

**STATE OF TASMANIA v DIRK PERRY FULTON
and DAVID TONY CARVER
COMMENTS ON PASSING SENTENCE**

10 DECEMBER 2019

BRETT J

Mr Fulton and Mr Carver have each pleaded guilty to the crimes of aggravated burglary and aggravated armed robbery.

The crimes relate to the invasion of the home of the complainant by both defendants, in company with each other and another man, on 10 October 2018. Some of the facts asserted by the prosecution for the purposes of sentencing were disputed by each of the defendants. In order to resolve the dispute, I heard evidence from the complainant and have been referred by all parties to relevant parts of the Crown papers. At the outset, I can say that, in general terms, I found the complainant to be an honest and reliable witness. It was patently clear from his evidence that he was recounting what he could honestly remember of the relevant incident. From time to time during the course of his evidence, he became frustrated, but it was obvious that that frustration related to his inability to recall the level of detail being sought from him. This, in fact, demonstrated the honesty of his evidence. It would have been a simple matter for him, if he was fabricating or exaggerating his testimony, to attribute specific actions to the various individuals involved in these events. He clearly did not do this. It was also suggested that the fact that he had consumed some cannabis and then pain relief in the ambulance affected the reliability of his recollection. However, in my view, he related the events as he recalled them, without exaggeration, and with sufficient detail to satisfy me that his recollection is reliable. It was obvious to me that the events, as he recalls them, are still somewhat raw, but vivid, in his recollection. Further, his inability, for the most part, to attribute particular actions to identified participants is entirely consistent with the nature of the events he was describing. It is highly unlikely that he would have been observing and documenting the specific activities of each man beyond that which he identified in evidence. He would have been more concerned with protecting himself from the violent attack perpetrated upon him unexpectedly in his home. Accordingly, I accept his reliability as an historian of the relevant events to the extent that he purported to be able to recall those events.

Of course, the Crown facts asserted a greater level of detail than that which was given by the complainant in his evidence before me. I think, therefore, that I should proceed on the basis of the complainant's version as given in evidence. I observe that neither of the defendants provided any sworn evidence to contradict the complainant's testimony, although I was referred to aspects of a version of events provided by Mr Fulton to police during the course of an interview. In the absence of sworn evidence from Mr Fulton, I am not prepared to place significant weight on exculpatory comments contained in that interview, at least to the extent that those comments conflict with the sworn evidence of the complainant. I was not convinced that the other evidence in the Crown papers to which I was referred by Mr Stevens provided any significant support for that version. I intend to assess the factual basis of sentencing in accordance with the testimony of the complainant.

The complainant's version of events is as follows. On the relevant night, he was in his home alone, when he heard a car pull up outside. The house is in a relatively isolated rural location. He opened the back door and saw three men standing in and near the steps leading to the back door. They were holding weapons. The face of each man was covered with a mask, and each was wearing dark clothing. The complainant realised that he was in danger. He kicked at the first man, and tried to shut the door, but was immediately assaulted by one or more of the men, as

they forced entry to the house. The assaults continued after entry and included punches and kicks. He was knocked to the ground, and the punches and kicks continued when he was on the ground. He remembers one of the men trying to stomp on his head. At one point he was dragged into the bedroom, where he was again kicked and punched. As this was taking place, he was aware that the men were going through the drawers in the bedroom. At some point, he suffered two cuts to the palm of his right hand, consistent with having been caused by a sharp blade. He was not sure whether he had been cut deliberately by one of the machetes or had sustained the cuts during the assaults when he was trying to defend himself. One of the men was giving instructions to the others. This included telling another of them to continue to kick and punch him. Eventually, the men left, taking stolen property with them. The property that was stolen included some cannabis, of which the complainant was obviously in possession illegally, together with other personal property which included a video camera, a watch, a chainsaw, a coin collection and a purse. The total value of the stolen property, excluding the cannabis, was \$2,600. Of that, only property to the value of \$300 has been recovered.

It is not disputed by each of the defendants that they and the other man drove to the house and took weapons and masks with them. Their common intention was to forcibly enter the house and steal cannabis from the complainant. I infer that they took weapons because they expected the complainant to be present in the house and intended to use force, including with the weapons, to overbear any resistance from him. They wore masks to disguise their identity. The complainant had met both Fulton and Carver before and this was added motivation for the disguise.

