[1999] WASCA 191

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	COURT OF CRIMINAL APPEAL
CITATION	**:**	GALLEGOS -v- R [1999] WASCA 191
CORAM	**:**	MALCOLM CJ MURRAY J PARKER J
HEARD	**:**	3 SEPTEMBER 1999
DELIVERED	**:**	6 OCTOBER 1999
FILE NO/S	**:**	CCA 61 of 1999
BETWEEN	**:**	JUAN ANTONIO GALLEGOS Applicant AND THE QUEEN Respondent

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Catchwords:

Sentencing - Application for extension of time within which to appeal against sentence - 67 day delay - Applicant's impecuniosity, lack of access to legal representation and lack of English provided reasonable explanation for delay - Extension of time granted

Sentencing - Application for leave to appeal against sentence of three and a half years' imprisonment for aggravated burglary and assault occasioning bodily harm - Complainant and applicant ex-lovers - Complainant 16 weeks pregnant - Offence involved degree of premeditation and included threats with knife - Need for personal and general deterrence of domestic violence - Sentence not excessive

Legislation:

Nil

Result:

Application refused

Representation:

Counsel:

Applicant	:	In person
Respondent	:	Mr R E Cock QC & Ms T R Watt

Solicitors:

Applicant	:	In person
Respondent	:	State Director of Public Prosecutions

Case(s) referred to in judgment(s):

Australian Coal v Commonwealth (1953) 94 CLR 621
Badron v The Queen, unreported; CCA SCt of WA; Library No 990099; 4 March 1999
Chan (1989) 38 A Crim R 337
Game v The Queen, unreported; CCA SCt of WA; Library No 970113; 21 March 1997
Gavin v R (1992) 6 WAR 195
House v The King (1936) 55 CLR 499
Lowndes v The Queen [1999] HCA 29; (1999) 73 ALJR 1007
R v GP (1997) 18 WAR 196
R v Liddington (1997) 18 WAR 394
Sindel v The Queen, unreported; CCA SCt of WA; Library No 990110; 16 March 1999
The Queen v Dickson, unreported; CCA SCt of WA; Library No 990203; 23 April 1999
The Queen v Smith, unreported; CCA SCt of WA; Library No 980066; 17 February 1998

Case(s) also cited:

Nil

1 **MALCOLM CJ**: This was an application for an extension of time within which to make an application for leave to appeal against sentence. Although the applicant received some legal advice and assistance in relation to the preparation of his application for an extension of time and application for leave to appeal against sentence, he was unrepresented at the hearing.

2 On 8 January 1999 the applicant pleaded guilty in the District Court to two counts on an indictment being one count of aggravated burglary and one count of assault occasioning bodily harm. He also pleaded guilty to one count of assault pursuant to a notice under s 32 of the *Sentencing Act 1995*. He was sentenced to imprisonment for three years and six months for the aggravated burglary and to two years' imprisonment for the assault occasioning bodily harm. He was sentenced to imprisonment for nine months in respect of the assault the subject of the s 32 notice. The sentences for each of the offences were ordered to be served concurrently. An order was made that the applicant be eligible for parole.

The offences

3 The complainant was a 38 year old woman who was known to the applicant. They had a sexual relationship between April and October 1998, but did not live together. By October 1998 the complainant wanted the relationship to end. On the evening of 25 October 1998 the applicant approached the complainant in a nightclub in Fremantle. He spat on her twice and wiped or touched her on the face with a tissue covered with faecal material. The complainant then went home.

4 At about 10.45 pm the applicant followed the complainant to her house. He was familiar with the house and entered it through an unlocked front bedroom window. He entered the house without permission.

5 The complainant heard the applicant enter the house. She called the Police. While she was on the telephone the applicant approached her. He ripped the telephone from her hands and hung it up. He then pushed her into the lounge room where he started punching her violently. He punched the complainant in the face, chest and arms. He then pushed her, causing her to fall over. He then kicked her in the back. As a result of this attack the complainant suffered a number of injuries for which she was in need of medical attention. During the course of the assault the applicant produced a knife which he had obtained from the kitchen. He threatened the complainant with the knife. She was in fear of her life.

6 When the complainant was treated for her injuries she was found to have a fractured right clavicle, bruising of the breast, the chest wall and the mid-thoracic region, redness of the left forearm and a soft tissue injury to the left of her neck. Photographs of the injuries were tendered before the learned Judge who noted that there were numerous bruises and abrasions and that, at the time of being photographed, the complainant was obviously in a very distressed condition.

