[2021] QCA 218

COURT OF APPEAL

SOFRONOFF P
DAVIS J
WILLIAMS J

CA No 106 of 2021
DC No 2704 of 2017
DC No 2446 of 2020
DC No 726 of 2021

THE QUEEN

v

HCH **Applicant**

BRISBANE

MONDAY, 11 OCTOBER 2021

JUDGMENT

DAVIS J: The applicant seeks leave to appeal an effective head sentence of seven years imprisonment with parole eligibility after serving two and a half years which was a global sentence imposed for a total of 22 offences committed against the applicant's domestic partner. The applicant faced two indictments and 13 summary charges. The first indictment contained 17 counts. The applicant pleaded guilty to seven, and the Crown elected not to proceed on the other 10. He pleaded guilty to the two counts on the second indictment, and he pleaded guilty to the 13 summary offences.

The offending the subject of the first indictment occurred between 12 July 2014 and 25 August 2015. Those offences were four counts of assault occasioning bodily harm and three counts of common assault. The second indictment contained one count of assault occasioning bodily harm and one count of sexual assault. Those offences occurred on 10 October 2015. All the counts on both indictments were alleged to be domestic violence offences. In that respect see the *Penalties and Sentences Act 1992*, s 9(10A).

The summary offences were eight charges of common assault and five charges of contravention of a domestic violence order. The offences of common assault occurred between 1 June 2015 and 31 October 2015. The contraventions of the domestic violence order occurred between 16 November 2015 and 25 November 2015. The contravention of the domestic violence orders were alleged to be domestic violence offences as were some of the offences of assault.

Viewed overall the offending shows violent, degrading behaviour inflicted by the applicant upon the complainant over a period of some 16 months. The facts of the offending were not in dispute and were the subject of agreed statements of facts which were tendered to the learned sentencing judge. The applicant and the complainant lived in a de facto relationship for about three years, and they have a child together. By mid-2014 the applicant was acting violently towards the complainant, and a temporary domestic protection order was made on 7 January 2015.

Counts 5, 7, 8 and 11 to 17 on the first indictment were the counts abandoned by the Crown. Count 1 on the first indictment, assault occasioning bodily harm, was constituted by the applicant pushing the 20 weeks pregnant complainant against a car, elbowing her to the head and spitting on her while children were present. Count 2 on the first indictment involved the applicant pushing the 36 weeks pregnant complainant against a wall and, after she fell, grabbing her hair and dragging her up the hallway. Count 3 on the first indictment involved the applicant grabbing the complainant by the hair, then by the hand and twisting her fingers. The child who witnessed the events ran to a neighbour and called triple O.

Count 4 on the first indictment involved the applicant choking the complainant to the point of unconsciousness. In the course of that assault the applicant said to the complainant, "You're going to fucking die, you stupid bitch." Count 6 on the first indictment concerned the applicant grabbing the complainant by the throat and effectively demanding an apology for something that the complainant had allegedly said. Count 9 on the first indictment charged common assault, where the applicant head-butted the complainant and then, when she fell, he held his boot against her head. Count 10 on the first indictment concerned an argument about connecting the home to the internet. The applicant slapped the complainant to the face so she fell to the ground.

The counts of assault occasioning bodily harm and sexual assault, which are the subject of the two counts on the second indictment, were particularly serious even by comparison to the applicant's behaviour up to that point. The applicant and the complainant had a disagreement. The applicant punched the complainant in the face at least 10 times until she lost consciousness. That was count 1. Both suspected that the applicant had fractured the complainant's cheekbone.

The complainant remained in the bedroom with an icepack on her face trying to recover from the beating she had just received. The applicant left and returned to the bedroom with cable ties. He tied her hands over her head and then forced his fingers between her buttocks clawing at her anus. He then placed his fingers, which now contained the complainant's blood and faeces, into her mouth. As she asked him to stop the behaviour, he said, "You let everyone else fuck you like a whore. I'll fucking treat you like one." The applicant then repeated his action of dragging his fingers across the complainant's anus and then back into her mouth. This ultimately caused her to vomit. He left her tied up. He returned with a knife which, of course, frightened her. He then cut her ties.

