

STATE OF TASMANIA v KENNETH SIELY
COMMENTS ON PASSING SENTENCE

GEASON J
18 May 2020

Mr Siely you have pleaded guilty to a charge of assault upon Theresa Dierckx, committed by driving a quad bike into her, knocking her to the ground and driving over her.

Your offending occurs in the context of an ongoing dispute with respect to a right of way which burdens your property and benefits her property, and the property of another neighbour, a Mr Cameron.

On the day of the offence, upon becoming aware that your dog had strayed from your property you were concerned that it may have been taken by Ms Dierckx's partner. You decided to use your quad bike to investigate. You rode to the boundary of her address and called for the dog. The complainant answered that call and spoke to you, standing just a few metres in front of you. She filmed the exchange on her mobile phone.

You became aware that in fact the dog was on Mr Cameron's property. He told you that it was playing there with his dog.

In order to recover the dog from his property you needed to cross the complainant's property but she would not let you. She accused you of trespassing, and this can be heard in the video that was played to the Court.

An argument ensued about your right to be on the driveway and she told you to leave. You verbally abused her saying to her you are "fucking such a silly bitch" and "my land here you silly bitch".

Mr Cameron offered to go and get the dog but you insisted that you would get it. However the complainant repeated that you were not permitted to cross her land and that you were trespassing.

You then said to her "I'll run you over". She responded "Oh Really, you're going to run me over". She was standing slightly off to the side of your quad bike. You put the quad bike into gear and you accelerated heavily, riding into her saying "get out of my fucking way".

She was knocked over, and went under the front of the bike where she came into contact with its undercarriage. One of her legs was run over by one of the wheels. When the bike was on top of her you said "I said get out of my fucking way".

The complainant managed to get up from underneath the bike and you reversed and pulled away before riding up to Mr Cameron's property to find the dog.

The complainant was conveyed by ambulance to the Royal Hobart Hospital. She suffered extensive bruising to her body, a headache and muscle stiffness all over her body, particularly to her neck. Her condition is ongoing. I accept the State's submission that the complainant continues to suffer physical pain as a result of your conduct. The State's contention, which I accept, is that you are responsible for these consequences because the complainant did not suffer them before the assault. Through good fortune alone the physical injuries sustained by Ms Dierckx are much less serious than they might have been in consequence of your aggressive

and unnecessary conduct. I note the other impacts described by Ms Dierckx in her victim impact statement to which I have regard.

With respect to the status of the land, the Court is not required to make a determination as to the legal rights of the complainant, Mr Cameron, or you. It is enough to note, that prima facie, you were entitled to cross the land of the complainant in order to recover your dog and have access to Mr Cameron's property, but that in no way justifies the escalation which your action of driving the quad bike into and over the complainant, involved.

I can accept that you were concerned and frustrated at the complainant's intransigence, and I accept that those frustrations emerge from a long history of dispute, but resorting to violent actions is never acceptable. The sentence the Court imposes must reflect the principle that it is never acceptable to assault another person no matter how frustrated you are by that person's actions or words.

Mr Slicer has presented a detailed and helpful plea on your behalf. He submits, and appropriately so, that this conduct is out of character for you. Your record of prior convictions in this State discloses no prior offences for assaults or acts of violence of any type. There is a conviction for assault in New South Wales in 1989. That was dealt with by way of a good behaviour bond, or something similar to that. That conduct occurred over 30 years ago, and in the absence of any convictions for this type of offending since then you are entitled to submit that this offending is out of character.

I have been provided with a psychiatric report prepared by Dr Jordan. It records, consistently with Mr Slicer's submission, that you are suffering from end-stage chronic pulmonary air disease. This requires continuous low dose oxygen therapy and you are prescribed morphine to help cope with the distress associated with the shortness of breath that you experience. You suffer fragile physical health and your respiratory issues contribute to periods of agitation and anxiety. Your dog is important to you; it is your only company in your difficult circumstances.

The relevance of those matters in sentencing you is that the conflict which occurred on 25 November last year, is explained at least partly, by concerns about the whereabouts of your dog, the circumstances which led to it not being on your property, and an agitated reaction to that situation. It is likely that that sense of agitation was exacerbated by the complainant's refusal to allow you to cross the land.

In that respect, the offer by Mr Cameron to retrieve the dog is one you ought to have accepted as an immediate solution to the problem giving rise to your concern.

You have no history of psychiatric admissions; you self report being treated for depression and anxiety in early 2000 and having been prescribed anti-depressants for a time. You are no longer using those. Recent engagement with adult community mental health services indicates no particular diagnosis and no medication is prescribed in respect of mental health issues.

Dr Jordan opines that your personality structure over a longer period may pre-dispose you to disputes and inter-personal difficulties. He suggests that in many respects you would have a reduced insight into those issues. He suggests, and I accept, that this provides context to your actions. It is not however suggested, by that report or by any submission made by Mr Slicer, that you did not appreciate that your actions were wrong.

Your medical condition is relevant to sentencing in the context of the current COVID-19 pandemic; Mr Slicer rightly submits, and the Crown does not say otherwise, that your lung condition makes you vulnerable and that is relevant in fixing the period of detention which is appropriate for your crime.

I note your early plea of guilty. I discount the sentence I would otherwise have imposed by 25% in recognition of the utilitarian benefit which accrues as a result of that plea. That benefit includes the advantage of avoiding issues associated with the practical management of a jury in the context of the pandemic. This benefit was noted recently in Victoria in the decision of *DPP v Bourke* by Her Honour Justice Dixon.

There is a benefit for your victim too in avoiding the consequences of the delays which are presently impacting the Court's capacity to dispose of contested criminal matters.

In sentencing you I am required to have regard to the principles of general deterrence, the need to deter you from offending in this way in the future, and the need to vindicate your victim.

In terms of personal deterrence, I am satisfied that there is little likelihood of your reoffending. That is not just because of your health condition, but you have spent a considerable time in custody as a consequence of your behaviour. That is the first time you have been in custody. You have had an opportunity to reflect upon your actions in that time. You will know that repetition of such behaviour will have similar consequences.

Balancing the relevant sentencing considerations, I have decided that a term of imprisonment is an appropriate penalty for your conduct. By my calculations you have served nearly six months in prison since you were taken into custody in respect of this matter.

I take into account that you have endured that incarceration in the circumstances of your ill-health. In that respect, prison will have been more difficult for you. In *RC v The Queen*, in New South Wales, the court accepted that an offender with poor respiratory health will suffer a level of anxiety, stress and fear at the potentially fatal consequences of being infected with COVID-19 in prison, to an extent that a younger, fitter person would not. Whilst in that case, the court was addressing the exercise of the residual discretion not to re-sentence an offender, it nevertheless identifies a matter that is relevant to assessing the impact of prison on you, and I have regard to it.

Having regard to your age and circumstances, your lack of relevant prior convictions, I have decided that time served represents an adequate period of actual incarceration.

I convict you of assault. I sentence you to 12 months' imprisonment. That sentence will commence on the date you were taken into custody. I am satisfied that the relevant sentencing objectives are satisfied if I suspend the remainder of the sentence on condition that you are of good behaviour for a period of two years, and commit no offence punishable by a term of imprisonment during that time.

In respect of the s 385A application, I convict you of the summary offence of breaching a restraint order.

The net effect of that sentence, Mr Siely, is that you are to be released from prison having served, as I say, close to 6 months, but with the balance of the sentence suspended on the

condition that I have just indicated. If you offended again and that offence involved the potential for a term of imprisonment, then the remainder of the sentence could be activated and you would be required to serve it.