SUPREME COURT OF QUEENSLAND

CITATION:	*R v Fitzgerald* [2004] QCA 241
PARTIES:	**R** **v** **FITZGERALD, Mark Andrew** (applicant)
FILE NO/S:	CA No 179 of 2004 DC No 1292 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 July 2004
DELIVERED AT:	Brisbane
HEARING DATE:	16 July 2004
JUDGES:	de Jersey CJ, Jerrard JA and Mackenzie J Separate reasons for judgment of each member of the Court, de Jersey CJ and Mackenzie J concurring as to the order made, Jerrard JA dissenting
ORDER:	**Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – PURPOSE OF SENTENCE – DETERRENCE – where applicant convicted on his own pleas of guilty of break and enter with intent and assault occasioning bodily harm – where applicant sentenced to 21 months imprisonment suspended after 6 months for an operational period of 3 years – where offences involved the invasion of the complainant's home - where sentencing judge considered deterrence a significant factor in imposing sentence – whether sentence imposed manifestly excessive *R v Denham; ex parte A-G (Qld)* [2003] QCA 74; CA No 376 of 2002, 28 February 2003, considered *R v Miles* [1999] QCA 325; CA No 96 of 1999, 20 August 1999, considered *R v Wentt* [1995] QCA 613; CA No 440 of 1995, 6 December 1995, considered
COUNSEL:	M J Byrne QC for the applicant S G Bain for the respondent

SOLICITORS: Legal Aid Queensland for the applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **de JERSEY CJ**: I have had the advantage of reading the reasons for judgment of Jerrard JA, and am grateful for His Honour's recitation of the relevant circumstances.

[2] I have also had the advantage of reading the reasons for judgment of Mackenzie J. I agree with those reasons.

[3] In my respectful view, the gravity of this home invasion, which occurred some substantial period (approximately four months) after the ending of the applicant's relationship with his wife, and exhibited considerable deliberation and brutality, warranted the penalty imposed, notwithstanding the limited injuries to the complainant, the attitude of the applicant's wife, the aspect of care for the applicant's eldest child, and the rehabilitation of the applicant over the period between the offending and sentencing. I consider the sentence imposed to have been moderate.

[4] The court must, through the penalties imposed, take a serious stand against home invasions. There is a strong need for deterrence in that area.

[5] I would refuse the application.

[6] **JERRARD JA:** On 11 June 2004 Mark Fitzgerald pleaded guilty to one count of entering the dwelling of Zane Milfull with intent to commit an indictable offence in that dwelling, the entry being by means of a break, and one count of unlawfully assaulting Zane Milfull and doing him bodily harm. Those offences were committed on 29 January 2003. He was sentenced to imprisonment for 21 months, that sentence to be suspended after six months for a period of three years, and 16 days pre-sentence custody from 29 January 2003 to 13 February 2003 was declared to be imprisonment already served under that sentence. Mr Fitzgerald now applies for leave to appeal against that sentence, on the ground that it was manifestly excessive.

[7] While the offences involved in the forcible and unwanted entry of another person's dwelling and subjecting that other person to a violent attack are becoming all too common, the background events to Mr Fitzgerald's offences are not common. He was 39 years old when he offended, with no prior convictions, and a psychiatric report placed before the learned sentencing judge recorded therein that the complainant Zane Milfull had been Mr Fitzgerald's best friend.

[8] As is perhaps more common, what had occurred was the development of a sexual relationship between Mr Milfull and Pamela Fitzgerald, the applicant's wife. What was uncommon about that circumstance is that, as the prosecuting counsel informed the learned judge, in approximately March of 2001 Mr Milfull had been involved in a group sexual activity "colloquially called a threesome"[1] with Mr and Mrs Fitzgerald. Unsurprisingly, one consequence of that was that the marriage relationship deteriorated and the Fitzgeralds separated in September 2002. Mrs

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1 AR 3

Fitzgerald remained involved with Mr Milfull and Mr Fitzgerald was resentful, angry, and hurt by this relationship. In that month in which they separated, Mr Fitzgerald was admitted to hospital after taking an overdose of sleeping and other tablets. He remained depressed after discharge.