It is unnecessary to detail the counts of common assault which were dealt with as summary offences. They are part of the pattern of behaviour reflected in the offences on the indictments. Worth particular mention, though, is the assault which occurred on 7 August 2015. On that occasion the complainant was breastfeeding a baby, their child. There was an

argument and, while she was breastfeeding the child, the applicant assaulted her by pulling her hair and pushing her.

The four counts of contravention of domestic violence orders concern an assault, controlling and emotional abuse about the purchase of a music ticket, and posting derogatory posts on Facebook.

Over the period of his offending the applicant was a user of illicit substances and a heavy user of alcohol. Towards the end of 2015 the applicant and complainant holidayed in Bali. There was an argument, and the applicant left the complainant stranded by returning to Australia. By February 2016 the relationship had ended.

The applicant was charged, and he sought and obtained a referral to the Mental Health Court on the basis that he was unfit for trial or had a defence. Ultimately that referral was withdrawn. He then had solicitors negotiate pleas to some charges and the discontinuance of others, as already observed.

The applicant was born on 31 January 1981. He was aged between 33 and 34 at the time of the offending and was 40 at the time of sentence. The case is yet another demonstration of the fact that domestic violence has no socio-economic boundaries. The applicant is a dentist, although no longer able to practice. The complainant is a solicitor.

The applicant submitted to the sentencing judge that he had made timely pleas given that there had been delay due to the referral to the Mental Health Court and some charges had been abandoned by the Crown after negotiation. The sentencing judge rejected those submissions and considered them to be late pleas. Her Honour thought that the applicant's conduct was "a concerted effort at delay and avoidance". Her Honour observed that while the applicant had the matter referred to the Mental Health Court on the ground that he was unfit for trial, he was at the same time attempting to demonstrate that he was fit to continue to practice as a dentist. Her Honour found that the negotiations which led to some counts being discontinued only occurred after the failure of the Mental Health Court proceedings. There was no criticism of her Honour's findings in that respect.

There was contradictory evidence before her Honour as to the applicant's mental health. Dr Milad, psychiatrist, examined the applicant in 2017 and thought there was evidence of autism spectrum traits and adjustment disorder type symptoms. The difficulty with this report, though, is that the doctor, to a point, relied upon the applicant's version of events which at that time was inconsistent with the later pleas. Dr Schramm, a psychiatrist, examined the applicant in March 2021. Dr Schramm saw little evidence of an autistic spectrum disorder but identified features of narcissistic personality disorder. He thought there was no evidence of any serious depressive illness, and while there was some evidence of psychotic symptoms in the past, he thought there was no evidence suggestive that those symptoms were active at the time of the offending.

The learned sentencing judge found:

> "There is no credible evidence to conclude that a mental health disorder significantly impaired either your understanding of what was wrong or your capacity for self-control. I do accept the diagnosis of an underlying personality disorder. Mr Morgans –"

who I note was counsel for the applicant before her Honour. The quote continues:

> "Mr Morgans argued that reduced your moral responsibility and also meant more hope for rehabilitation because it was undiagnosed until this year. The personality disorder is not a mental health condition which impaired your relevant capacity. It is a partial explanation, but it does not alleviate your responsibility. On the other hand the narcissistic personality is a risk factor for future offending. You have shown consistently through strains of self-absorption a tendency to form unsuitable relationships, hypersensitivity and anger issues with a need to dominate those that cause you offence. There is also the tendency to self-justify."

There was no complaint about her Honour's findings. Her Honour noted that the applicant had undertaken domestic violence counselling. She thought that alcohol and substance abuse may have contributed to the offending but noted that the applicant had done nothing to address that issue during the course of the relationship with the complainant. Again there is no complaint about her Honour's assessment of those things.

A victim impact statement was tendered to her Honour. Unsurprisingly that showed that the complainant suffered horribly as a result of the offending. She has now married, has insight into the fact that she was, when with the applicant, in a dysfunctional domineering relationship. She has ongoing personal issues which are understandable.

The sentencing judge took a global approach to the sentence. Her Honour imposed a sentence of seven years on the sexual assault on the second indictment, four years imprisonment on the count of assault occasioning bodily harm on the same indictment, and then imposed lesser sentences of imprisonment on the other charges. All sentences were ordered to be served concurrently, and five days pre-sentence custody was declared as time served. A parole eligibility date was set at 19 October 2023 after the applicant had served two and a half years.

