SUPREME COURT OF QUEENSLAND

CITATION:	*R v O'Neill* [2006] QCA 383
PARTIES:	**R** **v** **O'NEILL, Gerard William** (applicant)
FILE NO/S:	CA No 243 of 2006 DC No 243 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	3 October 2006
DELIVERED AT:	Brisbane
HEARING DATE:	3 October 2006
JUDGES:	Jerrard and Holmes JJA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**The application for leave to appeal against sentence is refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY CONVICTED PERSONS – APPLICATIONS TO REDUCE SENTENCE – WHEN REFUSED – GENERALLY – Whether the complainants attitude towards the applicants imprisonment and subsequent economic hardship suffered was adequately put before the sentencing Judge – whether there were factual errors in sentencing requiring reconsideration of the sentence – whether the 'welfare principle' in considering the consequences of imprisonment of the offender on the family should have been taken into account by the sentencing Judge – whether sentence manifestly excessive *R v Boyd* (1984) 12 A Crim R 20, cited *R v H* (1995) 81 A Crim R 88, cited

COUNSEL:	M J Byrne QC, with M A McLennan for the applicant C W Heaton for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions for the respondent

MACKENZIE J: The applicant pleaded guilty at committal to doing grievous bodily harm to his wife and was subsequently sentenced in the District Court on the 23rd of June 2006 to two and a half years' imprisonment suspended after six months for three years.

The facts of the matter were that the applicant and the complainant had travelled from the Gold Coast to see a football game and then spent the night at the Sofitel Hotel. Each of them drank a considerable quantity of alcohol during the day. After the football they returned to the hotel where the applicant became annoyed over attention being shown to his wife by other male persons in a bar at the hotel. She was also disinclined to return to their room when he asked her to do so.

When they did so an argument erupted during which the applicant assaulted his wife by grabbing her by the throat, throwing her across the room where she hit an object and then repeatedly slamming her face into a tiled surface in the bathroom.

In consequence of his treatment of her she sustained multiple facial fractures which required surgical

intervention including the insertion of plates. She has permanent injuries including numbness, double-vision and scarring. The case is a particularly violent example of domestic violence which had severe consequences for the victim, albeit committed by a person of otherwise good character.

The issue in the present application is whether the complainant's attitude towards actual imprisonment of the applicant and economic hardship that would occur if he was imprisoned were adequately put before the sentencing Judge and consequently whether there were factual errors in the sentencing which require the sentence to be reconsidered. Reliance was placed on the welfare principle, of which the Western Australian cases of Boyd (1984) 12 Australian Criminal Reports 20 and H (1995) 81 Australian Criminal Reports 89 are examples, in relation to whether imprisonment should have been a component of the sentence.

An application was made unsuccessfully to the sentencing Judge to reopen the sentence under section 188 of the Penalties and Sentences Act. The affidavit relied on in those proceedings sets out the matters upon which the applicant's contention in these proceedings relies. It is an affidavit from his wife, the complainant.

In the original sentencing proceedings the Crown Prosecutor advised the sentencing Judge that the complainant had indicated that she did not wish to provide a victim impact

statement. The Crown Prosecutor also advised the Judge that the complainant had been in contact with the solicitors for the applicant to advise them of her views on the possibility of imprisonment as a penalty. She said that defence counsel had raised that issue with her and she had spoken to the complainant who had also advised her of her opinion that she did not believe that gaol time would be good for the defendant in the long term. The Crown Prosecutor, in response to the sentencing Judge, said that the applicant's exact words were, "I do not think that gaol time would be good for the defendant in the long term."

Experienced senior counsel then appearing for the applicant did not elaborate directly on the complainant's attitude but did not demur to the observation by the sentencing Judge during sentencing submissions that the attitude of the complainant could seem to indicate that she does not want him sent to gaol.

In his sentencing remarks the learned sentencing Judge said, "I particularly take into account her statements to both your instructing solicitors and the Director of Public Prosecutions Office that the complainant does not believe a gaol term would be good for you in the long term."