[9] On 29 January 2003 Pamela Fitzgerald visited Zane Milfull at his home and was there when Mr Fitzgerald telephoned Mr Milfull. Mr Fitzgerald later told the psychiatrist whose report was exhibited that he had remained very angry with his wife, and had decided that day he would confront Mr Milfull and ask him "to remove himself from disrupting his marriage".[2] When he rang, Mrs Fitzgerald answered the phone. Very soon afterwards Mr Fitzgerald arrived by car at Mr Milfull's house, where he saw his wife's car on the footpath. His own vehicle was described as having screeched to a halt, and Mr Fitzgerald entered the home through a closed door. He told the psychiatrist he kicked it open. Mr Milfull was on crutches at the time. The agreed schedule of facts records that Mr Fitzgerald head-butted Mr Milfull and then put him in a head-lock. He threw Mr Milfull to the ground, put his fingers around Mr Milfull's windpipe, and starting squeezing. Mr Milfull grabbed Mr Fitzgerald by the testicles and Mr Fitzgerald released his grip. Zane Milfull asked "why are you doing this?", and Mr Fitzgerald replied "I'm going to make you that ugly that Pam doesn't want to see you again…", and added that he was "not leaving until you die".

[10] He grabbed Mr Milfull's windpipe again and Milfull, who struggled for breath, recalls losing consciousness. He apparently immediately regained it, and grabbed Mr Fitzgerald by both arms and pulled himself to his feet. Both men then pushed and shoved the other and Mr Fitzgerald ceased his attack. The police arrived at that time, Mr Fitzgerald walked out the front door, and Mr Milfull went into his bedroom. Mr Fitzgerald then returned to the house and that bedroom, followed by a police officer, and then began punching at Mr Milfull. He punched him at least once in the face with a closed right fist before police intervention stopped the assault.

[11] Mr Milfull was examined by a doctor that day, whose report recorded that Mr Milfull had suffered abrasions to the front of his neck and bruising to his forehead and right forearm. He complained of some difficulty in swallowing and general soreness of the throat. Counsel for the prosecution told the learned judge that Mr Milfull's most serious injuries were "scratches to arms and to his throat, [and] the continuing sore throat",[3] while adding that the loss of consciousness interfered with Mr Milfull's comfort.

[12] The prosecution conceded that Mr Fitzgerald's plea of guilty was a timely plea, but submitted that his conduct fell squarely within what the prosecution described as "the home invasion scenario", adding that Mr Fitzgerald, in what the prosecutor described as a jealous rage, had forced his way into Mr Milfull's dwelling and assaulted him, while threatening to kill him, that assault including Mr Milfull being choked until losing consciousness. On that basis, the prosecution submitted that the appropriate head sentence was one of three years imprisonment.

[13] Mr Fitzgerald's counsel informed the learned judge that Mr Fitzgerald was employed as a marine cargo surveyor, employment he gained after his offences, and

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2 Page 3 of the psychiatrists report, at AR 33

