

SUPREME COURT OF QUEENSLAND

CITATION: *R v WX* [2007] QCA 388

PARTIES: **R**
v
WX
(applicant/appellant)

FILE NO/S: CA No 276 of 2007
DC No 2834 of 2007
DC No 1969 of 2007

DIVISION: Court of Appeal

PROCEEDING: Sentence Application

ORIGINATING COURT: District Court at Brisbane

DELIVERED EX TEMPORE ON: 9 November 2007

DELIVERED AT: Brisbane

HEARING DATE: 9 November 2007

JUDGES: Keane, Holmes and Muir 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 allowed but only to the extent that each term of imprisonment is set aside
3. In relation to the summary offence, the term of imprisonment is set aside; the applicant has been convicted but should not be otherwise punished

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 GRANTED – GENERALLY – where applicant/appellant convicted of indictable offence of causing suffering to a child under 16 years of age in his care and summary offence of failing to provide for a dog in his care – where applicant/appellant sentenced to 10 weeks imprisonment with three years probation and medical, psychological and psychiatric treatment for indictable offence and concurrent term of one month's imprisonment for summary offence – where personal and general deterrence was primary factor in sentencing – whether sentence manifestly excessive

R v Wharley [\[2007\] QCA 295](#); CA No 190 of 2007, 14 September 2007, cited

COUNSEL: A W Moynihan SC for the applicant/appellant
R G Martin SC for the respondent

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

KEANE JA: On 17 October 2007, the applicant was convicted on his own plea of causing suffering to a child under 16 years of age in his care by failing to provide her with adequate clothing, accommodation and care, in contravention of s 364A of the *Criminal Code* (Qld). He also pleaded guilty to the summary offence of failing to provide a dog in his care with its needs for veterinary attention.

In respect of the indictable offence of cruelty to a child, the applicant was sentenced to 10 weeks imprisonment to be followed by three years probation with the additional condition that he submit to medical, psychological and psychiatric treatment as directed by an authorised corrective services officer. For the summary offence he was sentenced to a concurrent term of one month's imprisonment.

The applicant seeks leave to appeal against these sentences on the ground that they were manifestly excessive in the circumstances.

The complainant was five years old when the offence of cruelty was committed. It was committed between 22 November 2005 and 26 June 2006. The applicant was her father. The

applicant had the care of the complainant for two to three days per week and the balance of each week the complainant lived with her mother.

When the complainant stayed with the applicant they lived in deep squalor. When officers of the Department of Child Services visited the applicant's house in November 2005, they found food infested with maggots and the bed on which the complainant slept smelling of urine. The applicant's dog was obviously underfed.

The applicant was given the opportunity to clean up the house. He had done so when departmental officers visited the house again a week later, but when they checked again in June 2006, the condition of the house was worse. There was a large puddle of dog urine in the complainant's room, and, even though it was winter, there were no blankets on the bed. There were dog and rat faeces in the house. The dining room was covered in food which was mouldy and covered in maggots. The child was left on her own for long periods. The dog was in poor condition and was infested with fleas.

There was no evidence though that the complainant was malnourished. She did not require any medical attention. She now lives with her maternal grandmother.

The applicant was 26 years of age for most of the period of the indictable offence. He has no criminal history. He was cooperative with the police.

He has a history of depression which commenced about five years ago. He is on medication for his depression. He has been without employment for that time.

The house in which the complainant resides is owned by the applicant's father. It appears that the applicant is supported by his father and his mother.

The learned sentencing judge accepted that the applicant's "acts were not deliberate, there was no malice, and there was no inflicting of harm." Nevertheless, his Honour took the view that, "this is a matter [in] which...personal deterrence as well as general deterrence is more than ordinarily important." It was this view which principally formed the sentence imposed on the applicant.

With great respect to the experienced sentencing judge, in a case where it is apparent that the offender is unable to cope with the demands of caring for a small child because of the offender's psychological disintegration, which, indeed, is so severe that it prevents him from caring for himself, the claims of personal and general deterrence as factors influencing the appropriate sentence are less than would otherwise be the case.

In some cases, the relevance of general deterrence as a consideration relevant to the sentencing of an offender is slight. This is such a case. The learned sentencing judge

recognised that the applicant's failure to care for the complainant was not the result of a deliberate decision on his part.

So far as the consideration of general deterrence is concerned, the theory is that others who might be disposed to commit a particular offence will be dissuaded by the prospect of punishment. This theory assumes that the persons who need to be dissuaded from offending are capable of making calculated decisions about the costs and benefits of their behaviour. The imposition of a custodial sentence on the applicant is quite unlikely to serve as a factor which will affect the decision-making and the conduct of other persons, especially other persons afflicted similarly to the applicant in relation to the care of their children. Such persons simply should not be in a position to insist on sole overnight care of a child and, in any event, the punishment meted out to the applicant is quite unlikely to influence their decision-making and conduct.

So far as the relevance of personal deterrence is concerned, the complainant is not being cared for by the applicant. The complainant will not be exposed to the risk of a recurrence of the ordeal which she has endured. Accordingly, the need for personal deterrence in relation to the applicant's future care of the complainant is not a compelling consideration. Indeed, it is hardly a consideration at all.

It is well established that the imposition of a short period of imprisonment for a first offender is not generally desirable. See, for example, the *R v Wharley* [2007] QCA 295 at [12]. This consideration was not applied in this case because of his Honour's view of the strong claims of deterrence. For the reasons set out above, I consider that view to be erroneous. The imposition of a custodial sentence in respect of the summary offence in relation to the applicant's dog was equally unwarranted in the circumstances.

I am, therefore, of the opinion that the sentencing discretion is miscarried in this case. In my respectful opinion, the imposition of terms of imprisonment was disproportionate to the applicant's criminality. The sentence of probation, on the other hand, will serve to foster his rehabilitation.

The application for leave to appeal against sentence should be granted.

The appeal should be allowed but only to the extent that each term of imprisonment is set aside.

HOLMES JA: I agree.

MUIR JA: I agree.

KEANE JA: The orders of the Court will be as I have indicated.

...

KEANE JA: In relation to the summary offence, the order of the Court will be that the term of imprisonment is set aside. The appellant has been convicted but should not be otherwise punished.