Sentencing remarks

7 In sentencing the applicant the learned Judge said:

> "You are 30 years of age. You have worked for 4 years as a manager of a garden centre or a nursery and you are highly regarded by your employer. I have got a reference from your employer. You came from Chile in 1990. You lived initially with your wife and you have a 5-year-old son but you are now divorced from your wife and you have been convicted in 1996 of breaching a restraining order which was obtained by your wife. I have also been provided with a reference by another acquaintance and I note that you at least have some people who regard you with some degree of regard apart from your employer.
>
> The offences you committed are serious and I consider the aggravated burglary to be certainly more than at the moderate range within the scale of such offences. It is a home invasion of the type that terrorises the victim and in this regard I have got a victim impact statement which indicates the difficulties that the complainant suffered as a result of her physical injuries, also the fact that she continues to fear for her safety, that she at one time left her home because she felt it necessary to do that and she ceased her employment because of her injuries and the trauma that she sustained and in general, the victim impact statement sets out all of the effects that one would ordinarily expect from an attack of this type.
>
> A very aggravating fact of the offences is that you knew she was pregnant and you attacked her in a very vicious manner while she was pregnant and without regard to the safety of the foetus. Now, in my view, these offences are so serious that terms of imprisonment are the only appropriate penalties notwithstanding you don't have any significant prior record.

> I consider that in respect of the burglary or the aggravated burglary, it could perhaps justify a sentence of 5 years but perhaps on reflection, certainly 4 and a half years' imprisonment but in view of the fact that you have pleaded guilty on the fast-track system and you haven't put the complainant through the ordeal of having to give evidence, I'm reducing that sentence to 3 and a half years' imprisonment.
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> On count 2, the assault occasioning bodily harm, you're sentenced to 2 years' imprisonment. In respect of the s 32 matter, the assault, you're sentenced to 9 months' imprisonment. I direct that those three terms are to be concurrent with each other which means you have a total of 3 and a half years' imprisonment. I am backdating those sentences to 5 January to allow for the 3 days you have had in custody and I will also direct that you should be eligible for parole."

Application for extension of time

8 The application for leave to appeal against sentence should have been filed by 29 January 1999. The application for leave to appeal against sentence and for an extension of time was filed on 6 April 1999 so that the application was some two months out of time.

9 The grounds upon which the application for an extension of time was made were, first, that after he was sentenced the applicant was sent to Albany Regional Prison, where it was difficult for him to contact his solicitors who were in Perth. Secondly, he said that as his understanding of English was limited, he did not fully understand what the sentence meant.

10 In February 1999, having asked his girlfriend to contact his solicitors, he discovered that he would have to spend more than a year in custody. He then instructed his solicitor that he wished to appeal on the ground that the sentence was too severe. In late March the applicant's girlfriend was able to provide his solicitors with some funds for the preparation of appeal papers. These were posted to him for his signature on 29 March 1999. The applicant signed the papers on 6 April 1999 and they were filed shortly thereafter. The delay was some 67 days or a little over two months.

11 The Crown's outline of submissions refers to the decision of this Court in ***Gavin v R*** (1992) 6 WAR 195 at 198 per Malcolm CJ; at

201-203 per Seaman J; and at 219 per Wallwork J. The proposition derived from that case is that where there has been a lengthy delay in instituting an appeal or application for leave to appeal, the court requires exceptional circumstances to be shown before an extension of time will be granted, unless there will be a miscarriage of justice if an extension of time is not granted. An extension will only be granted upon facts shown which, in the judgment of the court, appear positively to call for its exercise. The onus upon an applicant for extension of time will increase as time goes by.

12 It was submitted on behalf of the Crown that there were no exceptional circumstances disclosed here. In my opinion, however, given the applicant's limited understanding of English, the difficulty experienced in instructing his solicitors in Perth while he was in Albany Regional Prison, and his lack of funds to pay for the preparation of appeal papers constitute a sufficient explanation to justify an extension of time.