There is no complaint as to any findings by the sentencing judge and no complaint as to her Honour's general approach or the structure of the sentences. The only complaint is that the global sentence of seven years with parole eligibility after two and a half is manifestly excessive. Mr Power, counsel for the applicant on the appeal, submits that the sentence should be five years with parole eligibility after 21 months.

Various comparative sentences were referred to. These include *R v Thompson* [2019] QCA 46, *R v Stemm* [2010] QCA 141, *R v Luxford* [2020] QCA 272, *R v Rowlands* [2019] QCA 112, *R v LU* [2007] QCA 62, and *R v Barclay* [2021] QCA 193, and *R v Major; Ex parte Attorney-General (Qld)* [2012] 1 Qd R 465. What the comparatives show was a fairly broad range of sentences for offences arising out of persistent domestic violence. They show that substantial sentences are often imposed. It is unnecessary to analyse all the various comparatives.

R v Barclay [2021] QCA 193 is worth particular mention. There were four indictments presented against Mr Barclay. One charged a single count of attempting to pervert the course of justice. A term of imprisonment of three months was imposed in relation to that charge, and that was made cumulative upon the effective sentence of five years imprisonment on the other indictments. The other indictments all charged domestic violence offences. Parole

eligibility was set at five months after sentence which, taking into account time already served, meant that the offender served a total of 21 months.

In my view, the offending in *Barclay* was not as serious as occurred here. There were nine counts, two of which were wilful damage, one count of strangulation, one count of deprivation of liberty, and the rest were either common assaults or assaults occasioning bodily harm. There was nothing, in my view, approaching the severity of the two counts on the second indictment faced by the applicant. Those two counts were properly, in my view, assessed by the sentencing judge as being particularly serious and demeaning. They involved the physical restraint of the complainant, her sexual assault by rubbing her anus, and then her total humiliation by forcing her own faeces and blood into her mouth to the point that she vomited. The applicant then returned with a knife. While one intention of him returning with the knife was obviously to free her from the ties, it is also clear, in my view, that he meant to frighten her, which he did.

The maximum sentence for sexual assault is 10 years. That offence by itself must, in my view, attract at least five years imprisonment. In 2016 the legislature enacted an amendment to the *Penalties and Sentences Act* which introduced s 9(10A) in these terms:

> "**9 Sentencing guidelines**
>
> …
>
> (10A) In determining the appropriate sentence for an offender convicted of a domestic violence offence, the court must treat the fact that it is a domestic violence offence as an aggravating factor, unless the court considers it is not reasonable because of the exceptional circumstances of the case.
>
> *Examples of exceptional circumstances—*
>
> 1 the victim of the offence has previously committed an act of serious domestic violence, or several acts of domestic violence, against the offender
>
> 2 the offence is manslaughter under the Criminal Code, section 304B"

Section 9(10A) mandates that a court must treat the fact that an offence is a domestic violence offence as an aggravating factor in the absence of exceptional circumstances. That in turn

requires the court to reflect that factor in the sentence in the absence of exceptional circumstances. Here there are none. Section 9(10A) effectively mandates that considerations such as denunciation and deterrence should have greater weight than they might otherwise. See *R v O'Sullivan and Lee; Ex parte Attorney-General (Qld)* (2019) 3 QR 196.

Here all the offending was serious and was conducted over a protracted period. The offending was committed in a domestic setting upon the applicant's domestic partner and on some occasions, in the presence of children. The offending was demeaning and degrading to the complainant and has caused her ongoing harm. The offending reflected in the second indictment was particularly serious and obviously designed to humiliate the complainant.

In my view the imposition of a global sentence of seven years with a recommendation for parole after serving two and a half years is well within the range of a sound exercise of the sentencing discretion. I would dismiss the application.

SOFRONOFF P: I agree.

WILLIAMS J: I agree with the reasons and order of Davis J.

SOFRONOFF P: The order of the Court is that the application for leave to appeal is dismissed. Thank you both for your assistance.

MR POWER: Thank you, your Honours.