The affidavit of the complainant sworn on the 3rd of August 2006 confirms that the DPP's office contacted her on more than one occasion about a victim impact statement but that she did not provide one. On the evening before the sentence

she had spoken to the solicitor at the firm representing the applicant and believed she said to him that she did not want the applicant imprisoned. At the time she was heavily medicated being on prescribed drugs for depression caused by the incident and an unrelated matter. She believed her attitude would be conveyed to the Court.

According to her affidavit she spoke directly to the Crown Prosecutor on the morning of the sentence hearing. Her recollection of the conversation was vague because of the medication she had taken. She believed that she told the Crown Prosecutor that she could not recall her exact words to the solicitor however she believed that she may have said to the Crown Prosecutor that she did not think it would be good for the applicant to go to gaol. She could not recall whether she actually said to her that she did not want him to go to gaol. She also deposes that a day or two after the sentence she telephoned the solicitor and was devastated to hear that he had been sentenced to actual imprisonment which was not her wish. She also deposes that the possibility of reconciliation had been developed in conversations from about the end of April onwards which, she said, became a firm plan to do so in the weeks before the sentence. She also outlines certain financial difficulties she was encountering. There was no reference to those issues in the submissions on the applicant's behalf at sentence. What was said was limited to the notion that the applicant was still voluntarily supporting his wife financially to an extent

beyond which he might have been obliged and which exceeded her legal entitlements.

The impression to be gained from the report of Dr Curtis, the psychiatrist, based on an examination of the applicant on the 13th of March 2006, is that the applicant believed that the marriage must end for reasons explained in detail in the report. It was not modified in submissions to the learned sentencing Judge. There is still no evidence from the applicant himself confirming that the discussion of reconciliation deposed to by the complainant had occurred or had reached the stage she says.

Leaving aside the difficulties with respect to the cogency of the evidentiary basis of the applicant's submissions, it is unrealistic in any event, in my view, to think that the experienced District Court Judge who sentenced the applicant would not have taken what the complainant had said to the Crown Prosecutor to mean that she preferred the applicant not to be imprisoned. He correctly observed that that was merely one of the factors to be taken into account in sentencing.

The financial detriments deposed to by the complainant are decreased income from the applicant's business, not having income of her own, causing her to rely on a loan from her parents to provide necessaries and inability to access Centrelink benefits. She says there are unpaid bills amounting to about $600. One was incurred after the

sentence was imposed. When the other was incurred is not stated.

With respect to the welfare principle the consequences of imprisonment of an offender on a family unit, including economic consequences, may in some cases be a relevant factor, especially in a borderline case, in determining whether or not to impose imprisonment. However, in the circumstances of the present case, the matters relied on are not, in my view, decisive. It is a case where the offender has essentially presented his case and been dealt with on a submission that it is a mitigating factor that he had made generous arrangements for financial support of his victim. The subsequent concerns expressed about her financial position by the victim in her affidavit do not provide a basis for interference with the sentence imposed.

A head sentence of two and a half years' imprisonment for the attack inflicted on the complainant is plainly not excessive. So much was conceded in submissions here. There was relatively protracted violence which caused serious injuries. The learned trial Judge allowed for factors in the applicant's favour, including the attitude of the complainant and the applicant's continued financial support for her and the child by providing for suspension of the imprisonment after a period significantly shorter than would ordinarily reflect the plea of guilty and cooperation with the administration of justice or remorse.

It has not been demonstrated that the factors raised by the applicant justify interference with the sentence imposed by the learned sentencing Judge on the grounds that there had been a misapprehension of relevant facts, or the welfare principle, or that the sentence actually imposed is otherwise in any way manifestly excessive. The application for leave to appeal against sentence should be refused.

JERRARD JA: I agree.

HOLMES JA: I agree.

JERRARD JA: That is the order of the Court.
