

STATE OF TASMANIA v BENJAMIN DAVID PYKE
COMMENTS ON PASSING SENTENCE

15 APRIL 2025
JAGO J

Mr Pyke, you were found guilty by a jury of the crime of committing an unlawful act intended to cause bodily harm. You were found not guilty of a crime of stealing. Consistent with the verdict of the jury, it is for me to find facts for sentence. I may only find facts adverse to you if I am satisfied that they have been proved beyond reasonable doubt.

On the evening of Friday 12 August 2022, the complainant, Mark Fleming, went to the unit where you and your then girlfriend, Ashleigh McCoy, were living. He was very drunk when he went there. It seems there was some dispute about money between Mr Fleming and your partner. I do not find it necessary to determine who owed who, what amount of money. It is apparent from the evidence on the trial, that Mr Fleming was asked to leave by Ashleigh McCoy. He did not do so. Ms McCoy went back inside the unit and shortly after, you came out. I am also satisfied that you asked Mr Fleming on several occasions to leave the property. Again, he did not do so. Initially, it seems your requests were made in a civilised manner, but as time went on you became more aggressive with Mr Fleming. A neighbour heard you and Mr Fleming arguing for something like 75 minutes. The neighbour described the tenor of this argument as you constantly asking the complainant to leave. The neighbour said that initially your voice was fairly low but as time went on you became "aggressive and threatening". I am satisfied the complainant was being difficult, I suspect because of how drunk he was. I am also satisfied, however, that you ran out of patience and rather than leaving it be, or calling police to have him removed, the incident became violent.

There was some conflict in the evidence as to what occurred next. Mr Fleming said that he sat down on a wood pile, went to light a cigarette and you struck him from behind and to the side of his head. He said the first blow struck him to the head and ear area and he believed that you may have had an axe handle in your hand. Mr Fleming said the blow caused him to stumble some six to eight feet from the wood pile, and that you followed him and struck him again, this time using your fists to his head and face area. Mr Fleming said he believed he lost consciousness around this point. When he regained consciousness, you were standing over him, with the axe handle, trying to hit him. He said he had his hands and arms up over his head, trying to protect himself. He said he believed you swung the axe handle three to four times, striking him on the arms.

His evidence was that he again lost consciousness, and regained consciousness as he was being dragged along the ground, towards the front gate. He was dragged through the gate area, and he recalled being on the ground, with you standing over him. He believed he then lost consciousness again and his next recall was being in the Burnie Hospital.

Mr Jason Dwyer lived in the adjoining unit. He is the neighbour to whom I have already referred. He described hearing an argument that continued for about 75 minutes, between you and another man. He recalled hearing some loud thuds towards the end of this argument. He described them as impact sounds. He said the thuds went on for a couple of minutes and he estimated he heard 10 to 12 thuds. He also gave evidence of hearing you say words to the effect of "fuck off, or I'll smash you" and hearing the other man, who was obviously the complainant, say words to the effect of "get off me Ben".

Mr Dwyer said shortly after hearing this, he looked out his unit window and observed a male lying on the ground, at the front of his driveway, with you standing over the top of him. He

said the sensor light in his driveway activated and he could see you punching and kicking the male on the ground. He said he saw you deliver, what he described, as "about four to five, full force punches" and about six "full blown" kicks. He said all the punches and kicks were delivered to the upper half of the complainant's body. He said at no time during your attack upon the complainant did he observe the complainant to move. He described the complainant as "motionless".

Eventually, Mr Dwyer called out for you to leave him alone. You walked away and presumably returned to your unit. Before Mr Dwyer's intervention, you had shown no sign of desisting.

Police were called and attended at approximately 1.35am. They had their Body Worn Cameras activated. The footage tendered on the trial shows the complainant laying at the top of Mr Dwyer's unit's driveway, completely motionless and unresponsive. When police spoke to Mr Dwyer, he described what he had observed as follows: "pretty sure it's Ben Pyke that was into him. They were fucking laying into him.... kicking the fucking shit out of him."

The way Mr Dwyer described the viciousness of the assault is reflective of a high level of violence. It is indicative of an intent to cause harm and it is in no way consistent with acting in self-defence.

I will sentence on the basis that the assault upon Mr Fleming started in the yard of your unit. I cannot find that you possessed any weapon during the assault, but I am satisfied you inflicted some blows upon the complainant, whilst he was in your yard, consistent with the thumps heard by Mr Dwyer. I am satisfied you then dragged Mr Fleming from your yard to the driveway area of Mr Dwyer's unit. I reject any proposition that the violence you inflicted upon Mr Fleming in your yard, was committed in self-defence. I do not consider Mr Fleming presented as any threat to you. He was drunk to the extent that any physical violence offered by him would have been easily avoided. I am satisfied he did have a beer mug with him when he attended at your residence, but I am not satisfied he struck you with it. Mr Dwyer heard nothing that suggested Mr Fleming was being violent to you. He heard nothing consistent with you being struck with a mug and I am certain that you would have complained loudly about that if it had occurred.

