

STATE OF TASMANIA v DAVID McCULLOCH
COMMENTS ON PASSING SENTENCE

22 OCTOBER 2024
JAGO J

David McCulloch, you have pleaded guilty to one count of Criminal Code assault, contrary to s 184 of the *Criminal Code* and one count of committing an unlawful act intended to cause bodily harm, contrary to s 170(1)(b) of the *Criminal Code*. The particulars of the latter crime are that you, with intent to cause grievous bodily harm, struck the complainant with an offensive weapon, namely a shovel. Both of these crimes were committed upon your brother, Jamie McCulloch.

Additionally, pursuant to s 385A of the *Criminal Code*, I am dealing with a number of related summary matters being two counts of common assault – one in respect to your wife and one in respect to your mother; one count of possess a firearm to which a firearms licence may not be issued, one count of possess ammunition when not the holder of an appropriate firearms licence, one count of fail to take all precautions to ensure the safekeeping of firearm and ammunition, one count of selling cannabis, one count of supplying cannabis, and one count of possess cannabis.

As at 28 March 2024, you were 41 years of age. Your brother was 44 years of age. You were married to Jacinta King. You had been in a relationship with her for some 25 years and married to her for six years. You had four children together. You and Ms King lived together. Your mother also lived with you. On the evening of 28 March 2024, your wife and mother went out to meet your brother. Having collected him, your mother then drove your brother and your wife to some units and parked the vehicle in a nearby carpark area. She sat in the front seat of the vehicle whilst your wife and brother had sexual intercourse in the backseat of the vehicle.

Throughout the evening you tried to contact your wife several times by phone but had no success. You became somewhat suspicious. You drove to the area where your mother had parked the vehicle. You observed your wife and brother having sexual intercourse in the backseat, whilst your mother sat in the front seat, apparently unperturbed by your wife and brother's behaviour. You opened the rear, driver's side door and started punching your brother multiple times to the head and to the body. These acts constitute the Criminal Code assault. You then pushed your wife into the window before moving to the rear passenger side door, opening it, and punching your wife to the head several times. This act constitutes part of what is a rolled up count of common assault against your wife.

Your brother got out of the vehicle and ran. I note at this point you had the opportunity to pause and reflect upon what you were doing. Instead, you yelled out that you were going to kill them all. You retrieved a wooden handled shovel from the back of your vehicle. You approached your brother and hit him to the head and body several times with the shovel. These acts constitute the crime of committing an unlawful act intended to cause bodily harm. Your mother intervened. You pushed her to the chest, causing her to fall backwards into a wheelie bin. This behaviour constitutes the second count of common assault.

Your brother ran away. You returned to your vehicle and hit it with the shovel, causing the shovel to split in half. You then hit your wife to the head with the handle of the shovel and punched her to the right eye and face. These acts constitute the balance of the particulars of the common assault committed against your wife.

Police were notified of the incident by nearby residents. They attended and intercepted you as you were leaving the scene. The shovel was found in your vehicle. You were arrested and taken to the Devonport Police Station. Your brother and wife were taken to the Mersey Community Hospital. Your brother sustained bruising and minor lacerations to his face and legs. These injuries resolved without the need for further medical intervention. I infer from the moderate injuries sustained by your brother that either a portion of the blows you delivered did not connect with him, or you limited the amount of force you used when striking him with the shovel, because given the potential for serious harm to be caused by your use of the shovel, the actual injuries he sustained were not particularly grave. Ms King sustained bruising and swelling underneath her right eye and also a split lip.

Whilst you were in custody you told police officers about a homemade firearm and some ammunition that you had at your residence. A telephone search warrant was obtained. When police searched your residence, they found the homemade firearm and ammunition in the laundry, and not properly secured. A quantity of cannabis was also found. In total, you had 240.93 grams of cannabis in various zip-lock bags. You made admissions to police as to your dealings with that cannabis consistent with your pleas of guilty to the offences of selling and supplying cannabis.

When interviewed by police, you expressed your frustration and angst over the situation you found when you attended at the carpark, and in essence you suggested your brother deserved it.

As noted, you are 41 years of age. By way of prior convictions, you have a matter of common assault, involving family violence, from 2006. You have a conviction for possession of cannabis from 2014. Beyond that, you have a relatively poor criminal history for driving offences and matters of dishonesty, but your prior criminal history does not suggest a propensity for violence. You and your wife have been together since your teenage years. You have always worked hard to provide for your family. You have prided yourself on raising your children in a secure and supportive family environment. Your children are now all adults and are doing well for themselves. I accept, the circumstances you discovered were confronting. The betrayal by your wife and brother, and the apparent acquiescence of your mother, must have been upsetting, and whilst one can appreciate that would give rise to a level of angst and frustration, it in no way excuses what you then did. It does, however, place your behaviour into a specific context. This was not premeditated or planned behaviour, but rather was a spontaneous reaction to you discovering a difficult situation involving a breach of trust.

The crime of committing an act intended to cause bodily harm is at a high level of general seriousness in the hierarchy of violent crimes. It is made up of an unlawful act with an intention to do serious harm, in this case, grievous bodily harm. It is the sinister intent, coupled with the use of a dangerous weapon, which makes your behaviour on this occasion so serious. It is, of course, relevant that as a matter of fact, the harm you occasioned to your brother was quite moderate. It has been said many times that ordinarily a period in gaol of between three and seven years is appropriate for a crime of this nature, but there always remains cases which fall outside the ordinary range of sentences. In my view, this is such a case. I have already described the circumstances that you found yourself in. The actual harm occasioned was moderate. There is no question that what you did was exceptionally serious and your use of the shovel had the potential to cause serious harm, but the context in which the violence was committed was, in all of the circumstances, morally provocative. You reacted most

inappropriately, but I accept it was an emotive response to the circumstances that you had discovered.

Having said all of that, there nevertheless needs to be a sentence that reflects the serious nature of the form of the crime, and the importance the factors of denunciation and general deterrence must have in sentencing any crime of this nature. In my view, that can be achieved whilst at the same time adopting a rather individualised approach, which I consider is warranted in this case. I take into account the character references that I have received. I take into account what I accept is an early plea of guilty to these matters. I am satisfied that there is unlikely to be a repeat of this type of criminal conduct. You do not have a history of violent offending and, as I have noted, the circumstances were quite specific. In my assessment, personal deterrence does not have a significant role to play in this sentencing exercise.

David McCulloch, you are convicted of all matters to which you have pleaded guilty. On counts four to nine on Complaint 51180/2024, you are fined the sum of \$1,000. In respect to the two counts on the indictment and the two counts of common assault, I impose one sentence. You are sentenced to three years' imprisonment, backdated to commence on 7 May 2024 to take account of the time you have been in custody. The last 18 months of that period of imprisonment will be suspended on condition that you commit no offence punishable by imprisonment for a period of two years. I order that you will not be eligible for parole until you have served one half of the operative period of imprisonment.

I make the forfeiture order sought in respect to the firearm by the State.