[2018] QCA 93

COURT OF APPEAL

SOFRONOFF P
MORRISON JA
ATKINSON J

CA No 47 of 2018
DC No 2552 of 2017

THE QUEEN

v

BARNES, Korry James **Applicant**

BRISBANE

TUESDAY, 22 MAY 2018

JUDGMENT

SOFRONOFF P: The applicant is 30 years old. He was raised by his mother. He completed year 10 and then qualified as a chef. He has a history of severe anxiety and depression and had been placed on medication for some time. A short while before the offence the subject of this application was committed he ceased taking his medications. The main feature in his life and the main feature on this application is the situation of the applicant's mother. There was material before the learned sentencing judge about her condition. It can be summarised in this way: she has suffered cancer of the larynx and has undergone a tracheotomy. She has peripheral vascular disease. She suffers from hypertension, depression and diabetes. She has difficulty making herself understood. By

reason of these conditions and many others she is liable to suffer from illnesses that healthy people would not suffer.

As a consequence of her many illnesses, in a statement that she prepared herself and that was tendered at the sentencing, she explained that the applicant helps her in many ways. This includes helping her with showering, her personal grooming, the administration of her medication, cleaning of the house, cooking and driving his mother to her many medical appointments. In short, he has been her full-time carer. According to a reference that was furnished by Mr Peter Gritt, the applicant also has been caring for his nephew who suffers from low level autism. He does this up to three times a week and on most weekends. Mr Gritt has observed that the applicant faces very stressful days in performing his various duties towards his family members. It seems that he has little time or opportunity for work or for social relations.

However, on the 8th of April 2017, he was able to get away from his duties. As was explained at the sentencing, on that day he began drinking early in the morning and then travelled to see a concert in the Valley. He was on a train on his way to see a friend in Ipswich when he saw the complainant. By that stage he had consumed four VB schooners, six cans of premixed Wild Turkey bourbon and cola, and there was evidence that he had smoked some marijuana as well. In her sentencing remarks, her Honour described the offence as follows:

> "It just happens to be the complainant who was also on the train watching a movie on his mobile phone. He observed you walking past him to the toilet and again a short time later, about five minutes later, you again walked towards him. You stopped two feet away. You pulled a pair of scissors out of your pants pocket, and you said to him, "If you get up, I will stab you". You then pointed the scissors at his neck, holding them about 45 centimetres from his neck. You then grabbed the mobile phone from the complainant's hand. He requested the phone back. You told him, "No, it belongs to me now". He continued to ask for the phone back, and you became aggressive towards him. You then returned to your seat in another cabin and you began smashing the phone over your knee."

The complainant made a complaint to the police and in due course the applicant was interviewed by police. He denied the offending. He said then and he says now, and there is

no reason to doubt this, that he has no recollection of committing the offence. However, the commission of the offence was recorded on CCTV footage, and the applicant accepts that he did what he is alleged to have done.

As a consequence of this, her Honour imposed a sentence of two years imprisonment to be suspended after serving a period of four months. The applicant now seeks leave to appeal against his sentence on the ground that it was manifestly excessive. He points to the situation of his mother as the basis for that submission.

It seems to me that there are five matters of significance here. Two of these are circumstances that would aggravate the sentence. The first is that robbery is a very serious offence and it calls for a serious sentence to act as a general deterrent. The second factor is the effect of the robbery upon the victim. The victim impact statement shows that the effect upon Mr Steverwald has been and will continue to be serious. He has suffered physically, emotionally, mentally and financially. He suffers chronic chest pains that feel like a heart attack. This happens every day.

He has nightmares and suffers from insomnia. His mental condition resulting from the robbery has affected his relationship with his family and his fiancée. His mother is also very ill. She has terminal cancer. The complainant can no longer visit his fiancée because he is frightened of travelling by train. He has lost his job as a chef. And the loss of his phone itself was serious for him, because there were photographs on it which he can now no longer replace.

Ordinarily, the offence of robbery such as the one committed by the applicant would call for a sentence of imprisonment and would require that at least a part of that sentence should be served. Absent powerful factors in mitigation, that is the position. There are three factors in mitigation in this case. The first of these is that the offence seems to be particularly irrational. The applicant knew his victim and, indeed, had worked with him, yet he stole his phone and then destroyed it. The offence seems to have been utterly pointless.

This irrationality points to a second feature of this offence, namely that the applicant's behaviour was out of character. He does have a previous history of offences which involve his being a real nuisance to the point of requiring his arrest and charge. However, the offence of robbery with this weird weapon is bizarre. The third feature in mitigation is the substance of the case and that is that the applicant says that he is his mother's sole carer. He certainly has been his mother's sole carer. That care has been of the most intimate and personal kind and, correspondingly, her dependence upon him is profound. Otherwise, as Judge Rosengren remarked, the applicant's guilty plea was an early plea. He has shown real remorse.

In a statement of his own that was handed up at the sentence hearing the only basis he put forward to justify an immediate suspension of his sentence of imprisonment was his need to care for his mother. Mr Boyle, who appears for the Crown on this appeal, has helpfully set out the relevant principles. One of these is that it is only in exceptional cases that the effect of imprisonment upon family members will be given any weight: *R v Edwards* [2011] QCA 331. In an earlier case, *R v MP* [2004] QCA 170, Justice Chesterman said:

> "Imprisonment imposed upon parents, usually fathers, almost invariably involves hardship on children, but this consideration is almost never relevant and never in the case of serious offences for which substantial periods of imprisonment must be imposed."

That reasoning applies equally to the circumstances of this case. In *Stewart v The Queen* (1994) 72 A Crim R 17 at 21, the Court of Criminal Appeal of Western Australia said:

> "Generally, the hardship caused to an offender's children is not a circumstance to be taken into account. The authorities are clear, however, that it may be taken into account when the degree of hardship that imprisonment will involve is exceptional or when the offender is the mother of young children or where imprisonment will result in the children being deprived of parental care. In all cases, however, it depends on the gravity of the offence and the circumstances of the case."

Obviously, when a sentence of actual imprisonment is called for in the case of a conviction for a very serious offence such as this one it is very difficult to sustain an argument that the sentence should be decreased for such a reason. This is, in my view, not a case in which her Honour erred in the exercise of her discretion. It is true that the prosecution did not submit

that the applicant ought to serve a period of actual imprisonment. However, in this particular case the situation of the applicant's mother is capable of being alleviated.

In a document that was handed up at sentencing, there is information that Ms Maxwell, the applicant's mother, applied for a home care package from the Department of Health and also for residential respite care. Approval for that was sought and obtained on the 2nd of August 2017. It appears that Ms Maxwell has declined those offers of assistance because she would prefer to remain at home. That attitude is certainly understandable. And the applicant's desire to care for his mother in her own home is equally understandable. But the availability of other, even though undesirable, means of alleviating Ms Maxwell's situation means that this is not a case in which the effect upon an offender's family would require, as a correct exercise of discretion, that he not serve a term of actual custody.

As to the period of actual custody imposed, four months, this is a substantial reduction from the period that might otherwise have been imposed, having regard to the other factors in mitigation. It therefore appears that the particular circumstance of the applicant's mother has been given due consideration and appropriate weight in the sentence that was imposed. In my respectful opinion, Judge Rosengren has not been shown to have erred in the exercise of discretion, and I would refuse leave to appeal.

MORRISON JA: I agree.

ATKINSON J: I agree.

SOFRONOFF P: The application is refused.