3 At AR 6

tendered a reference from his employer. Counsel described Mr Fitzgerald as having experienced a difficult childhood with his own parents being separated, and having first met his wife Pamela some 21 years ago. The learned judge was told the couple have three children, of whom the eldest boy, aged 12, lived with Mr Fitzgerald and the other two children went with their mother. The couple had had difficulty with their parenting of that eldest child, who had been placed in the care of the Chief Executive Officer of the Department of Families in July 2003, and in Mr Fitzgerald's sole parenting care since November 2003. On counsel's submissions that boy was doing particularly well in his father's care, his mother having had difficulty in controlling him; and a report under the hand of that child's school Principal congratulated Mr Fitzgerald on the boy's academic achievements in his first term in 2004, describing those as "terrific". Counsel described Mr Fitzgerald as seeing the other two children weekly and as caring for them when Mrs Fitzgerald, whose work as a registered nurse involved shiftwork, was working a nightshift. A statement from Pamela Fitzgerald was also put before the learned sentencing judge, in which she said she did not think that she would be able to control their eldest son on her own if Mr Fitzgerald received an actual custodial sentence. She also said that she was no longer in fear of Mr Fitzgerald, and did not believe that Mr Fitzgerald would have offended had it not been for the relationship that had developed between Mr Milfull, herself and Mr Fitzgerald. Mr Fitzgerald had obviously done a good deal in the way of self rehabilitation by the time he came to be sentenced.

[14] The learned sentencing judge accepted the Crown description of Mr Fitzgerald's offending behaviour, and observed that the attack had not been momentary, nor trivial, and that quite an amount of force had been applied to Mr Milfull, sufficient to choke him into a loss of consciousness. As against that, the learned judge remarked that the background to those offences was a somewhat special one. Nevertheless, the learned judge cited remarks by Thomas J, as he then was, in *R v Wentt* [1995] QCA 613, in which that learned judge had written:

> "Offences of this character which threaten the safety of persons in their own home are commonly regarded as sufficiently serious to demand custodial sentences even in the case of persons of previous good character";

and the sentencing judge remarked that the deterrent element was more than ordinarily important in relation to matters of that nature, to deter people from entering the homes of others intending to be violent and in fact being so violent. The learned judge then imposed the imprisonment described.

[15] Examination of another sentence approved by this court shows that the sentencing judge was correct in the view that offences involving entering the home of another and committing violence therein, as intended at the time of entry, do result in custodial sentences being imposed, even upon persons of previous good character. On this appeal counsel for the Director referred the court to *R v Miles* [1999] QCA 325. Mr Miles had pleaded guilty to three offences charged on indictment and two summary offences. He was a middle aged man with no criminal history, sentenced to three years imprisonment with a recommendation that he be considered for release on parole after one year. He had forced his way into his mother-in-law's house, where his estranged wife was staying, and assaulted both women. He pleaded guilty to what was an offence of entering a dwelling and committing an offence therein, and to one count of assault occasioning bodily harm to his mother-

in-law. That offender had separated from his wife in November 1998 and the offences were committed in February 1999.

[16] There had been two unsuccessful attempts by that offender at reconciliation, and during the period prior to commission of the offences that applicant had threatened more than once to harm himself, and on other occasions had threatened to burn the family home. He had once slapped the wife. His actual offences were committed after he had decided to go to his mother-in-law's house in a further attempt at saving the marriage, and had decided to commit suicide if she would not come back and live with him. He broke into the home, carrying some cyanide with him, and grabbed his wife around her neck. He shoved his fingers in her mouth, dragged her down a hallway, and pushed her to the ground. Those actions also caused his wife's mother to be knocked over, and that applicant then attempted to herd both women into a back bedroom. He punched his mother-in-law on the right side of her face, knocking her to the ground, and kicked her. He then threatened to end his own life with the cyanide if his wife did not agree to return to him, and told the two women that he had cut the phone lines to the house, a fact which was later established to be true. He also threatened to burn the house down. His wife calmed him down; he said he loved her and wanted her back, asked for another chance, and offered to clean up the broken glass (in the door) and pay for the damage. His wife drove him back towards his home, and subsequent police intervention resulted in yet more threats to commit suicide before he was finally peaceably arrested.

[17] That applicant was sentenced for his having breached a domestic restraining order by his entry into the premises, presumably obtained earlier and presumably on his wife's application; and also for the offence of possession of the cyanide. He also pleaded guilty to stealing the bottle of cyanide, and was sentenced to three months for that. This court found that the head sentence of three years imposed on him was not a low one, but was not manifestly excessive. It held that emphasis had rightly been placed on the fact that that applicant was the subject of a domestic violence order, caused by apprehension about his behaviour, and that requirements both of personal deterrence and general deterrence made the sentence imposed one within the proper range.