Further, I reject any claim that you were lawfully removing Mr Fleming as a trespasser from your property. I am satisfied the blow you inflicted upon Mr Fleming in your yard, as reflected by the thumps heard by Mr Dwyer, went far beyond what was necessary to remove Mr Fleming. Indeed, as I have already commented, the obvious thing to do in the circumstances that presented themselves, was to go back inside the unit and ignore Mr Fleming or call police. You responded as you did because you became angry and frustrated. The violence you inflicted upon Mr Fleming at the top of Mr Dwyer's driveway was entirely unwarranted. I am satisfied that by that point, Mr Fleming was injured and incapable of protecting himself, which is consistent with you having inflicted considerable violence upon him whilst he was in your yard.

At the top of the driveway, you inflicted more violence, at least six kicks and four punches, to the upper body area of Mr Fleming. I am satisfied, consistent with the evidence given by Mr Dwyer, that these were all forceful blows and delivered to a motionless victim. This was, in my assessment, a vicious and brutal attack.

Mr Fleming was taken to the Northwest Regional Hospital. He was described as having multiple head and facial injuries, and swelling. He was unable to speak in a comprehensible manner because of the significant swelling to his jaw. Further examination revealed extensive bruising around his jaw, neck and ears, particularly on the left-hand side of his head; a comminuted fracture of the nasal bone; a fracture of the medial wall of the right eye socket; and mildly displayed fractures of the left eighth and ninth rib. There was also significant tenderness to the right side of the chest and grazing, described as gravel rash, on his abdomen, consistent with being dragged from your yard to the driveway area of Mr Dwyer's unit. There was a laceration on his left shin. Mr Fleming was also left with a mild traumatic brain injury, characterised by concussion and amnesia. Mr Fleming was required to stay in hospital for 12 days because of ongoing concerns as to the symptoms associated with the brain injury.

Ultimately, Mr Fleming's injuries were treated conservatively, and surgery was not required. I have no further information about his mild brain injury. I infer it has resolved without complication, although in Mr Fleming's victim impact statement, he describes ongoing headaches and memory loss. In that statement, he also describes ongoing physical pain following the assault, but the greatest impact has been a psychological one. He now feels anxious and unsafe. He is reluctant to go out and has withdrawn from family and friends. Pre-existing mental health conditions have been exacerbated. The impacts of your violence upon Mr Fleming's emotional well-being are likely to be long term.

To strike a person using both fists and feet, with full force, such that injuries of the nature I have just described, were occasioned must, in my assessment, have involved an intention to cause serious and disabling injury. I am satisfied that whilst Mr Fleming's behaviour was difficult and antagonistic, you became frustrated and angry that he would not leave, and it was that anger that drove your violence. I find that your actions were motivated by anger, directed at Mr Fleming, rather than any sense of defending yourself or removing him from the property. In simple terms, you wanted to hurt Mr Fleming because he did not do as you asked. Your behaviour towards Mr Fleming, particularly at the top of the driveway, was nothing short of appalling. You delivered several, heavy blows to a motionless, and perhaps even unconscious, man. He presented no threat or danger to you, at that point, whatsoever. It was gratuitous violence.

You are 28 years of age. You have a substantial history of criminal offending. You first came before the courts at age 18 and you have been a regular offender since. You have a number of prior convictions for matters of violence, particularly against police. You also have prior convictions for disorderly conduct, common assault, driving offences, bail offences, offences involving the destruction of property and family violence offences. You have been to gaol on a number of occasions. Most recently in December 2022, you were sentenced to prison for driving offences.

I am told that you grew up surrounded by heavy alcohol use and that your consumption of alcohol and drugs has been problematic for many years. At times, when you have been able to obtain employment, you have been able to limit your use of alcohol and drugs, but it seems your employment history has been quite spasmodic. Really, your consumption of alcohol and drugs has defined your life for at least the past decade.

I am told that over the last nine to ten months, you have been making a concerted effort to address your drug and alcohol use. Around that time, you formed a new relationship. Your new partner is a positive influence. She has a 13-year-old child and I am told a condition of

her entering into a relationship with you, was that you curb your alcohol and drug consumption. Apparently, since the formation of the relationship you have been drug free and your alcohol use has been limited. Your behaviour has improved since becoming involved with your new partner.

The efforts you have made over the past nine to ten months certainly are meritorious but, of course, they come against a background of heavy illicit drug and alcohol use for over a decade. It is yet to be seen whether your efforts are enduring, but you deserve some credit for the improvements you have made in your life. I will allow for parole at the earliest opportunity.

Whilst there is no fixed sentencing range for a crime of this nature, given the various levels of violence that might be associated with it, a crime such as this ordinarily attracts a term of imprisonment in the range of three to seven years. You are not entitled to the mitigation a plea of guilty would have attracted. Whilst I sentence on the basis that this was not a planned or premeditated crime, it was a very brutal one. You decided to use violence against Mr Fleming because you became angry with his refusal to leave. The extent of the blows you inflicted upon him, particularly towards the end of the attack, when he was motionless, had the capacity to cause serious and lasting injury. It is the Court's duty to make clear that the consequence of serious violent crime will be a period of imprisonment in the hope that it will encourage you and others to think better of it in the future. Your conduct must be punished and condemned.

Benjamin David Pyke, you are convicted and sentenced to imprisonment for a period of four years, commencing 19 September 2024, in consideration of time you spent in custody on this matter following your arrest. I order that you not be eligible for parole until you have served one half of that term of imprisonment. I make a compensation order in favour of Mark Fleming, the terms of which will be adjourned for assessment.