Application for leave to appeal

13 The grounds upon which the applicant seeks leave to appeal are as follows:

> "1. The learned sentencing Judge erred in coming to the conclusion that imprisonment was the only appropriate disposition having regard to the following:
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> (a) the circumstances of the offence, in particular the lack of any premeditation on the part of the [applicant];
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> (b) the [applicant's] remorse as demonstrated by his actions immediately following the incident and by his plea of guilty at his first opportunity;
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> (c) the [applicant's] good antecedents and lack of any relevant criminal history.
>
> 2. The learned sentencing Judge erred in failing to have regard to the possibility of any other disposition. The [applicant] was in a position to pay a substantial fine, and would have benefited from supervision with psychological counselling which he had already undertaken.

> 3. Alternatively, if imprisonment is the only appropriate disposition, then it should have been suspended to assist the [applicant] in his rehabilitation.
>
> 4. Alternatively, the sentence of three and a half years' imprisonment was manifestly excessive having regard to the factors outlined above."

14 The imposition of a sentence is an exercise of judicial discretion. The principles upon which an appellate court must deal with an appeal against sentence were recently re-stated by the High Court in ***Lowndes v The Queen*** [1999] HCA 29; (1999) 73 ALJR 1007. It is not sufficient that an appellate court may have taken a different approach or imposed a different sentence. It must be demonstrated that the sentencing Judge erred in the exercise of his or her discretion: ***House v The King*** (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ; ***Australian Coal and Shale Employees' Federation v Commonwealth*** (1953) 94 CLR 621 at 627 per Kitto J; and see ***Chan*** (1989) 38 A Crim R 337 at 344 per Malcolm CJ.

15 The first contention by the applicant is that the learned Judge erred in concluding that imprisonment was the only appropriate disposition. It was submitted that the circumstances of the offence and, in particular, the lack of any premeditation were mitigating factors. The first assault, which was the subject of the notice under s 32 of the *Sentencing Act* must have involved some degree of premeditation as, in addition to spitting at the complainant, the applicant wiped her face with a tissue covered with faecal material. The applicant must have previously armed himself with the tissue and covered it with faecal material for the purpose of assaulting the complainant. The nature of the assault was both degrading and offensive. Likewise, the assault which aggravated the burglary was premeditated. It involved the applicant following the complainant home to her house where she was assaulted while she was on the telephone to the Police, following which she was threatened with a knife and was in fear of her life. As a result of the assault she received a number of injuries which needed medical attention. The applicant knew that the complainant was pregnant at the time and the nature of the attack was such that no regard was paid to the safety of the foetus. Following the assaults the complainant continued to fear for her safety to the extent that, at one point, she felt it necessary to leave home and cease her employment as a result of the injuries and trauma she had suffered.

16 The learned sentencing Judge had before him a detailed victim impact statement from the complainant which detailed the significant injuries which she suffered and the difficulties which they caused her during her pregnancy. The assaults took place when she was 16 weeks pregnant. In order to protect the baby from possible damage the complainant offered no resistance to the attack and merely tried to protect herself and the baby until it was over. One result was that all her efforts toward good health in the pregnancy prior to that time were wasted. In that statement she describes how, after the assault had been committed, the applicant obtained a carving knife from the kitchen and thrust it toward the complainant's lower abdomen shouting, "Tell me that the baby is not mine". Fortunately, the complainant was able to speak to the applicant in a manner that succeeded in calming him down and the Police were called. The complainant said however:

> "It is because this happened that I can never see [the applicant] again. I had never realised how much we can risk when we allow someone into our intimate life. I could never again trust him, having had my precarious physical vulnerability exposed and exploited by his violence."

17 We were informed by the applicant that the complainant had since visited him in prison and had assisted him by putting up some funds to enable his grounds of appeal to be prepared. While this speaks volumes for the complainant and her character, it does not in any way detract from the serious view of the offence properly taken by the learned sentencing Judge. In my opinion, it has not been demonstrated that there was any error in the exercise of discretion by the learned sentencing Judge in imposing an immediate sentence of imprisonment.

18 The learned sentencing Judge clearly took the view that the circumstances of the case were sufficiently serious as to place the case in a category where imprisonment was the only appropriate penalty. In reaching that conclusion the learned Judge took into account the applicant's good work record and the favourable reference from his employer, as well as the regard with which he was held by other people who knew him, the absence of any prior criminal history, apart from breaching a restraining order obtained by his ex-wife, and his plea of guilty. Notwithstanding these factors, the learned Judge concluded that the offences were so serious that imprisonment was justified. His Honour concluded that for the offence of aggravated burglary a sentence of four and a half years to five years would have been justified. This was reduced to imprisonment for three and a half years on account of the plea of guilty

on the fast-track system, which had also saved the complainant the ordeal of a trial.