[18] The stealing, possession, and threats to use the cyanide made that applicant's offences of entering a dwelling and assaulting one of the occupants more dramatic, and involved more generally unlawful behaviour, than did Mr Fitzgerald's. Further, Mr Fitzgerald did not breach an existing restraining order by going to Mr Milfull's home. He did not carry, or ever avail himself of, anything which could be used as a weapon or means with which to harm another or himself. Nevertheless, the head sentence imposed in that case and not interfered with by this court makes it impossible to conclude that the head sentence imposed on Mr Fitzgerald was manifestly excessive.

[19] The applicant referred both the sentencing judge and this court to the matter of *R v Denham; ex parte A-G (Qld)* [2003] QCA 74. That respondent had pleaded guilty to one count of burglary and one of assault occasioning bodily harm, and to an additional summary offence of breach of a domestic violence restraining order. All of that offending behaviour had occurred on 31 January 2002. That respondent was sentenced in October 2002 to 12 months imprisonment on each of the two indictable offences, to be served by way of an intensive correction order containing special conditions that he submit to psychiatric and psychological treatment and have no

contact with the complainant, and he was also ordered to pay $1,000.00 to the complainant within three months in default of one month imprisonment. A six month sentence of imprisonment, wholly suspended for three years, was also imposed. The Attorney-General had appealed against those sentence orders, arguing the sentence was manifestly inadequate.

[20] That respondent had prior convictions for what were described by this court as minor street offences, as well as a conviction in 2000 for unlawful damage, and a prior conviction for assault occasioning bodily harm in 1999, for which he had been sentenced to two months wholly suspended. That respondent was 32 years old at sentence with a good work history, and in full time employment when appearing for sentence.

[21] In breach of a domestic violence restraining order, he had approached the home of the complainant, a 59 year old man who was the father of that respondent's former partner. The complainant had attempted to lock his front door, but that respondent had pushed the door open and a struggle ensued thereafter, in which that respondent hit the complainant to the face four or five times, causing his nose to bleed, and a struggle then continued outside the house. That respondent had the better of it and kicked the complainant and held him in a headlock. Eventually the complainant escaped and while the complainant waited for the police to arrive the respondent threw items, including furniture, around the house yard and into the complainant's swimming pool. When police arrived and located the respondent he was agitated and appeared intoxicated.

[22] That complainant was admitted to hospital overnight with bruising to his right shoulder and left rib, tenderness around the kidney region and upper chest, bruising to the right side of his jaw and neck, and abrasions to his right ear and knee. He also had a mild tenderness to the back. His victim impact statement described his finding the incident emotionally distressing, and the complainant thereafter lived in fear he might be attacked again, that fear being exacerbated because he lived alone on a rural property.

[23] That respondent's counsel at sentence submitted that the offence had occurred because the respondent was concerned about his baby son's welfare, believing that his former partner had formed a new relationship which had resulted in her being involved with drugs. She had failed to keep eight appointments convened by the Family Court Counselling Service regarding their child. That respondent understood his former partner's new de facto had boasted at a party that the de facto and the former partner had been blowing marijuana smoke in the respondent's baby son's face, and that was why the respondent went to the complainant's home that night; it was to see if he could get the child away from that environment.

[24] He had not broken the law in the ten months while he awaited sentence, now had regular and frequent access to the child obtained through an order of the Family Court, and was working as a plant operator. This court held that despite the serious aspects of his offending, the structured penalties imposed by the sentencing judge had resulted in that respondent remaining in full time employment and paying compensation of $1,000.00 to the complainant, while requiring that respondent to report to a community corrections authority twice a week; and in addition there had been the suspended sentence, imposed for breach of the domestic violence restraining order. This court held that, taken as a whole, the orders imposed

significantly punished the respondent and offered him the opportunity to complete rehabilitation with the assistance of a community corrections officer.