Mr Fulton, however, asserts that his only role was to provide the vehicle which transported the other two men to the house, and that he did not have any intention to take part in the planned burglary or robbery beyond providing transport. He disputes that he initially entered the premises with the other men. He waited in the car with his girlfriend when the other two went into the house. He did enter the premises at a later time, but he only did so, he says, when he heard cries coming from inside the house. When he did, he helped the complainant and told the other two men to desist from their assault on him. He disputed that he was armed or disguised at any time, or that he inflicted any actual violence on the complainant.

Mr Carver says that the three men went to the door and entered together. He agrees that he was masked but disputes that he was armed at any time. He disputes inflicting any actual violence on the complainant.

In evidence-in-chief, the complainant said he was sure that there were three men at his back door when he initially opened the door. They were all masked. He was sure that each of them was armed and identified two machetes and a large knife. I am satisfied that he did not resile from the substance of this evidence in cross-examination. His evidence about the weapons is supported by the fact that police found two machetes and a large knife in the motor vehicle abandoned by the men after the robbery. In any event, at the very least, the two men closest to the door were armed. For reasons which I will discuss shortly, whether or not the third man was armed has no significant bearing on his culpability. The presence of three men, all masked, at the door when it is opened, is determinative of the dispute raised by Mr Fulton. I accept the complainant's evidence about this and accordingly reject Mr Fulton's version. I am satisfied that he was at the door with the others, intending to unlawfully enter, when the door was first opened.

According to the complainant, the first man in was carrying a machete and was the one issuing instructions. He was described as larger and stockier than the others. Despite the complainant's

description of size, I am satisfied that the first man, the one who was issuing orders and the one who carried the machete which cut the complainant's hand, was Mr B. This is consistent with the complainant's evidence that he knows the voices of both Fulton and Carver, but could not identify the voice of the man in question. It is also consistent with the forensic evidence which identified the complainant's DNA on the blade of the machete on which Mr B's DNA was also located. Apart from that, it is impossible to identify who perpetrated any specific act of violence, except to say that more than one did, and that all of the men were present and clearly complicit in the violence which was taking place. Further, I am satisfied that at least two, if not all of the three men, were carrying weapons when the complainant opened the door. In my view, there is no basis on which to distinguish between the moral culpability of any of the three participants in these crimes. Each of them bears full criminal and moral responsibility for a planned home invasion, carried out with the intention of theft, which was perpetrated with weapons and in company, and in the clear expectation that violence would be used against the occupant of the home in order to overbear any resistance from him.

As a result of the attack on him, the complainant was taken to hospital by ambulance. Physically, he suffered cuts to his left hand and bruising to his left cheek and eye, bleeding in his left eye, a cut above his right eyebrow and soreness to his right side near his ribs. In his impact statement, the complainant says that he also had a sore back for a long time. He describes ongoing psychological impact, including hypervigilance and emotional reaction. He says he has been diagnosed with PTSD, but I have not received any medical evidence to support this. He does, however, attribute the breakdown of his relationship and his loss of employment to these events. Significant impact of this type is a foreseeable consequence of a violent and unexpected attack such as this.

Mr Fulton, you are 35 years of age. You have a significant criminal history, which includes numerous traffic and drug offences and some family violence related offending. However, you have not committed crimes as serious as this before. You have three children from a prior relationship. After your separation from their mother, the children came under the supervision of child protection authorities, but since 2014 you have had the full-time care of your 14-year-old son. Since your remand in custody, he has been placed in a shared home. You have now been in custody for almost one year, although some of that period has related to a sentence imposed for other offences, leaving a balance of 250 days, unattributed to any other sentence. You have found the time in custody particularly difficult, because you have not been able to see your son or the other children, and also because of circumstances in the prison, which have resulted in you being held in a unit where you had very restricted movement. Your counsel has submitted that I should take into account the fact that your experience of prison is more difficult than would otherwise be the case, because of these factors. I agree that this is a relevant consideration. It has also been submitted that you are remorseful for your part in these crimes and that I should take into account in your favour both your admissions to police of your involvement and an indication in July of this year that you would plead guilty. I accept that you did admit your involvement in the criminal conduct although I have not accepted the truth of everything you told police as to your involvement. Further, although I accept you should be given some credit for your plea, it was still necessary for the complainant to give evidence because of the dispute, which has been resolved against you. It is clear to me that the complainant found giving evidence to be an upsetting experience. You will not receive extra punishment for this but, on the other hand, it does reduce the mitigatory weight to be attributed to your plea of guilty.