19 It is recognised that an offence may be of sufficient seriousness so as to exclude the possibility of a suspended sentence in the exercise of discretion: ***Sindel v The Queen***, unreported; CCA SCt of WA; Library No 990110; 16 March 1999 at 11 per Malcolm CJ. The applicant contended before this Court that the offences arose in the context of a domestic dispute with the complainant. They were having some difficulty in their relationship and had an argument at the nightclub before he went to her house. He asserted that she had poured a glass of water over his head and that he reacted to that. He was in a very emotional state when he went to her house. He said that he had been there many times before, but on this occasion he lost his temper. He admitted the allegations made by the complainant, except that he only kicked her once. He said he was very remorseful about the incident, accepted that what he had done was wrong and, after the assault in the house, he had waited at the house for the Police to arrive. He had apologised to the complainant. He said he had arranged counselling with a psychologist. He realised that he had overreacted and during the three days he was in custody he realised he had reacted to his emotions "in the wrong way", so he arranged counselling to ensure that it would not happen again.

20 The applicant was born in Chile and came to Australia when he was aged 21. He said that, despite the fact that he had difficulty with the English language, he had a good work history and was in full time employment at the relevant time. He would have been able to return to his job had he not been imprisoned. His only prior conviction was for breach of a restraining order in respect of which, on appeal, he was sentenced to a conditional release order for a period of six months. This related to an incident involving his first wife with whom he had since reconciled. He was providing support for the child of that relationship, but his imprisonment has meant that he is unable to continue that support. He maintains that he would have been prepared to undergo any counselling imposed by an Intensive Supervision Order. He says this would have enabled him to continue his employment, support his child by his first marriage and attempt to reconcile with the complainant and also be a father to his child by her.

21 Given all of the circumstances of the case I am unable to accept that the learned sentencing Judge erred in the exercise of his discretion to reject an Intensive Supervision Order as an appropriate disposition.

22 The applicant submitted that, alternatively, given that he had already taken his own steps towards rehabilitation, the learned Judge erred in the exercise of discretion by failing to suspend the sentence.

23 In my opinion, a sentence of imprisonment should only be suspended where the circumstances of the case are such that there is a real prospect that the rehabilitation and reformation of the offender will be positively assisted by suspending the sentence. While the prospect of rehabilitation is a relevant factor, it is not the only factor and may not necessarily be the determining factor: ***R v GP*** (1997) 18 WAR 196 at 234 per Murray J; ***R v Liddington*** (1997) 18 WAR 394 at 399 per Malcolm CJ; and at 401 per Ipp J; and ***The Queen v Dickson***, unreported; CCA SCt of WA; Library No 990203; 23 April 1999 at 6-7 per Parker J. In addition to factors personal to the offender, the factors relevant to a decision whether or not to suspend a sentence of imprisonment include the character of the offence and whether there was any element of persistence and a need for a sentence to demonstrate the condemnation by the community of such an offence: ***R v GP*** (*supra*) at 220 per Malcolm CJ; at 234 per Murray J; and at 243 per Steytler J; and ***R v Liddington*** (*supra*) at 406 per Steytler J.

24 In my opinion, the circumstances of the aggravated burglary in this case, preceded as it was by the earlier assault at the nightclub, were such that it could not be said that the exercise of discretion to impose an immediate sentence of imprisonment was beyond the scope of the proper exercise of discretion by the learned sentencing Judge.

25 Finally, it was submitted that the term of imprisonment of three and a half years was excessive. During the course of submissions before the learned sentencing Judge, counsel for the Crown referred to the decision of this Court in ***The Queen v Smith***, unreported; CCA SCt of WA; Library No 980066; 17 February 1998. That case involved deprivation of liberty and an assault occasioning bodily harm in the context of domestic violence in respect of which a sentence of three and a half years' imprisonment was substituted by this Court for a fine of $10,000. In that case, after referring to the principles applicable to a Crown appeal against sentence, Kennedy, Franklyn and Ipp JJ said in their joint judgment:

> "In *The Queen v Kerr*, unreported; CCA SCt of WA; Library No 970402; 15 August 1997, Kennedy J said:
>
> 'It has been said repeatedly by this Court that the fact that a crime occurs against a domestic background is not a mitigating factor, as appears in the past sometimes to have