[25] That respondent might be thought fortunate compared to the applicant in *Miles*, and in having avoided a sentence of at least six months of actual imprisonment. What that sentence demonstrates, as the President remarked in her reasons for judgment in *Denham*, is that the observations of Thomas J in *R v Wentt* do not mean that an actual custodial sentence is demanded in every case in which a person of previous good character threatens the safety of another in that other's own home. Nor, one can add, even when the person is not of previous good character. After all, Mr Denham was not.

[26] The learned sentencing judge recognised that in his sentencing remarks, noting that what Thomas J had said in *Wentt* had been accompanied by a further observation by Thomas J which "made it clear there can be an exceptional case or a category of case in which a noncustodial term is implemented"[4]; as expressed by the learned sentencing judge.

[27] The applicant's counsel submitted that the sentencing judge had given inadequate weight to Mr Fitzgerald's achievements in rehabilitation before sentence, to the written reports tendered, and to the effects of a custodial sentence upon his eldest son, as a personal matter relevant to mitigation. The appeal record shows that the judge did read all the material, and consider it; and the judge referred to the rehabilitative behaviour. Counsel for the Director quite correctly reminded the court of the remarks of the Court of Criminal Appeal in *R v Tilley* (1991) 53 A Crim R 1 at pages 3 and 6 therein, in which that court noted that it was common that hardship or stress is shared by the family of an offender, but that that may be an inevitable consequence if the offender is to be adequately punished. Thomas J observed therein (at page 4) that an offender cannot shield himself under the hardship he or she creates for others, and that courts must not shirk their duty by giving undue weight to such personal or sentimental factors. Cooper J (at page 6) wrote that while the public interest is promoted by preserving wherever possible a family unit, and that while rehabilitation and preservation of a stable family environment are both relevant and important to the process of sentencing, they are but two factors which are required to be balanced against the need for deterrence and retribution.

[28] Ordinarily, application of the appropriate sentencing principles would result in dismissal of this application, particularly as the head sentence is not manifestly excessive. The sentence imposed is harsher than that in *R v Denham*, but that does not make it manifestly excessive. *Denham* was a lenient sentence; this court cannot say actual imprisonment is outside the available range for a first offender of good character committing these offences, who thereafter maintains and further exhibits that good character. But there is an additional factor here.

[29] That is that what is striking about the circumstances in this matter is that the complainant had imposed himself by his own conduct into the very centre of a family unit, with destructive consequences – very largely foreseeable by others – for it and for all concerned. Mr Fitzgerald's offending behaviour was an agonised and ineffectual reaction to that destruction, and caused very little actual injury to Mr

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4 At AR 16

Milfull. In those infrequently occurring circumstances I consider it appropriate to give greater weight than can usually be given to any specially occurring harm which can be predicted for innocent members of that family unit, if separated from Mr Fitzgerald by an order imprisoning him. Failing to give that greater than normal weight to the result to the eldest son of imprisoning Mr Fitzgerald has resulted in a sentence which is manifestly excessive.

[30] Accordingly, I would grant the application, and allow the appeal to the extent of varying the sentence imposed on 11 June 2004 by deleting the order that it be suspended after six months imprisonment and ordering instead that it be suspended immediately.

[31] **MACKENZIE J:** The applicant seeks leave to appeal against a sentence of 21 months imprisonment fully suspended after six months with an operational period of three years imposed for offences of entering a dwelling with intent to commit an indictable offence and assault occasioning bodily harm. The intent relating to the first charge was an intent to unlawfully assault the complainant.

[32] The applicant his wife and the complainant had been close friends. The applicant and his wife separated in September 2002, almost four months before the offences occurred.