Mr Carver, you are 33 years of age. You also have a not insignificant criminal history, with offending in traffic, drugs, firearms and family violence. At the time you committed these crimes, you were subject to a suspended sentence of imprisonment which had been imposed by a magistrate on 27 March 2018. The sentence was imposed for a variety of offences, most of which seem to have related to breach of family violence orders. I have been given information today about your background. I note that you are presently, and have been, in poor physical health. I note that you are currently in remission from cancer. You have suffered some recent epilepsy induced by, as I understand it, neurological complications of brain injury. You also have a problem with your mental health, which includes ongoing depression. It seems that you have had drug problems in the past, although I note that you have apparently managed to put an end to your addiction to methylamphetamine. I note that you have a five-year-old son, and that you have been having difficulties having access to him, and of course your incarceration will make that even more difficult. So, you will also suffer that particular problem as a result of being incarcerated. I will take all of that into account.

I regard the crimes committed by both of you as serious. You both went to this man's house, in company, disguised and armed with weapons. You went to steal from him and overbore his resistance by violently assaulting him in his own home. Crimes such as this are abhorrent to a peaceful and lawful society and cause fear and insecurity in the community. Personal security when at home is a fundamental expectation in our society. What you did was in direct conflict with that expectation. It follows that general deterrence and denunciation of your conduct are important sentencing considerations.

However, an important factor in mitigation in respect of each of you, is your respective counsel's statement in open court that you are prepared to give evidence for the prosecution in the trial of these charges against your co-offender. Because you will be giving such evidence whilst serving this sentence, your co-operation is not without personal risk to each of you. Further, when regard is had to Mr B's version given to police, which is consistent with his notified alibi, that although he was with you on this night, he was dropped off at another location before the robbery and was not present and did not participate in the crimes, it can be concluded that your testimony is likely to be important evidence in the prosecution case. For these reasons, I am satisfied that the promised co-operation is a significant mitigating factor in respect of the sentence to be imposed on each of you.

Mr Carver, in your case the prosecution has applied for an order pursuant to s 27 of the *Sentencing Act* in respect of the suspended sentence to which you were subject at the time you committed these crimes. Under that provision, I am required to activate that sentence unless I am of the opinion that it would be unjust to do so. Having regard, in particular, to the deliberate and serious nature of the offending involved in the crimes to which you have pleaded guilty, I am not of that opinion and, accordingly, must activate the sentence.

Ultimately, having regard to all relevant considerations, I see no reason to distinguish between you in respect of the appropriate sentence. Accordingly, the orders I make are as follows:

Mr Fulton, you are convicted of the crimes to which you have pleaded guilty and sentenced to imprisonment for a global term of two years and eight months. The sentence will be backdated to 4 April 2019. You are not eligible for parole until you have served one half of the sentence. Were it not for your promised co-operation in the case against Mr B, I would have imposed a head sentence of three years and six months.

Mr Carver you also are convicted of the said crimes. The suspended sentence of five months imposed by the Magistrates Court on 27 March 2018 is activated and will be served by you from 11 October 2019. You are not eligible for parole until you have served three months of that sentence.

For the crimes of aggravated burglary and aggravated armed robbery, I impose a global sentence of two years and eight months which will be served cumulatively upon the activated suspended sentence. You will not be eligible for parole until you have served one half of that sentence.

In your case I also indicate that were it not for your promised co-operation, I would have imposed a head sentence in respect of the said crimes of three years and six months. I should indicate that that is a global sentence.

For the purposes of s 92A(3) of the *Sentencing Act*, I specify in your case, that the total term of imprisonment which you are liable to serve in respect of all of the above sentences is three years and one month commencing on 11 October 2019.

The total period that you must serve before you become eligible for parole is the aggregate of the non-parole periods relating to the said sentences, which I calculate as one year and seven months.

I make a compensation order against each of you on a joint and several basis in favour of Craig Heard in the sum of \$2,300.