

SUPREME COURT OF QUEENSLAND

CITATION: *R v McCasker* [2004] QCA 233

PARTIES: **R**
v
McCASKER, Shaun Patrick
(applicant/appellant)

FILE NO/S: CA No 127 of 2004
DC No 215 of 2004

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane

DELIVERED EX TEMPORE ON: 7 July 2004

DELIVERED AT: Brisbane

HEARING DATE: 7 July 2004

JUDGES: Davies, Williams and Jerrard JJA
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **1. Application for leave to appeal against sentence granted**
2. Appeal against sentence allowed
3. In lieu, impose a sentence of 12 months imprisonment suspended after six months, with an operational period of two years

CATCHWORDS: CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - SENTENCE - FACTORS TO BE TAKEN INTO ACCOUNT - CIRCUMSTANCES OF OFFENCE - where the applicant pleaded guilty to assault occasioning bodily harm - where the offence occurred when the applicant came to the aid of his father - whether the learned sentencing judge took all the mitigating factors into account - whether the sentence is manifestly excessive in all the circumstances

COUNSEL: Applicant appeared on his own behalf
P F Rutledge for respondent

SOLICITORS: Applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for respondent

DAVIES JA: The applicant pleaded guilty in the District Court on 5 April 2004 to the offence of assault occasioning bodily harm. The plea was on the morning of his trial. The learned sentencing Judge referred to that fact, but his plea was not strictly a late plea in this sense; that he had been charged in addition with an aggravated circumstance and with an additional offence, and his father, whose involvement I will mention in a moment, had also been charged with an offence.

The aggravating circumstance, the additional charge against him and the charge against his father were dropped, and it was in those circumstances that he pleaded guilty. He was sentenced to 12 months imprisonment. He was, at the time, 36 years of age.

The circumstances of the offence were briefly as follows. He and his father went to the complainant's house to collect belongings of his father's wife who had been living with the complainant. An argument developed in which the complainant grabbed the father causing some minor scratches, and it was then that the applicant intervened, coming to his father's aid.

His intervention, however, was undoubtedly an over-reaction. He punched the complainant a number of times in the face, knocking him to the ground, and then when he was on the ground, kicked him in the ribs. He and his father then left. The complainant was left with bruising and swelling to his eyes, lacerations to the cheek and lower chest, a soft tissue

injury to the chest and a fractured rib. He was required to be in hospital for some time.

An important circumstance which no doubt persuaded his Honour to impose the sentence which he did was the applicant's previous criminal history which commences in 1984. It consists mainly of offences involving dishonesty but includes one serious offence of indecent dealing with a child under 12 years for which he was sentenced to three years imprisonment; and perhaps more relevantly to the circumstances of this case an offence of assault occasioning bodily harm on 7 October 1991 for which he was given probation for two years and later fined in lieu of probation; and an offence of assault occasioning bodily harm on 8 December 1993 for which he was convicted and fined.

These are no doubt important factors in determining a sentence that should be imposed. On the other hand, as I have already mentioned, the circumstances were that the applicant went to the aid of his father and it was in a situation of helping his father who had been assaulted by the complainant, that he committed the offence which he did.

Another factor which is in the applicant's favour is that he is the sole carer of his father who has a number of medical conditions and who, in addition to those, is unable to read and write and is heavily dependant on the applicant to assist him in his normal living such as paying rent, filling in forms, and ordinary tasks such as shopping.

In my opinion, having regard to all of those circumstances, the sentence which was imposed, being a sentence of 12 months imprisonment, without any relief for the mitigating circumstance of his plea of guilty and the other factors I have mentioned, was manifestly excessive.

In my opinion, an appropriate sentence would have been a sentence of 12 months imprisonment, suspended after six months. I would therefore grant the application, allow the appeal, and in lieu, impose a sentence of 12 months imprisonment suspended after six months, with an operational period of two years.

WILLIAMS JA: I agree.

JERRARD JA: I agree.

DAVIES JA: The orders are as I have indicated.