[33] According to what the applicant told Doctor Kingswell, who psychiatrically assessed him, he began to develop ill health in the month before the separation. The applicant believed his deteriorating marriage and financial problems due to a reduction in working hours were contributing factors. Dr Kingswell described his condition as adjustment disorder with mixed anxiety and depressed mood, although he also observed that some might argue that because of the number and severity of the symptoms the criteria for a major depressive episode were met.

[34] On the day of the offence, 29 January 2003, the applicant phoned the complainant's home. The applicant's wife answered the phone. The applicant then drove to the house. According to the account he gave to the psychiatrist he "went nuts". He said that he drove at 70km an hour, onto the footpath, slid on the grass and collided with his wife's car. He then kicked open the front door and went into the house. He saw his wife go out the front door (where she called the police). He saw the complainant, who was at that time on crutches, apparently because of ligament damage to his knee. The applicant head-butted him, got him in a headlock and threw him to the ground. He started to squeeze the complainant's throat, causing him to struggle for breath to the point where he blacked out. When the complainant regained his senses he was aware of the applicant kneeling on one knee over the top of him. The complainant grabbed the applicant by both arms and pulled himself to his feet. They pushed and shoved each other. The police arrived at about this point. The applicant walked out the front door and the complainant went to his bedroom but shortly afterwards the applicant came into the room, followed by a police officer, and began swinging punches at the complainant. The police officer saw the applicant punch the complainant in the face with a closed fist. Fortunately the complainant did not suffer major injuries. However, he had a bruised forehead, gravel rash and bruising to his right knee, scratches to his arms and throat and a sore throat with difficulty in swallowing.

[35] The focus of the submissions on behalf of the applicant both before the learned sentencing judge and in this court was on the course of events after the incident. Particular reliance was placed on the evidence of the applicant's rehabilitation in the eighteen months before sentence, in that he had been in no trouble since the offences, that he had been in employment and that he had assumed control of his son who was in need of strong parental guidance with beneficial results. Further in a statement tendered at sentence the applicant's wife expressed the views that he had by then dealt with the separation and that he was not a risk of re-offending.

[36] It was submitted that the learned sentencing judge had ignored the evidence of rehabilitation, and had not given due regard to the views of the applicant's wife and the evidence of his efforts in assisting their son. It was submitted that it was incumbent upon the court to have regard to evidence of rehabilitation. It was submitted that the case was one where there should have been a fully suspended sentence initially and that it was appropriate now that the applicant, having served about 1 and a half months in custody, be immediately released.

[37] It is apparent from the circumstances, and confirmed by the plea of guilty to the first count, that the applicant deliberately went to the house to assault the complainant. It was not a case where the assault happened in the immediate course of the separation: nor was it one where a chance encounter ended in confrontation. He entered the house forcibly and there attacked the complainant who was somewhat disadvantaged by his temporary incapacity. The attack continued for some time and was resumed even after the police had arrived. The course of events was consistent with his admission that he went there in a rage, probably when his judgement was clouded by his then existing depressed state. Nevertheless, the conduct involved a deliberate decision to go to the complainant's home to assault him, and the assault was premeditated and not transitory.

[38] In his sentencing reasons the learned sentencing judge weighed up a variety of relevant factors including the general context of marriage break-up, the applicant's state of health, his general good character and work record, the fact that he was a responsible father to a child who was in need of strong guidance and his cooperation with justice. However he also said that deterrence was more than ordinarily important in relation to matters of this nature. People had to be deterred from going into another's home intending to be violent and in fact being violent.

[39] I am not persuaded that there is any error in principle in the learned sentencing judge's approach to the case. Nor does the level of sentence imposed suggest that there must have been some error that is not otherwise apparent. The sentence of actual imprisonment was relatively short and reflected a larger discount for factors in the applicant's favour than would ordinarily be given. I am not persuaded that the sentence imposed was beyond the proper exercise of the sentencing discretion. I would therefore refuse the application for leave to appeal.