> been suggested. On the contrary, in the majority of cases of domestic violence a deterrent sentence, both personal and general, will be called for …'
>
> In our opinion, the learned sentencing Judge failed to give adequate weight to the deterrent aspects of punishment for offences of the present nature, and has given excessive weight to matters personal to the Respondent, such as his exemplary work record.
>
> In our opinion, the learned sentencing Judge has failed properly to balance the subjective and objective aspects in the sentencing process - as to which see *R v Rushby* [1977] 1 NSWLR 594, per Street CJ at 597-598, and *R v Potter* (1994) 72 A Crim R 108, per Carruthers J at 113-115. But this is a case in which it is necessary for the court to intervene, by reason of the fact that the fines imposed by the learned sentencing Judge reveal such a manifest inadequacy and inconsistency in sentencing standards as to reveal an error in principle. Acknowledging that imprisonment is a sentence of last resort, in our view, it was called for in this case. At the same time, however, the double jeopardy in which the respondent has been placed must be recognised, particularly having regard to the fact that the initial disposition was non-custodial. Accordingly, the sentence which we intend to impose is somewhat less than the sentence which we consider should have been imposed at first instance."

26 In the present case, it was submitted by the applicant that the learned sentencing Judge was wrong to impose the same sentence that was imposed in ***Smith*** because the offence committed in that case was a lot more serious. That case involved an offender who had been separated from his wife, the complainant, some months earlier. It was contended that Smith's offence was more serious because it involved a greater degree of premeditation in that the offender had hidden in the boot of the complainant's car and had armed and disguised himself. It was contended by the applicant that he, by contrast, had acted in the heat of the moment, was not disguised and, while he had a knife, he did not take it with him to the house and did not hold it at the complainant's throat. That may be so, but the assault which he committed on her at the house was particularly vicious and did involve threatening her with a knife.

27 It was further contended by the applicant that the ordeal that Smith's wife was subjected to took place over a long period of time and involved

her being taken to different locations and tied up. It was submitted that the applicant's offence "was over very quickly" and that when he had calmed down, he apologised and waited for the Police to arrive. While that is true, it nonetheless remains that the applicant's offence was premeditated, followed an earlier assault at the nightclub and took place under circumstances in which the applicant had gained unlawful entry to the complainant's house. Finally, it was said that although the bodily harm in each case was of similar severity, the ordeal that Smith's wife was subjected to was much worse. In this respect, as has been seen, because ***Smith*** involved a Crown appeal the sentence imposed was less than the sentence which the court considered should have been imposed at first instance. Consequently, it is not appropriate to compare the applicant's sentence directly with that imposed in ***Smith***.

28 It is now clear that in cases of domestic violence a sentence which gives effect to both personal and general deterrence will normally be called for. The circumstances may be such as to justify a substantial sentence of imprisonment: cf ***Game v The Queen***, unreported; CCA SCt of WA; Library No 970113; 21 March 1997 at 7 per Malcolm CJ, Murray and Heenan J; ***Smith***, *supra*, at 8 per Kennedy, Franklyn and Ipp JJ; ***Scott v The Queen***; unreported; CCA SCt of WA; Library No 990004; 15 January 1999; and ***Badron v The Queen***, unreported; CCA SCt of WA; Library No 990099; 4 March 1999 at 7-8 per Malcolm CJ, Ipp and Anderson JJ. Further, this Court has made it clear on a number of occasions that the range of sentences imposed for burglary offences, particularly those committed at homes, should be firmed up: ***Pezzino*** (1997) 92 A Crim R 135 at 138 per Franklyn J; and at 148 per White J; and ***Nguyen v The Queen; Tran v The Queen*** [1999] WASCA 54 at [11] per Kennedy J. In my opinion, the sentences imposed upon the applicant were appropriate and the grounds of appeal have not been made out.

29 For these reasons, I am of the opinion that while the application for an extension of time within which to make an application for leave to appeal should be granted, the application for leave to appeal against sentence should be refused.

30 **MURRAY J**: I agree with Malcolm CJ that, whilst an extension of time should be granted, leave to appeal should be refused. I have nothing to add to his Honour's reasons with which I express my entire agreement.

31 **PARKER J**: I have had the advantage of reading in draft the reasons now published by the Chief Justice.

32 I agree with those reasons and with the orders proposed.