to 12 months' imprisonment and the other offender to nine months' imprisonment, which was wholly suspended. Both the sentences were varied by the Court

of Appeal, but the focus on the offending of the de facto husband showed that the sentence of imprisonment was reduced to a period of six months.

In Gillam v. Payne, CA 144 of 1997, the offender's assault of his de facto wife was of a more violent nature than that in the subject appeal. It resulted in the victim sustaining a fractured wrist and other injuries consistent with being kicked across the buttocks, leg and tail bone, chest and breast.

The sentence there of 12 months' imprisonment was not held to be manifestly excessive, but a recommendation for parole consideration after four months was added to take account of the offender's lack of prior convictions.

More recently, in The Queen v. Pierpont, [2001] QCA 493, the offender had assaulted his de facto wife in the course of an argument over custody of their child. The complainant struck the offender and he retaliated with a degree of violence, which included throwing her to the floor, partially choking her, punching her and causing other physical injuries.

He was sentenced to 18 months' imprisonment, after a plea of guilty, with a recommendation for eligibility for parole after six months. The case principally dealt with the validity of that order following amendments to the Penalties and Sentences Act, but of more relevance here is the fact that the Court in this instance considered a number of comparable decisions,

some of which are relied upon by the parties to this appeal. In the end result, the Court of Appeal substituted a penalty for 12 months' imprisonment which was to be suspended after serving three months.

We were referred also to the decision of The Queen v. Matamua, ex parte The Attorney-General, CA No 186 of 2000, in which the Attorney-General appealed against a wholly suspended sentence for an assault which involved a great deal more violence than has occurred here. The assault there arose out of a domestic argument in which the offender at one stage threatened to slice the complainant with a broken bottle. When the argument resumed, he picked up an axe swinging it at her. He hit her on the back of the head with the axe handle and knocked her to the ground and swung the axe towards her, embedding it in the ground beside her head. He applied further force to her and threatened to kill her.

The sentence imposed there was of 18 months, wholly suspended for an operational period of two and a half years. The Court of Appeal did not interfere with that suspension, but required some part of the penalty to be served by imprisonment, but made a recommendation for parole after six months. A period of three months had been served at that time.

We were referred also to the case of The Queen v. Taylor, but the circumstances of that case do not assist in the determination of the penalty.

The consideration of all of these cases leads me to the view that the penalty imposed in this instance, without some qualification, was manifestly excessive. The conduct of the complainant in arousing the applicant from his sleep, by shaking him and hitting him, to continue an argument which had ceased some hours earlier, was the action which precipitated the violent conduct by the applicant.

There is little doubt that the applicant was still affected by his consumption of alcohol at this time, which no doubt contributed to his lack of self control and probably led to his exaggerated response in trying to prevent the complainant from contacting police.

The applicant's reaction to the police visit with intemperate and threatening, but the actual assault in which the police officer sustained the minor injury appears to me to have been caused by the applicant's wish to avoid being sprayed with the capsicum chemical.

Without in any way diminishing the applicant's conduct, the fact remains that the injuries sustained in respect of each of the assaults was quite minor and the circumstances of each assault did not, in my view, warrant the imposition of 18 months' imprisonment, despite the unfortunate prior criminal record of the applicant. Given that his Honour was looking at the totality of the conduct in deciding on the penalty and his regard to - and even with regard to his past criminal record,

the penalty, without providing some earlier termination, appears to me to be excessive.

When regard is had to the applicant's favourable work record, the wishes of the complainant and the desirability of the applicant caring for his children, rather than leaving that task in the hands of the non-family member, there ought to have been favourable consideration to earlier release.

I express this view conscious of the fact that since the time of many of the decisions to which we have been referred there have been an increase in the penalties provided for the offence of assault and assault in circumstances of aggravation.

Nevertheless, in my view, the application for leave should be granted, the appeal allowed and the sentence varied by ordering that the term of imprisonment be suspended after the applicant has served six months' imprisonment, with an operational period of three years.

THE CHIEF JUSTICE: I agree. Ms McGinness, who appeared for the applicant, submitted among other things, that the pain suffered by the applicant upon the administration of the capsicum spray should in some way be brought to account in the sentencing process.

I would like to say for my part that I think that to be untenable simply because the police officer was in so doing acting in accordance with the law.

HELMAN J: I agree.

THE CHIEF JUSTICE: The order is as indicated by Justice Jones.
